



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BRAD LANDER

Vilda Vera Mayuga
Commissioner
Department of Consumer and Worker Protection
42 Broadway, 9th floor
New York, NY 10004
via: email

March 21, 2023

Dear Commissioner Mayuga,

As New York City elected officials committed to advancing fair pay for the essential work of third-party delivery and courier service workers, we are deeply disappointed by the Department of Consumer and Worker Protection (DCWP)'s unacceptable decision to further delay the promulgation of a final rule implementing Local Law 115 of 2021, and to introduce further erosions to the rule that would codify a subminimum wage for deliveristas.

First, by its delay, DCWP is in violation of the law, which required the rule to be in place by January 1, 2023. Every day of delay is money lost for delivery workers who have long deserved a raise.

Second, while DCWP staff worked hard to research and calculate a minimum pay rate in an effort to fulfill the requirements of the legislation (and the worker-led campaign that resulted in its passage), the new rule is a large step backwards. The Second Proposed Rule introduces new, troubling elements that undermine the goals of the original legislation. As a result, the average deliverista would receive far below minimum wage.

While DCWP attempts to present the "hourly wage" for workers as \$19.96, with the proposed but misleading \$3.60 per hour reduction for "multi-apping," and the \$2 reduction in 2023 for "phase-in" (better described as willfully allowing the apps to keep paying a subminimum wage for two years), \$2.26 for expenses and properly allocating \$1.10 towards time off (the base wage includes an additional 6% for vacation and sick pay) and \$2.25 for taxes and workers compensation, **the average base wage for 2023 would actually be \$12.69.**

New York State's minimum wage reached \$15 per hour in 2019. In 2019 dollars, the \$12.69 on average per hour that deliveristas would take home under DCWP's proposal is worth just \$10.87 of goods and services in 2023. Even with the adjustments that DCWP includes to cover the costs of workers' comp, Social Security, and Medicare, deliveristas still do not receive health insurance or unemployment insurance. If you proceed with this rule, you will be codifying a subminimum wage for the some of the most exploited workers.

We are especially disturbed by the appearance that the delay and the undermining of the rule were the result of potentially unreported lobbying by the app companies. These multi-billion dollar corporations have established a business model based on denying basic workers' rights to some of the most vulnerable and exploited workers; indeed, in their comments to DCWP they declare that they don't believe delivery workers deserve a minimum wage.¹ So, it is no surprise they have fought implementation of the rule designed to ensure the workers receive a minimum wage. It would be appalling if the City of New York imposed a subminimum wage and a months-long delay even for workers to receive it as a result of corporate lobbying.

App-based delivery workers risked their lives through the pandemic to provide food to New Yorkers, enabling people to remain in their homes during the height of the Covid-19 outbreak in New York City. They continue to provide food and other goods to New Yorkers every day, amidst extreme weather and health and safety risks on the streets which are functionally their workplace – all at subminimum wages and without benefits. Out of that experience, they organized a moving and powerful campaign that captured the attention of New Yorkers, demanding justice and fair treatment, which led to a package of bills including LL 115.

New York City now has an opportunity to lead the nation by establishing a minimum wage standard for this growing industry that would adequately compensate delivery workers for their labor and their pivotal contributions to our city. We are encouraged by the seriousness with which DCWP initially undertook the required study of working conditions of third-party food delivery workers, including income, expenses, required equipment, modes of transit and safety conditions. We plead with you to return to the seriousness with which you initially sought to comply with the law.

While you cannot restore the five months of wages you have illegally taken from delivery workers, you can adjust the rules to ensure that they will, at the very least, receive at least the minimum wage as their base pay rate going forward:

1. The \$3.60 pay reduction for so-called “multi-apping” must be entirely eliminated.

The proposal to reduce workers' base pay by \$3.60 per hour because they may keep several apps open while waiting for their next job, so-called “multi-apping,” is not supported by the report, is inappropriate and results in a guaranteed sub-minimum wage for many workers. DCWP has failed to provide any evidence or explanation for why “multi-apping” should reduce workers' pay, and as far as we can tell, it is premised on entirely faulty assumptions. Like for-hire vehicle (FHV) drivers, who receive no “multi-apping” deduction in their comparable minimum pay rule, delivery workers may spend their on-call/waiting time with multiple apps open; however, during this time, no one is paying them. When they receive a job, they proceed to fulfill that delivery, so only one app is paying them. We have seen no evidence whatsoever that there is ever a time when workers are actually being paid by multiple apps at the same time. Under the Standard Method, there is no guarantee that an individual worker would be

¹ “Uber Eats, DoorDash, Grubhub, and tech industry advocates commented that the base pay rate should take into consideration the flexibility of food delivery workers' work arrangement and would appropriately be lower than the minimum wage applicable to employees.” DCWP Notice of Public Hearing and Opportunity to Comment on Proposed Rules, 3/7/23.

paid for their waiting time, which DCWP estimates as 40% of their time on average. Without paying for waiting time, it is a subminimum wage formula by definition.

In addition, it appears that multi-apping has precipitously declined as more apps have moved to requiring workers to reserve assigned shifts in advance, and order volume has diminished. This means that even if it were justified, the amount of multi-apping accounted for by the rule (and the accompanying monetary reduction) is overinflated. DCWP and the apps both know these amounts are overinflated. DCWP should not condone the apps' failure to provide more recent data as subpoenaed by relying on outdated figures to implement this punitive policy.

2. The “phase-in” must be eliminated. There is simply no justification for allowing multi-billion dollar apps to continue to pay subminimum wages for the next two years.

The current bill purports to ensure that the average worker will earn the “minimum wage,” but does not actually ensure that every worker will earn at least \$15 for 60 minutes of work. The multi-apping deduction threatens to reduce this by \$3.60 per hour, without justification. To add insult to injury, the rule would then, for the first year, reduce wages an additional \$2 below even the subminimum wage it provides, as a result of the “phase in.” There is no justification for this. All other large (and small) employers are required to pay the minimum wage; no special dispensation should be given here. The apps are not small businesses with precarious margins that cannot sustain sudden changes in labor costs. There was no “phase-in period” for driving apps under the TLC driver pay rule, and no reason to treat the delivery apps – who have profited from their workers reduced pay for several years long – any differently. The proposed phase-in should be eliminated.

3. Workers must be paid for their individual waiting time rather than in the aggregate or based on an industry average.

Presumptions of how individual market participants will act have no place in this rule.² The Standard Method would allow companies to pay individual workers just \$6.53 an hour after expenses and the Alternative Method would allow the apps to withhold upwards of \$4 an hour from workers as a whole. By not limiting those apps which can elect to use the Alternative Method until April 2024 and allowing apps to change their methodology of choice each pay period, the Department ensures that the aggregate pay requirement will continue to pose harm to workers with dire results. By allowing a company to only pay some of its workers for their time on trips at a lower rate than otherwise, and then give bonuses to other workers, apps will be incentivized to encourage dangerous behavior.

4. The formula for COLA increases must be revised to account for inflation in business expenses as already implemented by the TLC.

The proposed rules are insufficiently tailored to ensure that workers will not fall below minimum wage due to disparate inflationary impacts on expenses and purchasing power. The formula should accordingly be revised to separately calculate inflation for the base and expense components after an annual review of expenses. This is the same methodology that the Taxi and Limousine Commission uses

² Indeed, the SOH at pg. 10 states that the “Department assumes that ... Relay, which already pays workers for on-call time, will choose the standard method” despite Relay’s own testimony that “this proposal would almost certainly force us to change our payment model to one where we pay couriers per-trip.”

for app-based for-hire drivers. At a time when transportation-sector business expenses have faced an inflationary rate three times the overall increase in the consumer price index, this review process is required by § 20-1522(c).

Only by making these revisions to ensure that deliveristas actually earn at least the minimum wage will DCWP fulfill its obligations under the law and show these essential workers the dignity they deserve. Through this delay, DCWP has already unacceptably reduced the pay of workers it is charged with protecting. We are counting on you to reverse the proposed harmful erosion of the rules, in order not to make this any worse.

Sincerely,



Brad Lander
New York City Comptroller



Antonio Reynoso
Brooklyn Borough President



Christopher Marte
New York City Council Member, District 1



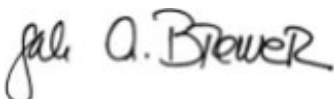
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CC: Deputy Mayor Maria Torres-Springer