Relay Delivery, Inc. v New York City Dept. of Consumer & Worker Protection
2023 NY Slip Op 33351(U)
September 27, 2023
Supreme Court, New York County
Docket Number: Index No. 155944/2023
Judge: Nicholas W. Moyne

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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RELAY DELIVERY, INC.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF CONSUMER AND WORKER PROTECTION, VILDA VERA MAYUGA

Defendant.

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INDEX NO. 155944/2023

MOTION DATE 07/06/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

INTRODUCTION:

Petitioners, Uber Technologies, Inc. (Uber), DoorDash, Inc. (DoorDash) together with GrubHub, Inc. (Grubhub), and Relay Delivery, Inc. (Relay), commenced these Article 78 special proceedings to challenge the adoption of the Final Minimum Payment Rule ("Final Rule") promulgated by the New York City Department of Consumer and Worker Protection (DCWP). Petitioners seek to vacate and annul the Minimum Pay Rule: (Subchapter H of Chapter 7 of Title 6 of the Rules of the City of New York §§ 7-801, 7-804, 7-805, 7-806, 7-807, and 7-810[b] and [c]). Presently before the Court are petitioners' requests for a preliminary injunction enjoining the Minimum Pay Rule from taking effect pending the final determination of the petitions.[1] For

[1] The Final Minimum Pay Rule was set to take effect on July 12, 2023; following oral arguments, this Court issued a temporary restraining order on July 7, 2023, enjoining the Final Rule from taking effect pending its determination on the requests for a preliminary injunction.

the reasons set forth hereinbelow, the request is denied as to petitioners Uber and DoorDash, together with GrubHub, but is granted as to petitioner Relay.

Legislative Background:

In 2021, the New York City Council (City Council) adopted a package of laws that focused on the working conditions of food delivery workers within New York City. Included in this package was Local Law No. 115 (2021) of the City of New York, known as the "Minimum Pay Law" (*see* DoorDash/GrubHub's exhibit 14). Codified as Administrative Code of the City of New York § 20-1522, it directed the DCWP to study the pay and working conditions of food delivery workers and based on the results of this study, create a rule establishing a method for determining the minimum pay that third-party food delivery and third-party food courier services must pay their delivery workers.

The Minimum Pay Law granted the DCWP the authority to issue subpoenas for data, documents, and other relevant information necessary for their study (*see* Admin. Code §20-1522[a] [2]). Starting February 1, 2024, and every February thereafter, DCWP may announce an amendment to the Minimum Payment Method or formula and may promulgate such amendments by rule if necessary (*see* Admin. Code §20-1522[c]). DCWP shall submit to the City Council and the mayor a report on the Minimum Payment Rule, any amendment, and the effect of such Minimum Payment Rule on food delivery workers and the food delivery industry, no later than September 30, 2024, and every two years thereafter (*see* Admin. Code §20-1522[d]).

To fulfill its obligations under the Minimum Pay Law, DCWP conducted its study and issued a report centered on the pay and working conditions of New York City app-based food delivery workers. On November 16, 2022, DCWP concurrently published the findings of its study, entitled, *A Minimum Pay Rate for App-Based Delivery Workers in NYC* (Report), and its First Proposed Rule (*see* Uber's exhibits 4, 12). In conducting its study, Local Law 115 required the DCWP to consider the following topics: (1) food delivery workers' pay and the methods determining that pay; (2) total income earned; (3) workers' expenses; (4) required equipment; (5) workers' hours; (6) average mileage of a trip; (7) mode of travel used; and (8) safety conditions (Admin. Code §20-1522[a] [1]). In addition to the topics the City Council required it to consider, DCWP was given discretion to include in its study and report any additional factors that it deemed appropriate (*Id*.).

As detailed in the Report, the DCWP's study drew principally on data obtained from the apps, primarily petitioners, in response to administrative subpoenas used in combination with data from a survey that DCWP distributed to nearly all of the approximately 123,000 workers who performed app deliveries in New York City between October and December 2021 (Worker Survey) (Report at 2). DCWP's study also drew on additional sources, including a separate in-person field survey of delivery workers (Deliveristas Survey), a survey of restaurant owners and managers in NYC (Restaurant Survey), testimony from a public hearing on delivery worker pay and working conditions, expert and stakeholder interviews, and other public information (Report at 2-4; Uber's exhibits 6, 7).

Pursuant to the New York City Charter and the City Administrative Procedure Act (CAPA), New York City agencies, when rulemaking, shall give notice by publishing the full text of the proposed rule thirty days prior to the date of the public hearing and provide the time and place of the public hearing to be held (*see* NY City Charter § 1043[b] [1],[4]). Additionally, an agency must provide the public the opportunity to comment on the proposed rule and all written comments, along with a summary of the oral comments shall be placed in a public record (*see* NY City Charter §§ 1043[e] [i], [ii], [iii]). After a consideration of relevant comments, an agency may adopt a final rule and shall publish the text of the final rule and the statement of basis and purpose in the City Record (*Id*. at §1043[f] [1] [c]).

As required under CAPA, the DCWP gave notice and held a public hearing for the First Proposed Rule on December 16, 2022. During the first comment period, DCWP received comments from workers, advocates, restaurants, researchers, representatives of the apps, and members of the public *(see* respondent's exhibit D). The four petitioners submitted comments, objections, and proposed revisions to the First Proposed Rule.

On March 7, 2023, DCWP published a Second Proposed Rule. The Statement of Basis and Purpose of the Second Proposed Rule (Second SBP) included the DCWP's responses to comments on the First Proposed Rule and explanations for incorporated or unincorporated changes. Notice was again provided, and a second public hearing was held on April 7, 2023. Throughout the second comment period, DCWP again received comments, objections, and alternative suggestions, including submissions from the four petitioners (*see* respondent's exhibit G).

On June 12, 2023, the DCWP published the Final Minimum Pay Rule. The Notice of Adoption and the Statement of Basis and Purpose to the Final Rule (Final SBP) included the full text of the Final Rule. The Final SBP, which incorporated the Second SBP and Report by reference, included responses to comments, objections, and suggestions DCWP received in response to the Second Proposed Rule. The Final Rule, which was to go into effect on July 12, 2023, set a Minimum Pay Rate and included two payment methods by which third-party delivery workers could be paid: the "Standard Method" and "Alternative Method" (*see generally* 6 RCNY § 7-810).

ARTICLE 78 REVIEW AND INJUNCTIVE RELIEF:

Shortly after the Notice of Adoption was published, petitioners Uber, DoorDash together with GrubHub, and Relay commenced these underlying Article 78 special proceedings to challenge the adoption of the Final Minimum Pay Rule. Each petitioner requests the interim relief of a preliminary injunction to enjoin the Final Minimum Pay Rule from taking effect. The Court conducted oral arguments, spanning three separate days, to aid in reaching its determination.[2]

A preliminary injunction may only be granted when the proponent of such relief clearly demonstrates (1) a likelihood of success on the merits; (2) irreparable injury if the relief is not granted; and (3) a balancing of equities in their favor (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

[2] The Court heard oral arguments for this matter on July 6, 2023, July 7, 2023, and August 3, 2023.

Although conclusive proof is not required, an injunction is an extraordinary preliminary remedy and therefore the threshold inquiry is "whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action" (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]; *Chester Civic Imp. Ass'n, Inc. v New York Tr. Auth.*, 122 AD2d 715, 717 [1st Dept 1986]). The Court reviews the administrative action under the applicable standard of review for an Article 78 proceeding to determine whether DCWP, in promulgating the Final Rule, acted outside the authority statutorily delegated to it or if the regulation was so lacking in reason for its promulgation that it is essentially arbitrary (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; see also *Natl. Rest. Ass'n v New York City Dept. of Health & Mental Hygiene*, 148 AD3d 169, 179 [1st Dept 2017]).

In an Article 78 proceeding, judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary and capricious, or whether it was affected by an error of law (CPLR § 7803[3]). "Arbitrary" for the purposes of the statute is interpreted as "when it is without sound basis in reason and is taken without regard to the facts" (*Matter of Pell v Board of Educ.*, 34 NY2d 222 [1974]). To survive challenge, an administrative agency determination need only be reasonable and supported by the record when taken as a whole (*Pell*, 34 NY2d at 231; see also *New York State Ass'n of Ctys. v Axelrod*, 78 NY2d 158, 166 [1991]; *Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Judicial review of an agency's action is limited to the grounds invoked by the agency and cannot be affirmed on an alternative ground that may have been adequate if cited by the agency (*Matter of Natl. Fuel Gas Distrib. Corp. v Pub. Serv. Com'n of State*, 16 NY3d 360, 368 [2011]). If the determination has a rational basis, it will be sustained, even if a different result would not have

been unreasonable (*Matter of Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013]). When an agency acts pursuant to its authority and within the orbit of its expertise, it is entitled to deference, even if different conclusions could be reached as a result of conflicting evidence (*Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. Of Hous. & Community Renewal*, 46 AD3d 425, 428-29 [1st Dept 2007] [internal citations and quotations omitted).

Petitioners[3] argue that they are likely to succeed on the merits for the following reasons: (1) the Final Rule is based on flawed and biased surveys; (2) the DCWP failed to include grocery and convenience delivery services in its study and Final Rule; (3) the Final Rule arbitrarily compensates workers for all on-call time; (4) the Final Rule contains a workers' compensation component that is not rationally related to the purported purpose; (5) the recordkeeping and reporting requirements are irrational and unreasonable; (6) the DCWP improperly relied on the assumption that restaurants do not benefit from delivery services; and (7) the DCWP failed to adequately consider the Final Rule's consequences (*see* Uber petition; DoorDash/Grubhub petition; Relay petition).

Relay, in addition to the aforementioned reasons, argues that they are likely to succeed for the following additional reasons: (1) DCWP, in its study and process preceding the promulgation of the Final Rule, failed to adequately consider Relay's unique business model; (2)

[3] Petitioners Uber and GrubHub together with DoorDash, asserted similar and/or overlapping arguments, and the parties, including Relay, largely incorporated each other's arguments by reference. For convenience and to avoid redundancy, the Court will address all arguments as one and any reference to "petitioners" shall mean all parties collectively.

DCWP failed to consider the impact of the Final Rule as it relates to Relay; and (3) the Final Rule sets a compliance period that is unreasonable or impossible for Relay to meet.

DCWP, in response, argues that the Final Rule is reasonable and rational, and petitioners have failed to establish entitlement to the requested relief under the highly deferential Article 78 standard.

SURVEY RESULTS:

Petitioners argue that, because the Final Rule is based on the results of flawed and biased surveys, it is arbitrary and capricious. While a regulatory agency is entitled to rely on all facts that exist so long as they are reliable and trustworthy, a rule must be annulled when the information on which the agency relied is proven to be outdated, erroneous, or incomplete (*Schur v New York State Div. of Hous. And Community Renewal*, 169 AD2d 677, 678 [1st Dept 1991] [express reliance on a flawed inspection report was arbitrary and capricious]; *Matter of NY Palm Tree, Inc. v New York State Liq. Auth.*, 18 Misc 3d 1102(A) [Sup Ct 2007]).

Here, petitioners assert that DCWP's reliance on the results from the Workers Survey, Deliveristas Survey, and Restaurant Survey, was irrational. Petitioners take issue with each survey's design, question structure, phrasing, and type, lack of controls, disclosure of who conducted the surveys, and intended use and/or purpose of the surveys. Further, petitioners argue they raised concerns about the surveys, relying on survey expert reports, which were not adequately addressed by the DCWP (*see* Uber's exhibit 25 at 1500-16). According to petitioners, the methodological flaws and improper survey tactics produced biased or unreliable

results, which dictated several aspects of the Minimum Pay Rate- pointing primarily to the component dealing with worker expenses.[4]

The Court finds these arguments to be unavailing primarily because they overstate the surveys' role in formulation of the Final Rule. As DCWP argues, using surveys to inform agency determinations is neither novel nor controversial (*see Brenner v O'Connell*, 308 NY 636, 642 [1955] [agency reasonably denied liquor license based on survey revealing that community had sufficient density of liquor licenses]). Additionally, informing survey respondents of the intended uses of their responses and disclosing that it was the City of New York conducting the survey is appropriate and customary (Final SBP at 24). This is in line with Federal rules regarding government surveys (*see* 44 U.S.C. § 3506[c] [1] [B] [iii] [each information collection informs the person receiving the collection of the reasons the information is being collected and the way such information is to be used]; see also 5 C.F.R. § 1320.8[b] [3] [i], [ii]).

Petitioners assert that DCWP improperly relied on data from both the Restaurant and Deliveristas Surveys to inform critical aspects of the Final Rule. However, these contentions are unsubstantiated as there is no evidence in the record indicating that DCWP actually relied on data from the Restaurant or Deliveristas Survey in its calculation of the Minimum Pay Rate for the Final Rule (Final SBP at 22; Report at 3-5).

[4] The Minimum Pay Rate is the minimum amount that the third-party food delivery and courier services must pay workers for their trip and on-call time; comprised of the base pay component, workers' compensation component, and expense component, after adjustments, and to be phased-in over three years (Final Rule at 3).

Moreover, the record before the Court demonstrates that DCWP relied on the data from the Workers Survey for very limited purposes, including, if not primarily, for assessing compensation relative to workers' reported expenses (Final SBP at 24, 25). The Court agrees that it would be unreasonable for an agency to rely exclusively upon survey results without analyzing the potential for bias, or adjusting the data based upon any bias found, when the survey respondents are made aware of the purpose of the survey (*Friends of Boundary Waters Wilderness v Bosworth*, 437 F3d 815, 826 [8th Cir 2006]). There is no evidence that is the case here. Here, DCWP sufficiently detailed the methodology, analytics, and rationale behind the formation, design, and use of the Workers Survey in the Report, Second SBP, and Final SBP. Accordingly, the DCWP appropriately utilized the data supplied by this survey's results while also taking measures to account for or compare this data with other reliable metrics.[5]

While petitioners claim that DCWP did not address their concerns about the Workers Survey, its results, or otherwise explain its uses, the record shows otherwise. The Report, Second SBP, and Final SBP explain and provide a clear outline of: the structure and sources of the survey, DCWP's methods and use of control measures[6], a break-down of the survey's findings, and an overview of in what aspects of formulating the Minimum Pay Rate the results

[5] Included in the Second SBP, was the following comment, "DoorDash, Uber Eats, their experts, and some tech industry advocates commented that the expense component of the rate is too high, arguing that the Department relied on a biased survey, did not account for use of equipment and services outside of delivery for restaurant apps, and did not account for tax deductibility of expenses. Some of these commenters proposed alternatives for the expense component of the minimum pay rate" (Second SBP at 9). DCWP's response adequately detailed the survey's methodological practices, supplemental analyses/sources, and what the information contributed to the expense component (*Id.*).

[6] The control measures included post-stratification weighting, supplemental analysis, and cross referencing against the apps' and/or market data (Final SBP at 22-24).

were used (Report at 2-5, 12-26; Second SBP at 9; Final SBP at 22-25).[7] While petitioners may disagree with DCWP about what would have been the most appropriate survey methodology, DCWP's design and reliance on the Workers Survey was not unreasonable or irrational (*Matter of Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013]; *Matter of NY Palm Tree, Inc. v New York State Liq. Auth.*, 18 Misc 3d 1102(A) [Sup Ct 2007]; see also *Friends of Boundary Waters Wilderness v Bosworth*, 437 F3d 815, 822, 825 [8th Cir 2006] [even if the agency's underlying data are flawed, substantial deference requires the ruling be reversed only if the survey design and implementation was so inadequate as to make any reliance upon the data unreasonable]).

EXCLUSION OF GROCERY AND NON-RESTAURANTS:

Petitioners claim that the Final Rule contradicts the plain language of Local Law 115's statutory mandate. Petitioners cite *Trump-Equit. Fifth Ave. Co. v Gliedman* (57 NY2d 588, 595 [1982]) for the proposition that "an agency may not promulgate a rule out of harmony with, or inconsistent with, the plain meaning of the statutory language". Furthermore, petitioners claim that where the question is one of pure statutory interpretation, the Court need not accord any deference to an agency's determination and can undertake its function of statutory construction (*Matter of DeVera*, 32 NY3d 423, 434 [2018]).

[7] Included in the Final SBP, under the "Use of Survey Data" heading, DCWP once again detailed the Worker Survey's fielding and analysis and provided a table with the calculations of specific inputs derived from it (Final SBP at 22-24). Additionally, in the Final SBP, DCWP included a response to the concerns or criticisms raised by the petitioners' experts regarding question type/phrasing, disclosure of the party conducting the survey and its purpose, etc. (*Id*. at 24-25). This response included an explanation for DCWP's reasoning or rationale behind the use of its chosen survey tactics, including its consideration of the survey population (*Id*.).

Petitioners argue that DCWP's failure to include third-party delivery services that do business with grocery stores or non-restaurant purveyors of food, such as Instacart, contravenes the plain language of its statutory mandate. Specifically, petitioners contend that, under the plain meaning of the statutory language, grocery and convenience stores constitute food service establishments and therefore the exclusion of a website, mobile application, or other internet service that only provides delivery from grocery stores and quick convenience stores is improper. Petitioners further argue that this exclusion from the Final Rule means that it is affected by an erroneous interpretation of the law and must be annulled (*see Matter of DeVera*, 32 NY3d 423, 439 [2018]).

Pursuant to New York City Administrative Code § 20-1501, the applicable definition of the term "food service establishment" is "a business establishment located within the city where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle" (Admin. Code § 20-1501; see DoorDash/GrubHub's exhibit 13). Other statutes and agency rules have different definitions of the term "food service establishment,"[8] some of which do, and some of which do not, include grocery stores. However,

[8] *See* Public Health Law § 1399-n ["Food service establishment" means any area, including outdoor seating areas, or portion thereof in which the business is the sale of food for on-premises consumption]; Admin. Code § 17-1501 [The term "food service establishment" means any establishment inspected pursuant to the restaurant grading program established pursuant to subdivision a of section 81.51 of the health code of the city of New York]; Admin. Code § 16-329 ["Food service establishment" means a premises or part of a premises where food is provided directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle. Food service establishment shall include, but not be limited to, full-service restaurants, fast food restaurants, cafes, delicatessens, coffee shops, grocery stores, vending trucks or carts and cafeterias]; NYC Health Code § 81.50(a)(2) [Covered establishment means a food service

the Court need not reference these other definitions because the websites, mobile applications, or other internet services that deliver only from grocery or convenience stores are not third-party food delivery services as defined by Admin. Code § 20-1501. Therefore, the Final Rule is inapplicable to them.

The Minimum Pay Rule only applies to the food delivery workers engaged as independent contractors by a third-party courier service or third-party food delivery service that is required to be licensed pursuant to section 20-563.1 (Admin. Code §§ 20-563.1). Delivery services dealing with grocery stores are not required to be licensed and the independent contractors engaged by grocery delivery apps are therefore not "food delivery workers" as defined by the law (*Id.)*. Further, DCWP has previously determined that grocery delivery applications, such as Instacart, are not "third-party food delivery services" or "third-party courier services" (affirmation of Elizabeth Wagoner in opp to DoorDash/GrubHub mot ¶ 42). To be considered as a "third-party food delivery service" a site or service must offer or arrange for the sale of food and beverages *prepared by*, and the same-day delivery or same-day pickup of food and beverages from, a food service establishment (*see* Admin. Code § 20-1501).

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establishment or similar retail food establishment that is part of a chain with 15 or more locations nationally doing business under the same name and offering for sale substantially the same menu items, or a food service establishment or similar establishment that is not part of such a chain that voluntarily registers with the United States Food and Drug Administration to be subject to the federal requirements for nutrition labeling of standard menu items pursuant to 21 CFR 101.11(d), or successor regulation]; NYC Health Code § 81.50(a)(9) differentiates grocery stores as [similar retail food establishment means an establishment such as a convenience store, grocery or supermarket that serves restaurant-type food].

The plain meaning of the definition of third-party delivery services therefore supports the exclusion of websites, mobile applications, or other internet services that arrange only for the purchase and delivery of groceries and other prepackaged foods. The determination of whether food and beverages are prepared by a food service establishment for same day delivery or pickup, or whether an application constitutes a covered entity, requires an evaluation of the factual data and inferences to be drawn therefrom and is within the orbit of DCWP's expertise (*see Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. Of Hous. & Community Renewal*, 46 AD3d 425, 428-29 [1st Dept 2007] [internal citations and quotations omitted). Accordingly, the Court should defer to the agency (*see Claim of Gruber*, 89 NY2d 225, 231 [1996]). Therefore, DCWP's decision to exclude grocery delivery websites, mobile applications, or other internet services from the Final Rule was not an erroneous interpretation of the statute nor is it inconsistent with the plain language of the statute.

The Court also finds the petitioners' claim, that the legislative history of the Minimum Pay Law compels DCWP to treat grocery stores the same as restaurants, unavailing. Petitioners point to a (single) stray reference to groceries in the September 23, 2021, Committee Report for Local Law 115 of 2021 (DoorDash/GrubHub's exhibit 3 at 23; DoorDash/GrubHub Pet. ¶ 120). However, that reference, which states that it could include grocery stores, does not overrule the otherwise established meaning of "food service establishment" (*Id.*). But, in any event, the full legislative record demonstrates City Council's true intent. By contrast, that same Committee Report contains thirty-four references to "restaurants," seven references to "DoorDash", four references to "GrubHub", three references to "Uber Eats", and zero references to "Instacart" (*see* DoorDash/GrubHub's exhibit 3). The September 23, 2021, City Council Committee hearing,

involving discussion of Local Law 115, contains testimony by Council Members about the regulation of restaurants and the rights of these delivery workers (*see* DoorDash/GrubHub's exhibit 15). However, this testimony fails to mention grocery stores or Instacart. By comparison, the overall legislative record for both the Licensing Law and the Minimum Pay Law contains hundreds of references to restaurants (*see generally* DoorDash/GrubHub's exhibit 3, 15). Furthermore, both the City Council and the Mayor have proposed separate minimum wage legislation that would specifically encompass grocery delivery workers. Accordingly, the petitioners are unlikely to succeed on the merits of their claim that the rule is out of harmony with or inconsistent with the plain meaning of the statutory language.[9]

TREATMENT OF ON-CALL TIME:

On-call time is the time that a worker is connected to the third-party service's app in a status where the worker is available to receive or accept trip offers and assignments but excluding all trip-time (Final Rule at 26). The Final Rule includes two methods by which the

[9] There are many other contexts in which state and municipal agencies make distinctions between restaurants and grocery stores. For example, the New York City Health Code, distinguishes "food service establishments" as defined at Health Code § 81.03(s), from other businesses selling food, such as groceries and supermarkets. The Health Code requires calorie postings at a "food service establishment" and a "similar retail food establishment," defined as "an establishment such as a convenience store, grocery or supermarket that serves restaurant-type food" (Health Code § 81.50[a][9]). The Health Code also prohibits smoking "in any retail food establishment commonly known as a supermarket" (Health Code § 118.17[a]). These regulations would be superfluous if the term "food service establishment" included groceries and supermarkets. This same distinction exists at the state level, between a "food service establishment" and a "retail food store" (*see, e.g.*, NY Agric. & Mkts L § 500). The New York State Department of Health defines a "food service establishment" as "a place where food is prepared and intended for individual portion service" and expressly "exclud[ing] . . . retail food stores, private homes" as well as "congregation[s], club[s], [and] fraternal organizations" (*see* 10 NYCRR § 14-1.20).

third-party delivery and courier services may pay their workers. The two methods, the "Standard Method" and "Alternative Method," both compensate for on-call time either directly or indirectly (Final SBP at 4).

Under the Standard Method, third-party services must make payments that meet both the individual requirement (pay the individual no less than the sum of that worker's trip time in a pay period multiplied by the Minimum Pay Rate) and the aggregate requirement (pay, in the aggregate, the workers who engage in trip and on-call time in a pay period no less than the sum of all workers' trip and on-call time multiplied by the Minimum Pay Rate) (Admin. Code § 7-810 [b] [1], [2]). This method directly compensates for on-call time in the aggregate payment portion.

Under the Alternative Method, eligible third-party services must pay to each worker who engages in trip time in a pay period no less than the worker's trip time multiplied by the alternative Minimum Pay Rate (standard Minimum Pay Rate divided by 0.60) (Admin. Code § 7-810 [c] [2]). Prior to April 1, 2024, any third-party service may use the Alternative Method; after April 1, 2024, third-party services may use the Alternative Method for any pay period that its utilization rate (third-party service's total trip time divided by the sum of its trip and on-call time) is greater or equal to 0.53 and in two pay periods where it is lower (Admin. Code § 7-810 [c] [1]). This method indirectly compensates for on-call time by only paying for trip time but at a higher rate.

Petitioners argue that the Final Rule's treatment and inclusion of on-call time, compensating for all time spent logged into the app regardless of whether the worker is engaged in any work-like activity, is arbitrary and capricious for the following three reasons, each discussed in turn.

First, petitioners argue that the Final Rule's inclusion of compensation for all on-call time was erroneous as Local Law 115 only directed that DCWP *consider* the on-call time and work hours of delivery workers. Petitioners contend that DCWP, by including all on-call time, misunderstood the statutory framework which warrants annulment of the Final Rule (*Woods v N.Y. City Dep't of Citywide Admin. Servs.,* 16 NY3d 505, 509 [2011]).

Local Law 115 mandated that, "[i]n establishing such method, the department *shall, at minimum, consider*…the on-call and work hours of food delivery workers…" (Admin. Code § 20-1522 [a] [3]; [emphasis added]). While petitioners disagree with DCWP's interpretation of the word "consider", arguing the definition means merely "to think about" (DoorDash/GrubHub petition ¶ 141), it is clear DCWP considered on-call time: engaging with how on-call time is used, the purpose it serves, hearing commentary from workers regarding on-call time, studying how that time is spent, and depicting the way on-call time benefits or works for the platforms (Report at 16, 17, 22; respondent's exhibit L, June 2022 hearing written testimony). Following its consideration, DCWP determined that on-call time should be included in the Minimum Pay Method as the Minimum Pay Rule aims to provide a livable wage for delivery workers. Further, Local Law 115 afforded DCWP the discretion, after its consideration of the issues, to include what it deemed relevant in the Final Rule (*see* DoorDash/GrubHub petition ¶ 141; Admin. Code

§ 20-1522 [a] [3]). As the Final Rule is in harmony with the authorizing statute, the Court cannot re-interpret the statutory scheme simply because the petitioners do not like or agree with the manner in which DCWP utilized its statutorily provided discretion (*see Jones v Berman*, 37 NY2d 42, 53 [1975]).

Second, petitioners argue that the Final Rule's inclusion of all on-call time is irrational. Petitioners claim that DCWP failed to provide adequate reasoning for their decision to require platforms to compensate food delivery workers for all time spent logged onto the app, regardless of whether work is being performed. Petitioners maintain that compensating for all on-call time creates negative incentives and is inconsistent with the traditionally flexible nature of employment under the existing business models. Specifically, that the "gig economy" element will be fatally undermined because workers will lose the flexibility to choose their own hours and working conditions. Additionally, petitioners argue that DCWP did not adequately explain why it rejected alternative proposals or how it resolved the issues petitioners raised (*Trump on Ocean, LLC v Cortes-Vasquez*, 908 NYS2d 694, 700 [2d Dept 2010]; see also *Street Vendor Project v City of New York*, 811 NYS2d 555, 561 [Sup Ct 2005]).

The New York City Charter does not require that an agency fully explain its rationale for adopting a rule, nor that the agency articulate its rationale at the time of promulgation, so long as the record reveals a rational basis (*Lynch v New York City Civilian Complaint Review Bd.*, 206 AD3d 558, 560 [1st Dept 2022], *lv to appeal denied,* 39 NY3d 902 [2022]; *Tri-City, LLC v New York City Taxi and Limousine Commn.*, 189 AD3d 652 [1st Dept 2020]). In consideration of the nature of this employment and the concerns raised by petitioners, DCWP provided adequate

justification, with support in the record, for its decision to compensate for on-call time (*see Metro. Taxicab Bd. of Trade v New York City Taxi & Limousine Com'n*, 18 NY3d 329, 333 [2011]).

During the rulemaking process, DCWP engaged with the various elements and concerns, including flexibility and instability, that directly involve or implicate on-call time. One factor relevant to on-call time is the unique nature and benefits of app-based delivery work, where: delivery workers can connect or log-on when they wish, may pre-schedule shifts, are offered incentivizes to hit production targets, and can accept, ignore, or decline trip offers (Report at 16, 17). The record reflects that DCWP had to balance these competing factors and try to produce a compensation formula that adequately supported workers without subjecting the apps to having to pay a higher compensation without performing an adequate number of deliveries. The record also reflects that DCWP appropriately considered the unstable base pay and work hours of delivery workers, the inconsistent offer and assignment availability, and the unanticipated and uncompensated wait times for offers or order preparation which affect overall earnings and tips (Second SBP at 6, 7, 12; respondent's exhibit L, June 2022 hearing written testimony). The record therefore demonstrates that DCWP had a rational basis for its decision to compensate for all on-call time.[10]

[10] DCWP's rationale for opting not to exclude portions of on-call time under the Standard Method included: apps derive financial benefit from that time, in part by using it to provide for high service availability, the portions of on-call time that petitioners were hoping to exclude (during scheduled shifts or after a trip) were reasonably related to the service workers perform for the apps, apps can and do condition future work opportunities on workers' performance during on-call time, and DCWP's approach is consistent with the minimum standard which was set by the TLC for for-hire vehicles (Second SBP at 12). DCWP stated this rationale applies equally to the treatment of on-call time under the Alternative Method, including that it would reduce the alternative minimum pay rate and workers' incomes (Final SBP at 5).

Further, the record shows that DCWP conformed with CAPA requirements by providing a reasoned explanation for its actions and responding in a reasoned manner to comments received or problems raised (*St. Vendor Project v City of New York*, 10 Misc 3d 978, 986 [Sup Ct 2005], *affd*, 43 AD3d 345 [1st Dept 2007]). DCWP addressed the petitioners' concerns regarding compensating for time that does not result in a trip or actual work being performed, or otherwise incentivizing workers to log on to apps but not perform any food deliveries. DCWP found that the platforms had existing practices and could implement additional methods to combat this type of fraud and misconduct (Final SBP at 14). The platforms can block workers from receiving trip offers or, offer them infrequently (a practice known as gating); can limit future earning opportunities if a shift is missed or cancelled and can condition future earning opportunities on the acceptance rates of workers (Report at 35). DCWP also reasoned that the platforms are well equipped to monitor workers' performances and can and often do condition future work opportunities based on performance during on-call time (Second SBP at 12, 17).[11]

In fact, it was in direct response to the petitioners' concerns and comments that the DCWP created the Alternative Method and the adjustment for "multi-apping", both of which benefitted the platforms (Second SBP at 10; Final SBP at 4). In response to a proposal by petitioner DoorDash, DCWP adopted a version of the proposed "safe harbor" to the low utilization floor of 0.53, allowing platforms to use the Alternative Method in two pay periods

[11] As detailed, the platforms already utilize methods that incentivize accepting offers, i.e., preferential treatment or access to workers who accept a certain proportion of trip offers, restricting or limiting access, etc. and are therefore equipped to monitor potential fraudulent on-call time and deter future attempts (Report at 35; Second SBP at 17).

where its utilization rate is lower than 0.53 (Final SBP at 4). DCWP also explained why it would not adopt alternative proposals that requested or offered a different utilization rate or multipliers: the suggested utilization rate and multiplier resulted in inadequate income in relation to expenses and were not in compliance with Local Law 115 as they were based on the platforms' own data and not the results of DCWP's study (Final SBP at 5).[12] Rejecting these alternative proposals or declining to make requested modifications does not necessarily mean that DCWP failed to analyze, or disregarded, the alternative data before it (*Metropolitan Taxicab Bd of Trade v New York City TLC*, 18 NY3d 329, 333 [2011]).

Third, petitioners argue that the Final Rule's inclusion of on-call time clashes with DCWP's stated purposes: to require petitioners to assume financial responsibility for workers' time, and to accommodate the variety of pay arrangements already present in the industry.[13] Petitioners consider this inclusion, incentivizing logging on and undermining valued flexibility and independence, to be a grave threat to their business model and to the gig economy as a whole.

[12] In the Final Rule SBP, DCWP claimed that "the apps' suggestions to use a 1.156 multiplier or 87% utilization rate are arbitrary and not based on the results of the study, which found that on-call time represents 24 out of every 60 minutes workers log on the apps" (Final SBP at 5). DCWP asserted that the petitioners' proposed multiplier of 1.156 would lead to substandard wages for food delivery workers considering their expenses and other pay and benefits standards. DCWP cites to a study from California showing that using the petitioners' proposed multiplier would result in workers receiving only $5.64 an hour after accounting for uncompensated driver waiting time, expenses, unfavorable tax treatment and lack of benefits. Again, while the petitioners may disagree with this analysis, they have offered nothing to suggest that this conclusion is otherwise arbitrary or irrational.

[13] The Court previously discussed the rationale behind the DCWP's decision of requiring the platforms to assume financial responsibility for workers' on-call time and need not do so here.

The Final Rule's methods of compensating for on-call time does not conflict with DCWP's goal of promoting worker efficiency. Under the Alternative Method, the platforms are incentivized to increase the number of deliveries per hour of trip time (alternatively put, to cut down on workers' trip time per delivery) which will help offset labor costs and maximize workers' on-call time (Final SBP at 16, 17). The Final Rule does not compel petitioners to make operational changes to their existing flexible framework nor does it restrict their ability to do so. DCWP explicitly states that "[a]pps have flexibility to manage their own labor needs and costs within the Final Rule framework and may choose to self-impose restrictions on platform access if they wish" (Final SBP at 7). Petitioners offer anecdotal evidence from workers who claim the Final Rule will cause them to stop accepting delivery orders if they are forced to work a certain number of hours or during particularly designated times in a week (*see* Uber's exhibit 27, 29; Hermann affirmation, exhibit 6, public comments in response to first proposed rule). While this evidence is of relevance, the petitioners have not conclusively demonstrated that DCWP's methods of compensating for on-call time are in irreconcilable conflict with the industry goals of promoting worker flexibility and independent arrangements. Higher compensation, including for on-call time, need not be mutually exclusive with worker flexibility, and it is not irrational to pursue both goals simultaneously.

Nor does the Final Rule's methods of compensating for on-call time conflict with DCWP's goal of accommodating existing industry arrangements. DCWP's goal was "to accommodate the variety of pay arrangements already present in the industry, which include per-trip rates and hourly pay" (Second SBP at 11). The Final Rule's pay methods include: (1) the Standard Method, reflective of the previous pay practices by Relay that directly compensated for

on-call and trip time and (2) the Alternative Method, reflective of the previous payment practices and operating methods of Uber, GrubHub, and DoorDash, which does not directly compensate for on-call time but provides for a right to higher rate of pay for trip time (Final SBP at 4). Considering the record before the Court, the Final Rule's compensation of on-call time does not clash with, but is rationally related to, its stated purposes (*New York State Ass'n of Ctys. v Axelrod*, 78 NY2d 158, 167 [1991]).[14]

WORKERS' COMPENSATION COMPONENT:

Petitioners argue that the workers' compensation component is not rationally connected to its purported purpose and DCWP did not engage with or consider reasonable alternatives (*see Lynch v N.Y. City Civilian Complaint Rev. Bd.*, 98 NYS3d 695, 703 [Sup Ct NY Cnty 2019]; *Street Vendor Project v City of New York*, 811 NYS2d 555, 561 [Sup Ct 2005]). Petitioner DoorDash also argues that DCWP failed to account for the problem that it will be paying twice, as it already provides occupational accident insurance.

The stated purpose of the workers' compensation component is to "compensate for expected income loss and medical expenses associated with on-the-job injuries that food delivery workers experience" (Second SBP at 7, 8). Through its study into the working conditions of delivery workers, DCWP detailed the safety risks, high rate of injuries and expenses, and work-

[14] DCWP is not the first agency to set a pay rate that includes on-call time. The New York City Taxi and Limousine Commission (TLC) includes on-call time in setting a minimum pay rate for ride-hail drivers. Like DCWP's rate, TLC's pay rate compensates workers for all on-call time based on an industry-wide utilization factor, with an adjustment for multi-apping built into the rate (*see* Final SBP at 5, 11). And, in 2022, the City of Seattle passed a law ensuring a minimum pay rate for delivery workers that includes on-call time starting next year (DoorDash/GrubHub's exhibit 16, Seattle, Wash., Ordinance 126,595 [June 13, 2022]).

loss time that these workers face (Report at 23-26). DCWP further notes that since these workers are classified as independent contractors, not full-time employees, they lack access to traditional workers' compensation benefits or to alternative systems like the Black Car Fund (Report at 30). In consideration of these points, DCWP's inclusion of a workers' compensation component was rationally related to its' stated purpose.[15] Petitioners argue that DCWP failed to engage with the reasonable alternatives raised during the comment periods. However, the Court finds that DCWP did engage with these alternatives but found them to be unreasonable (*see Partnership 92 LP v State Div. of Hous. And Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd*, *Matter of Partnership 92 LP*, 11 NY3d 859 [2008] [even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency if it is supported by the record]). Given the nature of the work and the current classification of the workers, DCWP's rejection of the proposed alternatives was rational. DCWP reasonably rejected proposals for requiring apps to provide insurance or otherwise work with New York State to create a compensation fund for delivery workers. However, DCWP left open the possibility that if workers were able "to gain a legal right to a benefit equivalent to the workers' compensation coverage currently available to employees, the Department may choose to revisit the workers' compensation component at that time" (Second SBP at 8).

It was neither unreasonable nor irrational for DCWP to reject proposals of an exemption for platforms that provide occupational accident insurance. It should be noted that presently,

[15] Petitioner Uber also argues that DCWP did not adequately explain how the $1.68 workers' compensation component was calculated and the rationale behind the chosen classification/rates. This argument is unavailing as DCWP provides breakdowns of this number (Report at 22, 30, 31; Second SBP at 7, 8).

only one out of the four platforms provide this type of insurance (*see* respondent's exhibit J, DoorDash insurance claim letter). Contrary to the argument by DoorDash, DCWP did not fail to account for it already providing accident insurance. DCWP pointed out that DoorDash's current policy was inadequate as it: does not provide coverage for injuries sustained on on-call time, the policy contains exclusions that make benefits difficult or impossible to access, and the coverage terms are less generous than the New York State workers' compensation system (Second SBP at 8; see also *Med. Soc'y of State v Serio*, 100 NY2d 854, 870 [2003]). DCWP reasonably included the possibility of exemptions in the future for policies that do meet minimum coverage and accessibility criteria (Second SBP at 8).

Regardless of the possibility of viable alternatives, the DCWP provided a reasonable explanation for including its workers' compensation component and afforded a further opportunity of review for this component (*see Matter of Natl. Fuel Gas Distrib. Corp. v Pub. Serv. Com'n of State*, 16 NY3d 360, 368 [2011] [a court must judge the action solely on the grounds invoked by the agency]; *Matter of Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013] ["[i]f the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable"]).

REGULATORY REQUIREMENTS:

Petitioners argue that the Final Rule's recordkeeping and reporting requirements are burdensome, have no rational connection to administering a Minimum Pay Standard, and that the requirements exceed the limited scope of authority delegated to DCWP by the City Council. The law is clear that "[a]n agency cannot create rules, through its own interstitial declaration, that

were not contemplated or authorized by the Legislature" (*Matter of Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505, 510 [1989]; see also *Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 294-5 [2011] [agency's authority must coincide with its enabling statute and regulations must have a statutory basis, or they may represent an impermissible expansion of power]). However, this is not a winning argument in this case.

A plain reading of the statute supports the conclusion that DCWP was authorized to create recordkeeping and reporting requirements of this nature.[16] Local Law 115 directed DCWP to study and establish a method for determining the minimum payments that must be paid to food delivery workers in consideration of certain criteria. In doing so, the City Council authorized DCWP to request and issue subpoenas to produce data and information relating to this criteria and other factors DCWP deemed relevant (Admin. Code § 20-1522 [a] [1], [2], [3]). In conjunction with that task, Local Law 115 asked DCWP to announce any updates and promulgate any amendments determined to be necessary, as well as, to submit a report on the Minimum Payment Rate, any amendments to it, and its effect on the workers and the industry (Admin. Code § 20-1522 [c], [d]).

It is unclear how petitioner would expect the DCWP to iron out any wrinkles that should arise with the Minimum Pay Rule, or create a report on its' impact, if they did not have the

[16] The recordkeeping and reporting requirements are separate obligations under the Minimum Pay Rule (*see* 6 RCNY § 7-805[c]; 6 RCNY § 7-805[d]). In challenging these obligations, Uber refers to them collectively, but the majority of the arguments are focused on the reporting requirements.

relevant data to do so. What is clear is that the City Council, by including its own reporting requirement in Local Law 115, contemplated that DCWP would need to collect such data in order to fully fulfill its mandate. The Final Rule's reporting requirement includes providing information, in totalities, which is incidental to implementing and, if needed, tweaking the Minimum Pay Rate and petitioners have not demonstrated that these requirements are unduly burdensome (*see* 6 RCNY §7-805 [d]). Therefore, the regulatory requirements are rationally related to the intended or stated purposes: enabling DCWP to monitor compliance, adopt amendments, and report on the effects (*see* Final SBP at 15).

ASSUMPTION ABOUT RESTAURANTS:

Petitioners argue that the Final Rule is based on the unsupported assumption that restaurants do not profit from the orders placed on food delivery platforms and as a result, DCWP failed to adequately consider the implications of the Final Rule on restaurants. Petitioners also claim that DCWP did not provide a timely disclosure of the economic model underlying its impact analysis, which allegedly included an assumption of zero percent restaurant margins, but that it was only revealed through a Freedom of Information Law request and subsequent analysis of the data performed by Uber (*see* Uber's exhibit 16, 32).

However, DCWP published the impact analysis on which it relied and disclosed its methods and analysis during the rulemaking process (Report at 34, 35; Second SBP at 16, 17; Final SBP at 15, 16, 19-21). In its impact analysis, DCWP assumed that restaurants will not see a material increase in fees and restaurant profitability will mostly unaffected (Report at 34, 35). In response to concerns regarding the impact analysis modeling, in the Final SBP, DCWP included

a formal statement of its impact analysis, providing the inputs it used, and possible outcome variations based on additional sensitivity analyses (Final SBP at 15, 16: Table 7, 20, 21: Table 8). The impact analysis performed by DCWP, which serves as the basis for its assumption about restaurant profitability, did not include any numerical values for restaurant margins (*Id.*). Accordingly, this demonstrates that the assumption about zero percent restaurant profits or margins, was not actually relied upon in the impact analysis and/or economic modeling of the Final Rule (*Id.*).[17] Therefore, the information that Uber received in response to its FOIL request was immaterial to DCWP's consideration of the impact on restaurants and any issues are therefore irrelevant to the Court's consideration.

DCWP developed a model to estimate and assess the potential impacts and outcomes of the Minimum Pay Rule, by relying on assumptions about how industry actors will respond to the Minimum Pay Rate (Report at 5, 34). The DCWP looked at the relationship between restaurants and the apps to inform its assumption that restaurant profitability would be mostly unaffected (Report at 10, 35). DCWP claims that its statements about restaurant margins for delivery orders is consistent with previous data, pointing to previous interviews and an article, entitled, "Ordering in: The rapid evolution of food delivery," published by McKinsey & Company (Report at 4; Krinsky aff in opp to Uber's mot ¶¶ 16-17; see Kabir Ahuja et. al., Ordering in: The rapid evolution of food delivery | McKinsey [Sept. 2021]). On this point, petitioners argue

[17] In response to the concerns that the Minimum Pay Rule will result in harm to restaurants, DCWP again provided its rationale behind its assumption that restaurant profits will be mostly unaffected, suggesting alternative channels of profitability (Final SBP at 21). Further, DCWP engaged with why it deemed the large adverse impacts in Uber's sensitivity analysis as not plausible (Final SBP at 18, 19). Accordingly, DCWP did engage with the concerns and potential harms.

that it was irrational for DCWP to rely on information provided in an internet article by McKinsey & Company when forming its assumptions. Petitioners are correct that in terms of sources, an internet article may not have been the best choice on which to rely. However, it is not entirely without reason to rely on information from an article focused on the topics of its study and published by a well-known research company like McKinsey.

As review is limited to the grounds invoked by the agency, and petitioners have not pointed to any clear evidence demonstrating that restaurant delivery profit margins were a critical component of the final analysis, the Court need not consider this argument further (*Matter of Natl. Fuel Gas Distrib. Corp. v Pub. Serv. Com'n of State*, 16 NY3d 360, 368 [2011]). Petitioners also ignore Local Law 115's explicit authorization which enables DCWP to promulgate amendments and updates to the Minimum Pay Standard that it deems necessary or warranted[16] (Admin. Code § 20-1522 [c]). As reviews are built into the authorizing statute and Final Rule, in conjunction with the regulatory requirements that require petitioners to produce relevant data, DCWP can make adjustments based on this data rather than relying on uninformed predictions or assumptions (Final SBP at 19; *Tri-City, LLC v New York City Taxi and Limousine Commn.*, 189 AD3d 652, 653 [1st Dept 2020]). Similarly, Local Law 115 mandates that no later than September 30, 2024, and two years thereafter, DCWP must submit a report to the Council

[16] Upon a reading of Local Law 115, DCWP, at the outset, did not necessarily need to analyze prospective impacts other than the anticipated impact on delivery workers and their working conditions. However, to the extent that they did look at the impact on the other actors within the industry, these impacts are *prospective* in nature but are informed by data from previous years. As such, there is no way to know with 100% certainty the outcomes or quantifiable impact on the industry until the Final Rule goes into effect. While DCWP's predictions and assumptions may not result, to say that they are without a factual basis or without any analysis is not an accurate statement.

and Mayor on the Minimum Pay Standard and the effect on food delivery workers and the food delivery industry as a whole (Admin. Code § 20-1522 [d]). This provides an opportunity for DCWP to focus on measuring the actual effects of the Minimum Pay Standard on the industry, including restaurants, and it can do so by relying on numerical restaurant margins data provided by the most credible and interested sources: the restaurants themselves.[17]

CONSIDERATION OF CONSEQUENCES:

In addition to the arguments above regarding the impact of the Final Rule, petitioners also argue that DCWP failed to adequately consider the adverse consequences for consumers and restaurants. Namely, that DCWP failed to engage with the consequences that will result from incentivizing the platforms to increase their deliveries.

In its impact analysis, DCWP assumed that Uber, DoorDash, and GrubHub will elect to use the Alternative Method to pay their delivery workers (Final SBP at 16). As previously stated, under the Alternative Method the platforms have an incentive to reduce workers' trip time per delivery, i.e., incentivizes apps to increase deliveries per hour of trip time (*Id*.).

[17] It is worth noting that this Court has not yet received a single petition or amicus brief from a restaurant or a restaurant association asserting the arguments raised by the petitioners on delivery margins and the effect of the Final Rule on the restaurant industry. While undoubtedly there is concern amongst members of the restaurant industry, the Court believes that the issue of the effect of restaurant deliveries and compensation for restaurant delivery workers on the industry's bottom line, is an extremely complex one. Many unknown variables that may change depending on the type of restaurant involved, its location, its reputation in the community, etc. DCWP is certainly far more equipped than this Court to consider and balance all these variables and interests. By welcoming future input from the restaurants themselves, DCWP and the City Council have demonstrated their willingness to be flexible and commitment in trying to accommodate different viewpoints and perspectives.

Petitioners argue that the incentive to complete more deliveries per hour per courier means the platforms will have to reduce the delivery radii around restaurants and/or limit courier travel distances, potentially harming consumer ordering ability and decreasing demand for food orders from certain restaurants (Uber's exhibit 42). Petitioners assert that this reduction in delivery radii will mostly impact less densely populated areas, low-income communities, and outer boroughs (*Id.*).

However, DCWP did engage with the possibility that apps may pursue different strategies to increase deliveries (Final Rule at 16, 17). Importantly, the Final Rule does not compel the platforms to implement a specific strategy to do so nor require that the platforms restrict or change delivery distances. DCWP states that, "[i]f consumers value long delivery distances, apps are free to continue offering them and can set the fees they charge to consumers at any level they choose (Final SBP at 21).

The Report assessed the ordering patterns of consumers in New York City, noting that consumer expenditures are greatest in high-income areas with the 20 ZIP codes with the highest income ordering 1.5 deliveries per person per month and the 20 ZIP codes with the lowest income ordering 0.9 deliveries per person per month (Report at 9). DCWP described that app-based delivery is less costly to provide where there are high order volumes and short trip distances and willingness to pay is greatest on larger orders (Second BSP at 16). DCWP, recognizing that some consumers may be more price-sensitive than others, provided its underlying rationale for going forward despite this concern: raising the food delivery workers'

pay is necessary and some consumers' inability or unwillingness to pay for the cost of their labor does not justify limiting workers' income below the levels of the Final Rule (Final SBP at 21). Whether petitioners or the Court agrees with this rationale is immaterial, so long as the reasons upon which the agency relied reasonably support the determination (*Zehn-Ny LLC v New York City Taxi and Limousine Com'n*, 2019 NY Slip Op. 33705[U], 2 [NY Sup Ct, New York County 2019]).

As to its modeling of the impact on specific consumers and restaurants, DCWP claims that the while it subpoenaed data from the platforms that would have enabled it to model incidence of higher pay on detailed subsets of merchants and consumers, the platforms failed to produce it (Second SBP at 16). Finally, in response to the comment by Uber that DCWP under-estimated the adverse consequences to merchants or consumers, DCWP responded that to address this possibility the Final Rule has a phase-in and monthly reporting requirement to monitor outcomes and adjust the rate if necessary (Final SBP at 19).

As discussed at length in the section about restaurant assumptions, opportunities for review are built into the governing statute and Final Rule. Included in this review, is the requirement that DCWP conduct additional inquiries about the Final Rule's effect on the industry. This will include assessing and measuring the impact of the Minimum Pay Rule on workers, consumers, and restaurants.

For the reasons set forth above, the petitioners have not demonstrated a likelihood of success on the merits on the grounds common to all petitioners. Likelihood of success on the

merits is a prerequisite for preliminary injunctive relief (*see Kleynerman v Wing*, 242 AD2d 221, 222 [1st Dept 1997]; *Arnold v Off. of Professional Discipline of New York State Educ. Dept.*, 100 AD2d 665 [3d Dept 1984]). Accordingly, Uber, DoorDash and GrubHub are not entitled to a preliminary injunction.[18] As set forth below, the same is not true of Relay.

RELAY:

Relay has arguments that are distinct from those of petitioners Uber, DoorDash and GrubHub due to its unique business model and status as the only third-party courier service operating in New York City. As set forth below, Relay has demonstrated that it is likely to succeed on the merits, will suffer irreparable harm, and that the balance of equities weighs in its favor. Therefore, Relay is entitled to a preliminary injunction (*see Doe v Axelrod*, 73 NY2d 748 [1988]).

RELAY'S LIKELIHOOD OF SUCCESS ON THE MERITS:

In requesting a preliminary injunction, Relay argues that they are likely to succeed on the merits for the following additional reasons which are not applicable to the other petitioners: (1)

[18] Although failure to show a likelihood of success on the merits is itself fatal to petitioners' application for a preliminary injunction, petitioners Uber, GrubHub and DoorDash have also failed to show irreparable injury or a balance of equities in their favor. Unlike Relay, the Two-Sided Apps can charge a delivery fee to the end consumer. Therefore, their injury is far more speculative than that of Relay who does not have the ability to immediately offset the increased cost imposed by the Final Rule. Additionally, the balance of equities does not favor Uber, DoorDash and GrubHub. As set forth below, the net pay of Relay delivery workers is already largely in line with the anticipated net pay of delivery workers for the other petitioners after implementation of the Final Rule – therefore, the potential harm to Relay's delivery workers by the implementation of a preliminary injunction is less severe. However, with regard to delivery workers for the other petitioners, the fiscal impact is greater, and the balance of equities does not favor imposing a preliminary injunction.

DCWP, in its study and in the process preceding the promulgation of the Final Rule, failed to adequately consider Relay's unique business model; (2) DCWP failed to consider the impact of the Final Rule as it relates to Relay; and (3) the Final Rule sets a compliance period that is unreasonable or impossible for Relay to meet.

DCWP, in opposition, argues that a preliminary injunction is unwarranted as Relay has not demonstrated the likelihood it will succeed on the merits under the highly deferential standard used in Article 78 proceedings, Relay's claims of irreparable injury are speculative and unsupported, and the balance of equities weighs in favor of Relay's delivery workers who are losing income while the Minimum Pay Rule is delayed.

Relay, a New York City start-up, is a logistics company and third-party courier service that operates as a strictly one-sided business-to-business ("B2B") platform. Relay contracts directly with individual restaurants to provide food delivery services for orders placed or received through any restaurant sales channel; including those placed by phone, website, or other third-party applications. Relay therefore has no consumer-facing business and deals only with its restaurant customers to deliver the orders they receive.

The heart of Relay's argument lies in that: the Final Rule is arbitrary and capricious as DCWP failed to consider how Relay was unlike the Two-Sided Apps.[19] Petitioner argues that

[19] "Two-Sided Apps" refer to the applications such as those of Uber, DoorDash, and GrubHub, which are platforms that have both merchant-facing and consumer-facing elements. Two-Sided Apps may charge fees to restaurants/merchants and may also charge consumers to utilize these apps' services.

DCWP's economic analysis was flawed as it grouped the platforms all together, which led to the Department basing the Final Rule on numerous incorrect assumptions and conclusions as they specifically relate to Relay (Relay petition at 33).

DCWP briefly acknowledged ways in which Relay, a third-party courier service, differs from the other apps, which constitute third-party delivery services. Notably, (1) Relay is the only platform operating in New York City that does not have a consumer-facing mobile application or website and, instead of marketing to consumers, serves restaurants as a lower-cost option to fulfill deliveries (Report at 7); (2) the other delivery apps generate revenue by charging fees to restaurants and consumers whereas Relay only charges restaurants (Report at 8); (3) Relay pays its workers a regular hourly rate of $12.50 per hour worked, which includes on-call time (Report at 17).

While conducting its study and throughout the rulemaking process, DCWP analyzed the plausible outcomes or prospective impacts of the Minimum Pay Rule on the apps, workers, consumers, and restaurants. DCWP's modeling included the following assumptions about how the applications would respond: (1) the applications will increase deliveries per hour worked, offsetting costs but paying workers $5.18 more per delivery on average (2) the apps will pass the increase on to consumers dollar-for-dollar in the form of higher delivery fees and (3) restaurants will not see a material increase in the fees that apps charge them as restaurants already pay at or close to the maximum allowed under New York City law (Report at 34).

Although these assumptions may be reasonable with respect to the Two-Sided Apps, they are inapplicable to Relay (*New York State Ass'n of Ctys. v Axelrod*, 78 NY2d 158, 166 [1991]

[[a]dministrative rules are not judicially reviewed pro forma in a vacuum but are scrutinized for genuine reasonableness and rationality in the specific context]). First, Relay has already optimized their operating model and system to maximize deliveries per hour – the DWCP calculated that the industry average is 1.63 deliveries per hour and anticipates that the apps will respond by increasing deliveries per hour to 2.5 (Report at 34). However, Relay workers already average 3.22 deliveries per hour (*see* Krinsky aff ¶ 22), which is significantly higher than the number the apps are anticipated to achieve in response to the Final Rule. Therefore, Relay cannot reasonably be expected to offset costs by increasing its deliveries per hour. Further, as the DCWP expects delivery workers' net income to increase, along with an increase in tips resulting "solely from the increase in deliveries per hour" (Report at 35), and Relay already achieves higher numbers of trips per hour, DCWP does not adequately explain why a third-party courier service such as Relay should have the same Minimum Pay Rate as the less efficient third-party delivery services.

Second, as Relay does not have a consumer facing app, it is unable to directly pass on the increase to consumers in the form of higher delivery fees. Having continually distinguished consumers and restaurants in its study and Report, in the impact analyses, and in the SBP's, the DCWP cannot now claim that this assumption was intended to mean that Relay could pass the cost to its consumers, meaning restaurants.[20]

[20] Where the DCWP's assumptions and/or analysis regarding the impact on restaurant profits was supplemental, the assumptions and analysis about the platforms was not. The impact analysis for the platforms was to directly assess the possible responses and effects of the Minimum Pay Rule, how the platforms may both implement and sustain the increased costs of worker pay, and what this will mean for delivery worker conditions.

Finally, DCWP assumed that fees to restaurants will not be increased as they already pay at or close to the maximum allowed under NYC law.[21] However, the fee cap imposed by Administrative Code § 20-563.3 is applicable to third-party food delivery services, not to a third-party courier service such as Relay. The DCWP recognized that Relay operates as a lower cost option for restaurants. However, the only way for Relay to recoup the extra cost of increasing the base pay for its delivery workers is to increase the amount that it charges restaurants. Accordingly, the DCWP's assumption that restaurants will not see a material increase in the fees that apps charge them is not rational with respect to Relay. As stated in Relay's Verified Petition, "the Rule gives Relay no clear way to recoup the increase in costs, which are so large that they would quickly sink the company. Relay cannot pass on costs to consumers, and it cannot significantly increase the number of deliveries its couriers make per hour. DCWP does not expect restaurants to pay more, either. That leaves Relay with no options" (Relay petition ¶ 11).

The DCWP's contention that during the rulemaking process it considered the challenges and opportunities that the Final Rule presents to Relay is without support in the record (*see* respondent's memo of law in opp to Relay's mot ¶ 15). DCWP states that it relied on information collected during the interviews that were held with Relay's CEO. However, aside from affidavits prepared by DCWP in connection with this litigation, the contents or subjects of

[21] Administrative Code of the City of New York section 20-563.3 sets a fee cap on the amounts that a third-party food delivery service may charge a food service establishment, and it shall be unlawful to charge: a delivery fee totaling more than 15% of the purchase price, any fee (other than delivery or transaction fees) for using their service totaling more than 5% of a purchase price, and a transaction fee totaling more than 3% of the purchase price (Admin. Code §20-563.3). Third-party delivery services may not impose fees totaling more than 23% of an order subtotal.

these interviews cannot be found within the agency record presently before the Court. "Absent a predicate in the proof to be found in the record, [an] unsupported determination . . . must . . . be set aside as without rational basis and wholly arbitrary" (*Metro. Taxicab Bd. of Trade v New York City Taxi & Limousine Com'n*, 18 NY3d 329, 334 [2011] [citation omitted]). Additionally, DCWP claims that in its consideration, it provided solutions or suggestions to demonstrate how Relay could offset costs and maintain its current business practices (*see* Krinsky aff ¶ 42). However, these suggestions and solutions are also without support in the agency record and should therefore not be considered now (*Nelson v New York State Div. of Hous. and Community Renewal*, 95 AD3d 733, 734 [1st Dept 2012] ["[j]udicial review of an administrative determination is limited to a review of the record evidence and the court may not consider arguments or evidence not contained in the administrative record"]; see also *Matter of Natl. Fuel Gas Distrib. Corp. v Pub. Serv. Com'n of State,* 16 NY3d 360, 368 [2011]). Furthermore, in the rulemaking process DCWP failed to adequately engage with comments raising concerns about the impact for Relay and its network (Second SBP at 15, 16; Final SBP at 13). Within its limited discussion of the concerns about Relay's inability to pass off costs to consumers and commentators requests for an exemption, the DCWP's rationale was that as a third-party courier service, Relay was a covered entity, and DCWP did not have the authority to exclude Relay from the Minimum Pay Rule (Second SBP at 13; Final SBP at 13, 14). While it is reasonable that the DCWP declined to initially exempt the platform, the DCWP otherwise failed to engage with the underlying concerns about the inability or uncertainty of being able to pass off the costs of the Final Rule, nor how these issues were or would be addressed (*see St. Vendor Project v City of New York*, 10 Misc 3d 978, 985 [Sup Ct, New York County 2005], *affd*, 43 AD3d 345 [1st Dept 2007] [CAPA requirement that a rule-making administrative body give a reasoned explanation

for its action; the statement of basis and purpose is at least in part to respond to comments, explain how the agency resolved any significant problems raised by the comments, and show how that resolution led to the ultimate rule]).[22] Further, DCWP failed to engage with any of the comments, found within the agency record, that raised the issues of Relay's unique business model and role in the industry, the disproportionate harms that will be felt only by Relay, the concerns about the impact on Relay's delivery workers and customers, and the inability to pass off costs (Relay's exhibit 4, 6, 7, 8). Therefore, the DCWP's impact assessment, which utilized a one-size fits all model that is inapplicable to Relay, is not supported by the evidence in, or reasonable inferences that can be drawn from, the record and constitutes an erroneous interpretation of the facts (*Matter of Am. Tel. & Tel. Co. v State Tax Com'n*, 61 NY2d 393, 400 [1984]).

Accordingly, Relay has made a sufficient showing of a likelihood of success on the merits, weighing in favor of granting a preliminary injunction (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]).

IRREPARABLE INJURY:

Relay further argues that the thirty-day compliance period is unreasonable and impossible for Relay to meet. As noted above, the only plausible way for Relay to recoup the costs of the Minimum Pay Rule is to charge restaurants more. Relay has approximately 1,400 individual

[22] While it is rational that DCWP could not exclude or exempt Relay from the Minimum Pay Rule, there is nothing to indicate that DCWP, working within its statutory mandate and based on its study, could not have created a method of payment applicable to third-party courier services. In fact, the DCWP stated that it considered issuing separate rates based on different types of vehicles but ultimately declined to do so because of the possibility of poor incentives, such as apps restricting car users (Report at 31).

contracts with restaurants, each of which must be renegotiated and executed, a process that will take longer than a month (Relay petition ¶ 13). Therefore, Relay will absorb significant costs without any way to offset these costs until they can re-negotiate their contracts.[23] Thus, if they are not granted a preliminary injunction, Relay will incur an immediate irreparable injury that the other petitioners, who can begin to increase the delivery fees charged consumers, will not (*see Willis of New York, Inc. v DeFelice*, 299 AD2d 240, 242 [1st Dept 2002] [irreparable damage has been made out insomuch as it appears that, in the absence of a restraint, petitioner would likely sustain a loss of business impossible, or very difficult, to quantify]). Furthermore, as Relay points out, it would likely have to raise the per-delivery fee it charges restaurants by approximately 30% to cover the increased costs imposed by the Minimum Pay Rule following the effective date (*see* Relay petition ¶ 60). Considering there is no guarantee that restaurants would be willing to pay this, the increase thereby undermines Relay's position in the market as the low-cost option for restaurants (*Asprea v Whitehall Interiors NYC, LLC*, 206 AD3d 402, 403 [1st Dept 2022] [the loss of the goodwill of a viable, ongoing business may constitute irreparable harm warranting the grant of preliminary injunctive relief]).

BALANCE OF EQUITIES:

The balance of equities favors Relay. The balancing of equities usually requires the court to look to the relative prejudice to each party accruing from the granting or denying of the requested relief (*Ma v Lien*, 198 AD2d 186, 187 [1st Dept 1993]). Further, when the court

[23] DCWP's arguments that Relay has known since the date Local Law 115 was enacted and therefore had ample time to begin to prepare or comply are unavailing (*see* Final SBP at 12). It is unreasonable for DCWP to suggest that Relay begin to implement significant changes or renegotiate contracts at the start of and throughout the rulemaking process, a process of over 21 months.

balances the equities, it must consider the public interests involved (*Seitzman v Hudson Riv. Assoc.*, 126 AD2d 211, 214 [1st Dept 1987]). The DCWP argues that the balance of equities favors the denial of a preliminary injunction because Relay's delivery workers will lose an additional $5.46 per hour for every day the Minimum Pay Rate is delayed (*see* respondent's memo of law in opp to Relay's mot at 2). However, Relay's delivery workers already receive many of the benefits that will now be provided to delivery workers through the Final Rule, such as: set hourly pay and a high number of deliveries per hour. Further, Relay asserts, and the record demonstrates, that its delivery workers already average approximately $30 per hour, and 95% of Relay's couriers earn at least $19.43 per hour (*see* Relay's exhibit 4). In contrast, DCWP found that across all platforms, app-based restaurant delivery workers currently earn $14.18 per hour with tips (Report at 17). Therefore, if a preliminary injunction is granted, while Relay's delivery workers might not make the additional $5.46 per hour that they would receive if the Final Rule took effect, their net pay is likely to be equivalent to, or greater than, what DCWP seems to think delivery workers on other apps would receive.

On the other hand, if Relay is not granted a preliminary injunction, they will likely incur significant, immediate, and irrecoverable costs of a magnitude which could likely be sufficient to cause Relay to go out of business and their delivery workers to be out of jobs (*Vapor Tech. Assn. v Cuomo*, 66 Misc 3d 800, 809 [Sup Ct 2020] [the balancing of equities tips in favor of petitioners, a preliminary injunction would stave off the shuttering of their businesses]).

Accordingly, the balance of equities favors Relay, who seeks to maintain the status quo pending the ultimate determination of this controversy (*Gramercy Co. v Benenson*, 223 AD2d 497, 498 [1st Dept 1996]).

RELAY IS ENTITLED TO A PRELIMINARY INJUNCTION:

Relay has shown a likelihood of success on the merits, irreparable injury, and that the balance of equities is in their favor. Therefore, that portion of Relay's petition which seeks a preliminary injunction is granted.

CONCLUSION:

For the reasons set forth hereinabove, it is hereby

ORDERED that the portion of the petition (Index No. 155943/2023) of petitioner Uber Technologies, Inc. which seeks a preliminary injunction is DENIED; and it is further

ORDERED that the portion of the petition (Index No. 155947/2023) of petitioners DoorDash, Inc. and GrubHub, Inc. which seeks a preliminary injunction is DENIED; and it is further

ORDERED that the portion of the petition (Index No. 155944/2023) of petitioner Relay Delivery, Inc. which seeks a preliminary injunction is GRANTED; and it is further

ORDERED that respondents, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of respondent, are enjoined and restrained, during the pendency of this action, or until further order of the court, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of respondents or otherwise, any of the following acts: enforcing the Final Rule as to petitioner Relay Delivery, Inc.; and it is further

ORDERED that Respondents shall file and serve their answer or opposition to the petitions in each of these matters within sixty (60) days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

9/27/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE