State of Wisconsin

Labor and Industry Review Commission

AMAZON LOGISTICS INC. Petitioner Hearing No. S1800148MW	**Unemployment Insurance Contribution Liability Decision**[1] **Dated and Mailed:** MAR 12 2020 Amazon logistics, audit 16-18_umd.doc:152

The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the petitioner is liable for unemployment insurance contributions, interest, and penalties based on wages[2] paid to its delivery partners in the second, third, and fourth quarters of 2016, all four quarters of 2017, and the first and second quarters of 2018, as identified in a department audit.

By the Commission:

Michael H. Gillick, Chairperson

David B. Falstad, Commissioner

Georgia E. Maxwell, Commissioner

[1] **Appeal Rights**: See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

[2] Wage estimates were used for calculating contributions owed for 2018.

Procedural Posture

This case is before the commission to determine the petitioner's liability for unemployment insurance contributions (taxes), interest, and penalties based on wages paid to its delivery partners in 2016, 2017, and the first half of 2018. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision.

The commission received a timely petition for commission review. The commission considered the petition and the positions of the parties, and it independently reviewed the evidence submitted at the hearing. Based on that evidence, the commission makes the following:

Findings of Fact and Conclusion of Law

1. The petitioner, Amazon Logistics, is a business entity that coordinates the delivery of products purchased by Amazon.com customers.
2. The petitioner contracts with different companies to move packages and make deliveries, including UPS, USPS, FedEx, and smaller independent delivery service providers.
3. The petitioner created a smartphone application-based program, Amazon Flex, to coordinate last-mile deliveries made by individual drivers.
4. An individual interested in participating in the Amazon Flex program may go to the petitioner's website and download the Amazon Flex software application ("app"). After providing basic background (name, date of birth, etc.) and personal information (social security number, bank account number, etc.), clicking through some training videos, passing a background check, and agreeing to the Amazon Flex Independent Contractor Terms of Service, an individual is able to perform last-mile delivery services for the petitioner as a "delivery partner."
5. The training videos that are part of the application process provide information on how to navigate through and use the Amazon Flex app. Individuals are not required to watch the videos.
6. All delivery partners must have a valid driver's license and legally be able to operate a motor vehicle in the state.
7. Delivery partners began making last-mile deliveries for the petitioner through its app in Wisconsin in the second quarter of 2016.
8. At that time, delivery partners picked up packages from an Amazon warehouse in Milwaukee and delivered them to customers throughout the greater Milwaukee area. The petitioner later relocated its warehouse operations to Sussex.
9. Using an algorithm, the petitioner creates delivery "blocks," usually two to four hours in length, based on estimates of the amount of time it will take a delivery partner to deliver a collection of packages.

10. The amount the petitioner will pay a delivery partner to complete a delivery block is called a "service fee." The standard service fee for a four-hour block is $72. The standard service fee for a two-hour block is $36.

11. Delivery partners cannot negotiate the length of a block, the service fee to be paid for a block, or the geographical area covered by a block.

12. Based on supply and demand, the petitioner may increase the service fees paid for certain delivery blocks. This is referred to as "surge pricing."

13. In the petitioner's app, delivery partners can see available delivery blocks and the service fees associated with each. Delivery partners can accept delivery blocks at any time after they are "dropped" by the petitioner. Delivery partners are free to accept as many or as few blocks as they choose, subject to availability. There is no guarantee that a delivery partner will receive a certain number of blocks.

14. Based on historical data indicating that there will be packages needing to be delivered on certain days, the petitioner may offer delivery blocks in advance to delivery partners chosen at random.

15. A delivery partner may cancel a block without penalty if done at least 45 minutes before the start of the block. If a delivery partner fails to timely cancel a delivery block or fails to report for a block previously accepted, there is no monetary penalty. The petitioner sends an email, reminding the delivery partner of its expectations. Such actions negatively affect a delivery partner's reliability rating.

16. Approximately 45 minutes before a block is scheduled to begin, the app directs the delivery partner to the proper location for pick up.

17. By 2018, the petitioner offered four delivery services: Amazon Logistics (basic package delivery to Amazon customers), Prime Now (ultra-fast package delivery), Amazon Fresh (grocery delivery), and Whole Foods (grocery delivery).

18. For blocks involving bulk package deliveries, a delivery partner is directed to the petitioner's warehouse. Once there, a delivery partner drives his vehicle into the warehouse and is directed to an open parking spot next to a rack containing packages. The delivery partner scans the packages on the rack and loads them into his vehicle.

19. A delivery partner is seldom able to choose from among the racks to obtain a desirable geographical location.

20. After scanning the packages, each delivery partner receives through the petitioner's app a suggested delivery route. A delivery partner is free to follow the suggested route or devise his own.

21. The petitioner employs warehouse workers, who check the number of packages loaded by delivery partners as they exit the warehouse in their vehicles. Delivery partners are able to ask questions of these workers.

22. Upon delivering a package, a delivery partner scans the package and indicates through the app how it was delivered and where it was left.

23. Delivery partners are not required to wear uniforms or place any signage or decals on their vehicles.

24. The petitioner has a support team that is available to assist delivery partners with software issues, package handling issues, driver issues, and customer issues. The same team handles customer complaints.

25. The petitioner expects delivery partners to return any undeliverable packages at the end of their routes to its warehouse.

26. The petitioner pays the service fee associated with a block, even if the delivery partner is unable to deliver all of the packages included in the block.

27. The petitioner pays delivery partners twice per week. The petitioner issues 1099s to its delivery partners.

28. One of these delivery partners was Michael Domke. He had applied in the fall of 2016 to perform services for the petitioner.

29. After providing the petitioner with all requested information, watching the training videos offered, and agreeing to the Amazon Flex Independent Contractor Terms of Service, Mr. Domke was notified that he had been accepted as a delivery partner.

30. Mr. Domke activated the petitioner's proprietary app on his smartphone and began performing services for the petitioner. He used his own car and smartphone, both of which he owned prior to his relationship with the petitioner, to perform the services.

31. Mr. Domke was responsible for paying the expenses related to performing his delivery services for the petitioner, including gas, vehicle wear and tear, auto insurance, and data for his smartphone. He did not increase his auto insurance or his data plan beyond the level he had for his own personal use when performing services for the petitioner.

32. Mr. Domke had not previously performed delivery services. He did not consider himself as having a separate business and did not advertise his services. He did not have a home office.

33. Mr. Domke delivered packages for the petitioner from the fall of 2016 until June 2017.

34. Mr. Domke performed delivery services solely for the petitioner and did not work for any other businesses while performing services for the petitioner. Working for the petitioner was his main source of income.

35. The petitioner unilaterally terminated Mr. Domke's status as a delivery partner on June 16, 2017, for mishandling three packages. His account was deactivated.

36. Mr. Domke thereafter filed a claim for unemployment insurance benefits.

37. Upon request, counsel for the petitioner provided the department with a list of individuals who performed services as delivery partners and to whom 1099s had been issued for 2016 and 2017.

38. The department conducted an audit based on the 1099s issued by the petitioner.

39. There were over 400 individuals working as delivery partners in Wisconsin in 2016. There were over 1,000 individuals working as delivery partners in 2017 and 2018.

40. During the audit, the department classified all but two of the individuals who received 1099s from the petitioner as employees.

41. The department issued an audit initial determination on August 15, 2018, finding that the petitioner owed $205,436.45 for unemployment insurance taxes, penalties, and interest for calendar years 2016, 2017, and the first two quarters of 2018 for employees who were not reported as such to the department.

42. The amounts owed for the first two quarters of 2018 are based on estimated wages.

43. During the hearing in this matter, the department agreed that the petitioner did not operate in Wisconsin during the first quarter of 2016 and that adjustments to the interest owed by the petitioner should be made.

44. The individuals identified in the department's audit as having performed services for the petitioner as delivery partners performed those services as employees, within the meaning of Wis. Stat. § 108.02(12)(a), and not as independent contractors.

45. The petitioner owes unemployment insurance taxes, penalties, and interest for calendar years 2016, 2017, and the first two quarters of 2018 in the amount of $205,436.45, less interest adjustments, for individuals employed by the petitioner as delivery partners and not reported to the department as employees.

Memorandum Opinion

The petitioner, Amazon Logistics, sought commission review of an appeal tribunal decision finding the company liable for unemployment insurance taxes, interest, and penalties for individuals identified pursuant to a department audit as having performed services for the petitioner as employees from the second quarter of 2016 through the second quarter of 2018. The petitioner contended that the identified individuals, its "delivery partners," performed services as independent contractors and not as employees.

Wisconsin Stat. § 108.02(12)(a) defines "employee," for purposes of determining an employer's liability for unemployment insurance contributions, as "any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, except as provided in par. (b), (bm), (c), (d), (dm) or (dn)." Wisconsin Stat. § 108.02(12)(a) creates a presumption that an individual who performs services for pay is an employee and requires the entity

for which the individual performs the services to bear the burden of proving that the individual is not an employee.[3]

Delivery drivers agreed to provide the timely and effective delivery of undamaged parcels, bags, totes, and other items to Amazon's customers. There is no dispute that delivery partners performed these services for the petitioner for pay. Therefore, to rebut the presumption that the delivery partners performed their services as employees, the petitioner had to establish that they operated free from its direction or control and that they satisfied six or more of nine conditions relating to economic independence and entrepreneurial risk.[4]

Only one individual who performed services for the petitioner as a delivery partner, Michael Domke, testified at the hearing in this matter. There was no contention, and no agreement between the petitioner and the department, that Mr. Domke's testimony was representative of the other individuals who performed services for the petitioner as delivery partners. Other testamentary evidence came from the department's auditor and from two managers employed by the petitioner.

The commission notes that all of the delivery partners identified in the department's audit were required to agree to the "Amazon Flex Independent Contractor Terms of Service" (agreement) before being accepted by the petitioner as delivery partners. The agreement specifically provided that delivery partners would perform their services as independent contractors and not as employees. However, the agreement is not dispositive of the issue regarding the status of delivery partners as independent contractors or employees for unemployment insurance purposes. An individual's status is determined by statute and not by the terms of a private agreement.[5] In addition, the statutory provision at issue, Wis. Stat. § 108.02(12)(bm), requires an employing unit – in this case, the petitioner – to prove that the statutory conditions are met "by contract and in fact."

Part 1

The first part of the two-part independent contractor test set forth in Wis. Stat. § 108.02(12)(bm) lists five statutory factors that may be considered when determining whether an individual's services are performed "free from control or direction" by the employing unit.[6] These conditions are not the only factors that may be considered, and each factor is a separate indicator of an employing unit's exercise of direction or control over the individual's services. No one factor is essential in any case, and each factor may be weighted differently depending upon the facts of each case.

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[3] *See Quality Commc'n Specialists Inc.*, UI Dec. Hearing Nos. S0000094MW and S0000095MW (LIRC July 30, 2001), and cases cited therein.

[4] Wis. Stat. § 108.02(12)(bm).

[5] *Roberts v. Indus. Comm'n*, 2 Wis. 2d 399, 86 N.W.2d 406 (1957). *See also Knops v. Integrity Project Mgmt.*, UI Dec. Hearing No. 06400323AP (LIRC May 12, 2006).

[6] Wis. Stat. § 108.02(12)(bm)1.a.-e.

a. **Instructions** - whether the individual is required to comply with instructions concerning how to perform the services.

Employees typically receive instructions from an employer about when, where, and how to perform their jobs. Independent contractors, on the other hand, generally perform their services with few instructions as to the details or methods of their work. In this case, the petitioner did not instruct delivery partners how to transport a package from point A to Point B. Delivery partners were licensed drivers and independently operated their own vehicles. The petitioner provided them with what an algorithm had determined were the most efficient routes and delivery sequences, but delivery partners were free to take different routes and deliver packages in any order they chose. Delivery partners were not required to wear uniforms or put signs on their vehicles. They were sometimes given specific delivery instructions, such as where to leave a package, but those instructions came from customers. The petitioner merely passed customers' instructions on to its delivery partners through its app. These are not the kind of instructions contemplated by this condition.[7]

The petitioner provided delivery partners with instructions as to the degree of safety they must exercise, the reliability and quality they must exhibit, and the civility they must display while performing their services, but these are things that would be required of any individual, regardless of their status as an employee or independent contractor. They are not, therefore, an indicator of the petitioner's direction or control over the services performed by its delivery partners.[8] This condition was **met.**

b. **Training** - whether the individual receives training from the employing unit with respect to the services performed.

Employees often receive training from an employing unit in order to do their work, whereas independent contractors are typically able to perform their services without any training. The petitioner provided training videos to prospective delivery partners during the onboarding process that explain how to use the petitioner's proprietary smartphone app. Individuals were not required to watch the videos before performing services as a delivery partner, but the videos were available to those who wished to watch them. Delivery partners were not required to participate in "ride-alongs," nor were they required to attend meetings or training sessions. If delivery partners had questions about how to perform their work, they could ask employees who worked in the petitioner's warehouse or call the customer support team. This condition was **met.**

c. **Personal performance** - whether the individual is required to personally perform the services.

Generally, an employee must personally perform work that his employer assigns to him, while a true independent contractor can choose to have another person do the

[7] *See Ziburski v. Castforce Inc.*, UI Dec. Hearing No. 13202144EC (LIRC Nov. 22, 2013), *aff'd sub nom, Castforce Inc. v. LIRC and Ziburski*, No. 13 CV 401 (Wis. Cir. Ct. Douglas Cnty. Sept. 2, 2014).
[8] *Ebenhoe v. Lyft Inc.*, UI Dec. Hearing No. 16002409MD (LIRC Jan. 20, 2017).

work in his place. Delivery partners could not unilaterally subcontract or assign their work to another.[9] The petitioner placed restrictions on the assignment or delegation of delivery partners' services. While delivery partners could have "helpers," the petitioner required delivery partners to personally pick up packages at its warehouse and then personally deliver those packages to customers. This condition was **not met**.

d. **Services at times or in a particular order or sequence** - whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit.

Employees typically work during hours and on days set by their employer. Independent contractors set their own schedules, working when they choose. The petitioner did not require delivery partners to work at any time. Delivery partners chose if they wanted to work and, subject to the availability of blocks, when they wanted to work. Delivery partners could cancel blocks they initially accepted, if they wished to do something else with their time. The petitioner provided delivery partners with routes and delivery sequences that the petitioner's algorithms had determined were most efficient, but delivery partners had the option whether or not to follow those routes and sequences. Delivery partners had the discretion to perform their services in the manner, order, and sequence that they chose.[10] The petitioner asked only that delivery partners deliver packages before 9 p.m. or return them to the warehouse, which is more a matter of courtesy and safety than an indicator of direction or control. This condition was **met.**

e. **Oral or written reports** – whether the individual is required to make oral or written reports to the employing unit on a regular basis.

Employers may require employees to submit oral or written reports at regular intervals about the progress of their work, whereas independent contractors are not required to do so. The finished product is of primary interest. The petitioner did not require delivery partners to make oral or written reports about the progress of their work at any specific interval. It could be argued that delivery partners provided the petitioner with periodic updates every time they scanned a package, because delivery partners were required to document through the petitioner's app where they left a customer's package, such as at the front door, at the back door, or on the porch. That information was automatically transmitted to the petitioner. The commission does not consider these automatic updates to be the kind of report contemplated by this condition. Communication of information at the close of an assignment or task is typical of most working relationships, whether the individual performing the services is an employee or an independent contractor.[11] This condition was **met**.

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[9] *See, e.g., Ali v. Acute Care, Inc.*, UI Dec. Hearing No. 13600624MW (LIRC Aug. 7, 2013).
[10] *See, e.g., Shipwreck Boat Works Inc.*, UI Dec. Hearing No. S1300212AP (LIRC Dec. 16, 2013); *Cortez-Robles v. Pro-One Janitorial Inc.*, UI Dec. Hearing No. 11403642AP (LIRC May 3, 2012).
[11] *Ziburski v. Castforce Inc., supra.*

In summary, the petitioner established that four of the five conditions enumerated in the first part of Wis. Stat. § 108.02(12)(bm) concerning direction and control – conditions a., b., d., and e. – were met. However, those are not the only conditions that may be considered. The department asked the commission to consider several additional conditions.

First, the department argued that the petitioner was able to control when and if delivery partners were able to perform services. The delivery partner at the hearing, for example, testified that he would try to get three delivery blocks each day but most often was unable to get more than two. The commission is not persuaded that the number of delivery blocks available to delivery partners demonstrates direction or control on the part of the petitioner. It would seem that there is a finite number of last-mile deliveries that need to be made at any given time. The number of packages needing to be delivered depends on the timing and volume of purchases made by Amazon customers. Delivery partners could control their availability and were free to work as much or as little as they wished, but the petitioner made no promises or representations as to the availability of delivery blocks at any time. The petitioner was not in control of the number of packages needing to be delivered, nor was it in control of the number of delivery partners simultaneously competing for delivery blocks.

The department also argued that the petitioner exercised direction or control over delivery partners by informing them when packages were mishandled or blocks were missed. Again, the commission is not persuaded that providing such information to delivery partners demonstrates direction or control. An employing unit will expect satisfactory results, regardless of an individual's status as an employee or an independent contractor.

The department further argued that the petitioner exercised direction or control over delivery partners because it tracked their reliability and could terminate a delivery partner due to reliability issues. The commission is not convinced that, in this case, the right to terminate is necessarily indicative of direction or control. It is true that a business that has the right to fire a worker at will is generally considered the employer of that worker, but it is also true that a contract between a business and an independent contractor typically will specify conditions that must be met if the contract is to be cancelled and will provide recourse if the contract is cancelled and those conditions were not met. Delivery partners agreed that they would timely and effectively deliver undamaged packages to customers. If delivery partners repeatedly failed to achieve such results, they understood that their continued participation in the petitioner's Amazon Flex program was at risk.

Finally, the department argued that, by determining the rate of pay delivery partners may receive for blocks, the timing of payments, and whether delivery partners may be tipped, the petitioner exercised direction or control over the delivery partners. The commission disagrees. The petitioner paid delivery partners by the job (a block), not by the hour, and delivery partners could choose whether to accept or reject blocks

based on the service fees offered. The fact that the petitioner made a business decision to pay delivery partners twice per week does not appear to be a strong indication of direction or control. The amounts paid to delivery partners varied based on the number and length of blocks they completed, if any. Whether a delivery partner may receive tips from customers is determined by the type of deliveries they chose to make. Mr. Domke testified that he only had the option of delivering packages for a set service fee. The petitioner later added additional delivery services that may involve tipping, but delivery partners choose whether they want the opportunity to earn tips by deciding which delivery blocks to accept.

None of the above conditions concerning control or direction, individually, is dispositive. The commission finds that, under the totality of the circumstances, the petitioner established that delivery partners performed their services free from its control or direction.

Part 2

For an individual to be considered an independent contractor rather than an employee, both parts of the statutory independent contractor test must be satisfied. Therefore, the petitioner had the burden of establishing that six of the nine conditions set forth in the second part of Wis. Stat. § 108.02(12)(bm) concerning economic independence and entrepreneurial risk were met in contract and in fact.

a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.

This condition requires a determination as to whether the petitioner established that its delivery partners took some action to inform others as to their availability and willingness to perform services similar to those they performed for the petitioner. If they had, it would indicate that they had separately established businesses. If they had not, it would tend to indicate the contrary.[12]

Historically, individuals have been found to have satisfied this condition by maintaining an actual place of business; having and distributing their own business cards; circulating promotional materials; posting notices in newspapers and elsewhere; and providing their contact information to specialized trade or sports associations. Individuals who advertised through word-of-mouth were also found to have satisfied this condition. Recently, a Lyft driver was found to have satisfied this condition by making his availability as a driver known to others through his use of both the Lyft and Uber apps,[13] and an individual looking to tutor students satisfied this condition by advertising her qualifications on the online platform maintained by a company that connects students with tutors.[14]

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[12] *Thomas v. Renaissance Nutrition, Inc.*, UI Dec. Hearing No. 12401755AP (LIRC Oct. 30, 2012).
[13] *Ebenhoe v. Lyft, Inc., supra.*
[14] *Varsity Tutors, LLC v. LIRC*, 2019 WI App 65, ¶ 25, 389 Wis. 2d 377, 2019 WL 5151324 (unpublished).

The petitioner did not prove that its delivery partners made their services known to the general public or at least to a certain class of customers who would be interested in such services.[15] The only delivery partner who provided firsthand evidence did not advertise or otherwise hold himself out as being in the business of delivering packages. He did not attempt to inform anyone other than the petitioner that he was willing and able to perform delivery services.

The petitioner argued that this case is analogous to, and compels the same result as, the *Lyft* case,[16] which recognized that individuals advertise their services in new ways in the gig economy. By accepting delivery offers via its smartphone application, the petitioner argued, delivery partners made known their willingness and availability to perform delivery services. The commission is not persuaded.

By having the petitioner's app on their phones, delivery partners could see delivery blocks that the petitioner had available and could choose whether or not to accept a block. However, unlike Lyft and Uber, whose digital platforms connect drivers and riders, and Varsity Tutors, whose digital platform connects tutors and students, the petitioner's app does not connect delivery partners and entities seeking delivery services. The petitioner's app enables delivery partners to connect with one, and only one, customer – the petitioner. Delivery partners cannot use the app to solicit work from the petitioner or from any other entity. Delivery partners are dependent upon the petitioner to offer them blocks of work. Therefore, simply having "an online presence" is not sufficient to meet the statute's requirement that an individual "advertise or otherwise affirmatively hold himself or herself out as being in business." This condition was **not met.**

b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.

This is a two-part condition, and both parts must be met.[17] The focus of the condition is to determine whether a separate business, one created and existing separate and apart from an individual's relationship with an employing unit, is being maintained with the individual's own resources.[18]

It was not suggested that, nor is there any evidence that, any delivery partners maintained their own offices. The petitioner contended that this condition was met because delivery partners chose where to perform their services and used their own equipment or materials in performing their services. Specifically, the petitioner contended that delivery partners used their own vehicles and smartphones to perform

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[15] *Keeler v. LIRC*, 154 Wis. 2d 626, 633, 453 N.W.2d 902 (Ct. App. 1990).
[16] *Ebenhoe v. Lyft, Inc., supra.*
[17] *Downey Drywall LLC*, UI Dec. Hearing No. S1500179EC (LIRC Oct. 31, 2016).
[18] See, e.g., *Gilbert v. LIRC*, 2008 WI App 173, 315 Wis. 2d 726, 762 N.W.2d 671; *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983); *Campbell v. Speedmark*, UI Dec. Hearing No. 08002536MD (LIRC Apr. 27, 2009).

their delivery services, and they chose the facility and location from which they performed their services by selecting between various pick-up locations and by scheduling "preferred blocks." Based on the record in this case, the commission is not persuaded.

In the past, the commission had found that this condition was satisfied because, by selecting specific blocks, delivery partners chose from which station to begin their deliveries and, if packages needed to be returned, end their deliveries. However, the evidence in *this* record shows that, during the audit period, the petitioner did not have multiple pick-up locations from which delivery partners could choose; pick-ups for bulk package deliveries were made from a single warehouse in Milwaukee. An individual who is required to travel to a location chosen by the employing unit or its customer does not choose where to perform his services.[19] In the spring of 2017, the petitioner started providing Prime Now and Prime Fresh deliveries from a location "just a couple of suites down." Deliveries for Whole Foods did not begin until the summer or fall of 2018.

At the petitioner's warehouse, delivery partners were queued up at the start of a delivery block and directed to the next open parking spot, alongside a rack of packages needing delivery. On rare occasions, such as when they were late and multiple racks of packages remained available for delivery, were delivery partners potentially able to choose approximately where they would perform their services by looking at addresses on the packages. However, this was the exception and not the rule. Delivery partners could be given packages with addresses anywhere throughout the Greater Milwaukee area, including as far away as the south side of Racine. Some delivery partners cancelled their blocks, or contemplated cancelling their blocks, if the routes they received were not to their liking. Delivery partners who cancelled blocks under such circumstances risked deactivation by the petitioner if done frequently. The evidence in the record does not support a finding that delivery partners chose where to perform their services.

The department argued that, in addition to not performing most of their services in a facility or location of their choice, delivery partners did not use their own equipment or materials because they had to rely on the petitioner's materials – its app – to complete their services. The department argued that delivery partners needed the app to accept delivery blocks, scan packages upon pick up and delivery, and transmit photographs of packages left at certain locations. The app belonged to the petitioner, and delivery partners were required to uninstall the app when they ceased performing services for the petitioner.

The commission does not agree that, by having to download and use the petitioner's proprietary app, delivery partners did not meet the requirement of this condition that they use their own equipment *or* materials in performing their services. The two things delivery partners needed to perform their delivery services for the petitioner

[19] *See, e.g., Rohland v. Go2It Grp.*, UI Dec. Hearing No. 12202959EC (LIRC Feb. 14, 2013); *Cortez-Robles v. Pro-One Janitorial Inc., supra; Thomas v. Renaissance Nutrition, Inc., supra.*

were a smartphone and a vehicle. Delivery partners provided both of the necessary pieces of equipment. The petitioner's app enhanced the smartphones' technologies and capabilities.

Thus, although delivery partners used their own equipment in performing the services at issue, they did not maintain their own offices or perform most of the services in a facility or location of their choice. This condition was **not met.**

c. The individual operates under multiple contracts with one or more employing units to perform specific services.

The bona fide existence of multiple contracts tends to show that the individual either has multiple customers or that the individual has periodic opportunities for "arm's length" negotiation with the putative employer as to the conditions of their relationship and is not dependent upon a single, continuing relationship subject to conditions dictated by a single employing unit."[20] This requirement may be satisfied by multiple contracts with separate entities or by multiple serial contracts with a putative employer if it is established that those contracts had terms that varied over time and varied depending on the specific services covered by the contract.[21]

The petitioner argued that its agreement with delivery partners expressly permits them to perform similar delivery services for other entities, including its competitors, and that delivery partners have the practical ability to perform such services for others because they can work as much or as little for the petitioner as they desire. The petitioner's witness, a former area manager in the Milwaukee warehouse, testified that many delivery partners drove into the petitioner's warehouse to pick up packages in vehicles displaying signs for Uber, Lyft, Grub Hub and similar businesses. The petitioner argued that delivery partners "set their own schedule and can cancel delivery blocks at their discretion, providing them with the flexibility and time to work for other companies should more lucrative opportunities arise," and that "[t]he consequences resulting from certain Delivery Partners making the business decision (whether a poor one or not) *not* to take advantage of such opportunities should not fall to [the petitioner]." The petitioner's argument is unavailing.

This condition contemplates the actual existence of multiple contracts and not merely the theoretical ability to enter into such contracts. The petitioner's business model may be predicated on delivery partners being independent contractors, but their status as independent contractors with their own businesses must be proven in fact. It was not established that the petitioner's delivery partners provided delivery

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[20] *Ali v. Acute Care Inc., supra; Ziburski v. Shop N Chek, Inc.*, UI Dec. Hearing No. 08201187EC (LIRC Apr. 27, 2009).

[21] *See, e.g., Preferred Fin. of Wis., Inc.*, UI Dec. Hearing No. S0600240MW (LIRC Oct. 23, 2008); *Zoromski v. Cox Auto Trader*, UI Dec. Hearing No. 07000466MD (LIRC Aug. 31, 2007); *In re Thomas Gronna*, UI Dec. Hearing No. S9900063WU (LIRC Feb. 22, 2000).

services for other businesses as independent contractors.[22] Each delivery partner had a single, ongoing contract with the petitioner. There was no negotiation between delivery partners and the petitioner as to compensation or other terms of service under the contract.[23] This condition was **not met.**

d. The individual incurs the main expenses related to the services that he or she performs under contract.

Applying this condition requires a determination of what services are performed under the contract, what expenses are related to the performance of those services, which expenses are borne by each party, and which expenses constitute the main expenses.[24] This inquiry requires quantification of these expenses and a determination of who, the worker or the putative employer, bears the larger total expense,[25] unless it is obvious that the expenses necessarily borne by the worker would exceed those borne by the putative employer.[26]

There was no quantification of expenses incurred by the petitioner or the delivery partners related to the services they performed. However, under the terms of their agreement with the petitioner, delivery partners bore all costs associated with their services. To deliver packages for the petitioner, delivery partners needed, at a minimum, a smartphone and a vehicle. Delivery partners bore the costs of their smartphones, including a data plan to utilize the smartphones' technologies and capabilities, and they bore the costs of operating, maintaining, and insuring their vehicles. The petitioner did not reimburse delivery partners for any of their expenses.

The department argued that, when determining which expenses are the main expenses, the petitioner's expenses for developing and maintaining its proprietary app must be considered along with the petitioner's expenses for maintaining and staffing its warehouses, providing customer service, completing background checks on prospective delivery partners, and carrying an insurance policy that covers its delivery partners. The commission disagrees. While the petitioner undoubtedly incurred costs for buildings, personnel, and technology maintenance and

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[22] The petitioner argued that its witnesses had the best and most comprehensive evidence regarding the delivery partners at issue. The commission disagrees. The best and most comprehensive evidence regarding the delivery partners at issue would have come directly from the delivery partners themselves, but the petitioner did not call any delivery partners to testify and did not stipulate to having one delivery partner's testimony be taken as "representative" of all the others. In the absence of a stipulation or ruling that effect, it was necessary that sufficient proof be presented as to each delivery partner whose status is at issue. *Results Plus Inc.*, UI Dec. Hearing Nos. S0400231AP and S0400232AP (LIRC Nov. 8, 2006). The testimony given by the petitioner's witnesses does not sustain the burden of proof which was placed on the petitioner by statute. The testimony of the petitioner's former area manager was largely based on hearsay, speculation, and conjecture. Commission decisions must be based on factual findings supported by credible and substantial evidence. Wis. Stat. § 108.09(7)(f).

[23] *See, e.g., Ali v. Acute Care Inc., supra.*

[24] *See Preferred Fin. of Wis., Inc., supra*, and cases cited therein.

[25] *See Quale & Associates, Inc.*, UI Hearing No. S0200210MW (LIRC Nov. 19, 2004).

[26] *See Zoromski v. Cox Auto Trader, supra.*

development, those expenses are not the *main* expenses related to the services performed by delivery partners under contract.[27] The main expenses for delivering packages from the petitioner's warehouse to customers' locations included gas, vehicle wear and tear, auto insurance, and data. Those expenses were necessarily borne by delivery partners.[28] This condition is **met.**

e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.

This condition replaced condition 6 of the old independent contractor statute that read: "The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services."[29] The commission has held that an indemnification clause requiring an individual to hold a putative employer harmless from any third-party claim satisfies this condition.[30]

The department asked the commission to reconsider its position with respect to an indemnification clause automatically satisfying this condition, particularly when the clause is contained in "a click-through contract of adhesion" such as that in this case. The department argued that the commission's interpretation of the term "monetary penalty" is too broad and suggested that it would be more reasonable to interpret this condition as requiring a worker to forfeit a fixed sum of money for unsatisfactory work.

The commission recognizes that an independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to recompense a failure to complete the job. An employee, on the other hand, normally has the right to end the relationship with an employing unit at any time without incurring liability for uncompleted or unsatisfactory work. The commission is not persuaded that this condition should be interpreted as requiring a worker to forfeit a fixed sum of money for unsatisfactory work if the worker is not obligated to redo unsatisfactory work for no additional compensation, but the commission agrees that the mere presence of an indemnification provision in a contract for services should not automatically be found to satisfy this condition.

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[27] *See Varsity Tutors, LLC v. LIRC, supra,* ¶ 29, citing *J. Lozon Remodeling,* UI Dec. Hearing No. S9000079HA (LIRC Sep. 24, 1999).

[28] *See, e.g., Elie v. City Business USA LLC,* UI Dec. Hearing No. 11608771MW (LIRC Mar. 12, 2012); *Zoromski v. Cox Auto Trader, supra; T-N-T Express LLC,* UI Dec. Hearing Nos. S9700385 and S9700386MD (LIRC Feb. 22, 2000).

[29] *Ali v. Acute Care Inc., supra.* Substantive changes were made to the statutory definition of "employee" in Wisconsin unemployment insurance law by 2009 Wis. Act 287, enacted on May 12, 2010, and applicable to services performed after December 31, 2010.

[30] *See, e.g., Bentheimer v. Bankers Life & Cas. Co.,* UI Dec. Hearing No. 10006546JV (LIRC Aug. 16, 2011); *Schumacher v. Spar Marketing Servs. Inc.,* UI Dec. Hearing No. 11203182EC (LIRC Mar. 21, 2012); *Ali v. Acute Care Inc., supra; Rohland v. Go2It Grp., supra.*

An indemnification provision in a contract to perform services should be examined to ensure that the individual performing services will be responsible for losses, costs, and expenses arising from the individual's unsatisfactory performance, including default in performance or negligent performance, if the individual is not required to redo unsatisfactory work for no additional compensation. Only if an indemnification provision speaks to an individual's obligations with respect to unsatisfactory work, including an adverse pecuniary consequence, should a provision be found to satisfy this condition. An adverse pecuniary consequence could include, for example, nonpayment of the fee for work completed unsatisfactorily or liability for the cost of re-work if performed by a third party.[31] Additionally, inquiry should be made as to whether the employing unit enforces a standardized indemnification provision in fact.

Here, the indemnification provision in the terms of service agreement is very broad. Under its terms, a delivery partner agreed to defend, indemnify, and hold harmless the petitioner from any third-party allegation or claim based on any loss, damage, settlement, cost, expense or any other liability arising out of, or in connection with the delivery partner's actions or inactions, including a breach of the terms of service agreement. The provision does not specifically address what happens when a delivery partner fails to achieve the results he agreed to provide – the timely and effective delivery of undamaged parcels, bags, totes or other items to the customers' and the petitioner's satisfaction. The penalty imposed by the petitioner for poor performance appears elsewhere in the contract, under Service Standards. The penalty is that an individual will no longer be eligible to participate in the petitioner's program. A greater penalty than this is required to satisfy this statutory condition.[32]

The evidence in the record shows that delivery partners were not obligated to redo unsatisfactory work for no additional compensation, nor were delivery partners subject to a monetary penalty for unsatisfactory work. The petitioner asked delivery partners to bring all undelivered packages back to the warehouse. The petitioner paid delivery partners the service fee attached to a block at the time of acceptance, regardless of whether they delivered all of the packages in the block or not. If delivery partners misdelivered packages, they were sometimes asked to retrieve them, if possible. However, oftentimes they were not asked to do so. The petitioner worked with customers whose packages were mishandled. The petitioner did not enforce the indemnification provision in cases involving unsatisfactory work. The petitioner took action under the provision only in cases involving fraud or theft. The petitioner simply deactivates delivery partners in cases involving gross or repeated unsatisfactory performance. This condition is **not met.**

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[31] *See, e.g., Zoromski v. Cox Auto Trader, supra; Bentheimer v. Bankers Life & Cas. Co., supra.*
[32] *Bentheimer v. Bankers Life & Cas. Co., supra.*

f. The services performed by the individual do not directly relate to the employing unit retaining the services.

This condition relates to the "integration" of an individual's services into the kind of work done by the employing unit.[33] The services performed by the individual should not be directly related to the business activity conducted by the company retaining his services.[34]

The petitioner argued that the services performed by delivery partners were not directly related to its business. As a logistics company, the petitioner argued, it arranges through a variety of parties the delivery of products from point of origin to Amazon customers, and delivery partners' work is no more a core part of its business than when the same type of delivery services are rendered by FedEx, UPS, or USPS. The commission is not persuaded.

Unlike the businesses in *Lyft* and *Varsity Tutors, supra*, where integration was not found, the petitioner is not a digital platform connecting providers of services (drivers and tutors, respectively) with a class of customers interested in their services (riders and students, respectively). The petitioner's core purpose is to ensure that Amazon's products get into the hands of its customers as quickly and efficiently as possible. To that end, the petitioner employs the services of FedEx, UPS, and USPS – all independently established businesses with their own employees – when it deems it beneficial to do so. The petitioner also employs the services of individuals willing to provide delivery services on a per-block, as needed basis – "delivery partners" – when it deems it beneficial or necessary to do so. The petitioner provides its delivery partners with its propriety smartphone app, assists them with mapping, and gives them access to its customer support teams.

The services performed by delivery partners are directly related to the business activity conducted by the petitioner. The success of the petitioner's business depends on delivery services, and the petitioner relied on the services of its delivery partners to effectuate the primary purpose of its business. Delivery partners provide services critical to the petitioner's success. The services performed by delivery partners were directly related to, and were merged into, the scope and function of the petitioner's business. This condition was **not met.**

g. The individual may realize a profit or suffer a loss under contracts to perform such services.

This condition asks whether, over the term of the agreement between the individual and the employing unit, there is a realistic possibility that the individual could realize

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[33] *Ali v. Acute Care, Inc., supra.*

[34] *Keeler v. LIRC,* 154 Wis. 2d at 633 (court gave example of a tinsmith repairing a gutter on a business unrelated to the repair or manufacture of gutters; the tinsmith's activities were totally unrelated to the business of the company retaining his services, so his services were not "integrated" into the alleged employer's business).

a profit (income received under the contract exceeds expenses incurred in performing the contract) or suffer a loss (income received under the contract fails to exceed expenses incurred in performing the contract).[35] The proper test in this condition assumes successful completion of the services performed and not "whether, given the universe of possibilities, something could occur that could result in a loss."[36]

The petitioner argued that a delivery partner could lose money on a delivery block if his expenses exceeded the fee paid for that block and, conversely, that a delivery partner could realize a profit if he took advantage of surge pricing or completed a block ahead of its anticipated completion time. The commission is not persuaded. The test is not whether, on any given day, a delivery partner's expenses may exceed the service fee received. The test is whether, over the term of the relationship between a delivery partner and the petitioner, there is a realistic possibility that the deliver partner could realize a profit or suffer a loss. Here, delivery partners had receipts in the form of piece-work remuneration – fixed amounts set by the petitioner for various delivery blocks. Their receipts were assured for the work they performed. In this respect, the delivery partners were in much the same position as employees paid on a piece-work basis.[37] The risk of loss that exists in a real business was not present.[38]

There is no realistic prospect of experiencing a loss under a contract when predictable expenses are more than offset by the income that is earned providing services.[39] If a delivery partner's expenses exceeded what he earned in service fees, he could refuse to accept certain blocks, accept only blocks with surge pricing, or terminate his relationship with the petitioner. Notably, the only delivery partner who testified in this matter had never lost money on a delivery block.

The petitioner's argument that a delivery partner could realize a profit if he took advantage of surge pricing or completed a block earlier than anticipated is not compelling. Delivery partners were never assured of getting blocks with surge pricing, and they were never able to negotiate their compensation. The petitioner unilaterally determined the service fee to be paid for each block. Delivery partners could try to complete blocks ahead of the anticipated completion time, but doing so would not result in a "profit." The petitioner paid delivery partners the amount of the service fee attached to the block at the time of acceptance, regardless of the length of time it took to complete the block. Delivery partners did not receive a bonus if they finished early, and they could not accept more than one delivery block for a given period of time.

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[35] *See Martin v. Madison Newspapers Inc.*, UI Dec. Hearing No. 13001922MD (LIRC Oct. 10, 2013), and cases cited therein.
[36] *Koeser v. Pinnacle Health & Fitness Inc.*, UI Dec. Hearing No. 12002891MD (LIRC Nov. 16, 2012).
[37] *See T-N-T Express, supra.*
[38] *See Dane County Hockey Officials Ass'n, Inc.*, UI Hearing No. S9800101MD (LIRC Feb. 22, 2000).
[39] *Quality Commc'n Specialists, Inc., supra.*

An individual who operates as an independent contractor traditionally has assumed the financial, or entrepreneurial risks, of the business undertaking.[40] In contrast to other types of risk, entrepreneurial risk is "a risk that the entrepreneur will be unable to compete successfully in the market place, and as a result will lose capital investment or be unable to cover the cost of inventories, facilities, or other overhead expenses involved in operating the enterprise."[41] The petitioner argued that delivery partners participated in entrepreneurial decision-making on a regular basis by analyzing the risk of profit or loss in deciding whether to accept or reject a block. However, at the time a delivery partner makes a decision as to whether to accept or reject a block, he will not know where he will have to drive to deliver packages, nor will he know how many packages he will have to deliver. A delivery driver does not learn that information until after he accepts a block, reaches the petitioner's warehouse, and is parked next to a rack of packages after waiting in a queue. Given the dearth of information prior to beginning a block, a delivery partner was not realistically able to compare projected expenses with assured receipts. In addition, because delivery partners could not freely subcontract their work, they were foreclosed from a more significant prospect for profit through cost-efficient subcontracting. The risk of business profit or loss as anticipated by this test is not present in this case. This condition was **not met**.

h. The individual has recurring business liabilities or obligations.

This condition requires proof of a cost of doing business that the individual would incur even during a period of time when he was not performing work for the employing unit,[42] such as expenses for office rent, liability insurance, continuing education, membership dues, and professional or license fees.[43] Expenses under this condition must be for business purposes alone, or they do not qualify as business liabilities or obligations.[44]

The petitioner argued that delivery partners had recurring business liabilities and obligations through their purchases of separate smartphone devices and secondary vehicles specifically for package deliveries. If those delivery partners ceased performing services for Amazon, the petitioner argued, "presumably they would continue using this delivery-designated equipment as long as they continued performing 'package delivery' services." This argument is unsupported by evidence in the record and requires the commission to make assumptions, which it declines to do.

There was no testimony or documentation from delivery partners as to any recurring business liabilities or obligations relating to their delivery services. There is no competent evidence of separate smartphones or secondary vehicles obtained and maintained by delivery partners specifically for delivering packages. The only

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[40] *Margoles v. LIRC*, 221 Wis. 2d 260, 272, 585 N.W.2d 596 (Ct. App. 1998).
[41] *Id.*
[42] *Pilecky v. B&D Home Improvement*, UI Dec. Hearing No. 13203323EC (LIRC May 2, 2014).
[43] *See, e.g., Clear Choices, Inc.*, UI Dec. Hearing Nos. S0300202EC, S0300203EC (LIRC Oct. 26, 2005).
[44] *See, e.g., Start Renting, Inc.*, UI Dec. Hearing No. S0800059MD (LIRC May 15, 2009).

delivery partner who testified did not have any recurring business liabilities or obligations relating to his delivery services. When not performing services, he did not have vehicle, insurance, or data plan expenses above those incurred for personal use. The testimony of the former manager of the petitioner's Milwaukee warehouse – that she "had seen people get another phone for their business" and that "there were drivers who had gotten secondary vehicles for making deliveries" – does not prove that any delivery partners, much less all delivery partners, had recurring business liabilities or obligations. This condition was **not met**.

i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

"Economic dependence is not a matter of how much money an individual makes from one source or another. Instead, it refers to the survival of the individual's independently established business if the relationship with the putative employer ceases to exist."[45] An individual who performs services in an independently established trade, business, or profession is usually not economically dependent on one particular employer.[46] Analysis of this condition must be made on a case-by-case basis, taking into consideration each claimant's circumstances and whether there are the characteristic signs of a viable, independently established business.[47]

The petitioner argued that the legislative policy underscoring this condition is met where delivery partners "have the flexibility and time to work for other companies." Delivery partners select their own schedules and may cancel blocks when more lucrative opportunities arise. Moreover, the petitioner argued, delivery partners are expressly granted the right to perform similar services for other entities, even competitors. "Unconstrained by any requirements" from the petitioner, they can continue to operate as delivery drivers if their relationship with the petitioner ends. The commission is not persuaded.

While it is true that delivery partners had the freedom to perform delivery services for other entities, there is no evidence that they did so, either before or during their relationship with the petitioner, or that they would continue to perform delivery services after ceasing to work for the petitioner.[48] The department removed from the petitioner's list of 1099 recipients those delivery partners who appeared to have the characteristics of a viable, independently established business. There was a total absence of any evidence from the petitioner as to the source and amount of any other compensation received by its delivery partners. The delivery partner who testified at the hearing did not have anything invested in a business enterprise beyond the time

[45] *Larson v. LIRC*, 184 Wis. 2d 378, 392, 516 N.W.2d 456 (Ct. App. 1994).
[46] *Margoles v. LIRC*, 221 Wis. 2d at 273.
[47] *See Ziburski v. Castforce Inc., supra.*
[48] *See, e.g., Salvi v. Cullen, Weston, Pines & Bach LLP*, UI Dec. Hearing No. 12004296MD (LIRC Mar. 12, 2013) (condition met where claimant performed medical reviews and wrote medical reports as a contract worker and, when his relationship with putative employer ceased, it was likely that he would move on to perform these services independently for other entities as he had done so in the past).

he had spent making package deliveries for the petitioner. He had a single "customer" – the petitioner. He did not have, or attempt to secure, his own customers. As a matter of economic reality, the delivery partner depended on the petitioner's business to render services. This condition was **not met.**

Conclusion

The petitioner had the burden of proof relative to the status of its delivery partners as employees or independent contractors. While there are factors which favored both employee and independent contractor status, the petitioner failed to meet its burden of showing that it is entitled to an exemption from unemployment insurance taxes based on wages paid to its delivery partners. The petitioner met its burden with respect to the first of the two-part independent contractor test set forth in Wis. Stat. § 108.02(12)(bm), but it did not meet the second. The petitioner's delivery partners were free, for the most part, from its control or direction, but they did not satisfy, in contract and in fact, at least six of the nine conditions concerning economic independence and entrepreneurial risk. The petitioner established that only one condition in the second part of the independent contractor test – d. – was met.

Accordingly, the delivery partners identified in the department's audit are employees, within the meaning of Wis. Stat. § 108.02(12)(a). The petitioner is liable for unemployment insurance contributions, interest, and penalties based on the wages[49] it paid to those individuals in the second, third, and fourth quarters of 2016, all four quarters of 2017, and the first and second quarters of 2018.

NOTE: Commission review of a decision of an ALJ is not appellate in nature but is, instead, a de novo review of the factual record and the parties' arguments. Therefore, although the commission agrees with the ALJ's conclusion that delivery partners performed their services for the petitioner as employees and *not as independent contractors*, the commission has rewritten the decision to reflect, in a single document, its analysis of the relevant statutory factors and also to address the arguments raised by the petitioner and the department.[50]

cc: Attorney Charles Ramsey

Attorney Christine Galinat

[49] Wage estimates were used for calculating contributions owed for 2018.

[50] *See, e.g., Castforce Inc.*, UI Dec. Hearing No. S1300154MW (LIRC Sept. 8, 2014).