

Rebecca Dixon  
Executive Director

[www.nelp.org](http://www.nelp.org)

**NELP National Office**  
90 Broad Street  
Suite 1100  
New York, NY 10004  
212-285-3025

**Washington, DC Office**  
1350 Connecticut Ave. NW  
Suite 1050  
Washington, DC 20036  
202-640-6520

**California Office**  
2030 Addison Street  
Suite 420  
Berkeley, CA 94704  
510-982-5945

**Washington State Office**  
300 Lenora Street #357  
Seattle, WA 98121  
206-324-4000

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## **Testimony to the Department of Consumer and Worker Protection in Support of New York City Delivery Worker Minimum Pay Standard**

We write on behalf of the National Employment Law Project (NELP), a national nonprofit with more than fifty years of experience advocating for the employment and labor rights of low-wage workers. NELP works across the country with organized groups of app-based workers, supporting campaigns at the local, state, and federal level, and has been involved with recent campaigns by rideshare and delivery workers for basic labor and employment rights.

NELP supports a strong minimum pay standard for New York City's app-based food delivery workers. Since the depths of the pandemic, the City's delivery workers have been working long hours in dangerous conditions for subminimum wages, and receive few, if any, benefits or protections.<sup>1</sup> As long as their employers continue to classify them as non-employees, they do not have a right to a guaranteed minimum wage, paid leave, unemployment insurance, workers' compensation, and employer provided healthcare.<sup>2</sup> Worse still, the pay is not only low but inconsistent week to week, which makes it difficult for workers to care for their families and themselves, pay their bills on time, or build up savings.<sup>3</sup>

The Department of Consumer and Worker Protection's (DCWP) proposed rule promises to finally guarantee these essential workers a minimum wage, a huge victory for the delivery workers across New York City—a victory made possible by the dedicated organizing and leadership of Los Deliveristas Unidos and other organized groups of delivery workers.

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<sup>1</sup> *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs*, NELP Policy & Data Brief (Oct. 27, 2021), <https://www.nelp.org/publication/app-based-workers-speak-studies-reveal-anxiety-frustration-and-a-desire-for-good-jobs/>. See also *A Minimum Pay Rate for App-Based Delivery Workers in NYC*, New York City Dept. of Consumer and Worker Protection (Nov. 2022), <https://www.nyc.gov/assets/dca/downloads/pdf/workers/Delivery-Worker-Study-November-2022.pdf>.

<sup>2</sup> Ben Zipperer, Celine McNicholas et al., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, Economic Policy Institute (Jun. 1, 2022), <https://files.epi.org/uploads/250647.pdf>.

<sup>3</sup> Irene Lew, Debipriya Chatterjee, and Emerita Torres, *The Gig is Up: An Overview of New York City's App-based Gig Workforce during COVID-19 18-19*, Community Service Society (July 2021), [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Gig\\_Workers\\_V10.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Gig_Workers_V10.pdf).

With that said, NELP writes to flag some of our concerns with the new proposed rule.

### **The City's Many-Month Delay in Implementing the Pay Standard is Costing Workers Every Day.**

First, we are disappointed at the months-long delay in the City's implementation of this pay standard. Each day that passes without a legal wage floor for delivery workers is another day that the City's approximately 65,000 delivery workers, who are predominantly immigrants and other workers of color, continue to work for subminimum wages. The pay standard should be implemented as soon as possible.

### **The Pay Standard Should Be Implemented In Full Immediately.**

Second, we continue to disagree with the Department's plan for phasing in the minimum pay standard. Uber, DoorDash, and GrubHub are multi-billion dollar companies with access to near-unlimited credit in the capital markets. They do not need multiple years to figure out how to adequately compensate the workforce that generates value for their shareholders; they can afford to pay their workers a minimum wage right away. As currently proposed, the rule effectively sets a legal pay floor below the state's minimum wage of \$15 an hour for the next two years. Only in year three does the pay standard actually guarantee delivery workers the full proposed minimum wage. Especially as the highest inflation in forty years has sent living costs and work expenses for delivery workers skyrocketing, causing them extreme hardship, it is essential that the full minimum wage be in effect from the start. DCWP should scrap its phase-in and implement the pay standard, in full, immediately.

### **Delivery Workers Must Be Paid for All the Time They Work.**

Third, it is critical that these workers—like others—are paid for all the time they actually work. The "alternate method," a feature new to the Department's Second Proposed Rule, better compensates workers for all of their labor, including "on-call time," by employing a "utilization rate." The utilization rate is a measure of what proportion of the average delivery worker's time is spent on-trip, which the City's data suggests is 60%. DCWP then requires companies to pay drivers for their on-trip time, plus the additional 40% of driver time that otherwise would go uncompensated. This method guarantees that individual workers are compensated for at least an approximation of *all* the time they work, just as any other employees are under wage and hour laws. Under the dual-track "standard method" laid out in the Department's earlier rule, which includes both an individual pay and aggregate pay requirement, workers would only be guaranteed to receive a minimum wage for "on-trip" time. The individual pay component only requires companies to compensate their workers for on-trip time, and while the aggregate pay component of the standard method may ensure some workers are ultimately paid for more time than this, it fails to set an adequate wage floor that guarantees all workers that they will be paid for the all the time they work.

NELP therefore supports the Second Proposed Rule to the extent it better compensates workers for their labor. But the Department should take this logic one step further, and require all app-based companies that do not voluntarily pay their workers on an hourly basis to comply with the alternate method, rather than giving them the option to comply with the unworkable standard method.

### **The Multi-Apping Adjustment in the Second Proposed Rule Should be Better Explained or Re-Considered.**

The reduction of the base pay rate by \$3.60 an hour to account for “multi-apping” is poorly explained, and the evidence offered by the Department to support it inadequate. While we understand that some adjustments to the pay standard should be made in light of the switch from the standard method to the alternate method, it remains unclear to both workers and advocates alike why worker pay should be reduced by \$3.60 an hour.

Going forward, the Department should recalibrate the multi-apping factor using data collected from the companies—data that app companies are currently refusing to disclose in spite of a subpoena—about how much time workers spend on-trip and on-call for each app. With that data in hand, DCWP should also consider calculating company-specific utilization rates that better account for the amount of time individual workers spend working for each app.

### **If Companies Retaliate Against Workers With “Lock-Outs,” DCWP Should Exercise its Regulatory Authority to Ensure Equitable Access to Delivery Work.**

Unfortunately, but unsurprisingly, app-based companies have responded to the City’s proposed minimum wage by fear-mongering about the viability of their business should they be required to pay a minimum wage, and by threatening workers with “lock-outs.” Companies have been sending messages through their apps arguing that this proposal will require them to kick workers off the apps, and that it will mean irregular and unpredictable access to the platforms for workers whose livelihoods depend on regular and predictable access. This logic is poor and self-serving, but it remains possible that companies will nonetheless carry out the lock-outs they are threatening. The Department should think strategically about how it may protect workers from retaliation and unfair deactivations by ensuring that access to work remains equitable, and that the companies cannot successfully weaponize the minimum pay standard to make the lives of their workers more difficult.

Moreover, the Department should continue to work with worker organizations and advocates throughout the implementation of this rule, with a view to preventing business practices—like “order bundling”—that will undermine worker safety and pay.

### **Higher Pay for App-Based Delivery Workers is a Racial Justice Imperative.**

Excluding workers from labor rights is racist policy. For example, agricultural and domestic worker exclusions from bedrock New Deal laws meant that 65 percent of the country’s Black workers were excluded from federal wage and hour and collective bargaining

protections.<sup>4</sup> Today, in New York City, app-based delivery workers' exclusion from basic labor rights primarily affects workers of color and immigrants. And even within New York's immigrant communities, marginalized racial minorities are over-represented among delivery workers, including indigenous Central Americans and Black immigrants.<sup>5</sup>

New York's first-in-the-nation \$15 minimum wage was an important step toward addressing the racial income gap (though it has since fallen behind as it's been frozen at that level since 2019).<sup>6</sup> But even the strongest minimum wage leaves app-based delivery workers behind because of the way their companies are manipulating employee status and working hours. DCWP can dramatically improve the material conditions of tens of thousands of workers of color in the City, and should continue to consider the imperatives of racial justice as it implements this rule.

With the reservations expressed above, NELP supports the Department's Second Proposed Rule, and urges rapid implementation of a final standard so that New York's delivery workers can start earning the minimum wage to which they should have long been entitled.

Sincerely,

Daniel Ocampo, Legal Fellow  
Laura Padin, Director of Work Structures  
Cathy Ruckelshaus, Legal Director & General Counsel  
**National Employment Law Project**

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<sup>4</sup> Larry Dewitt, *The Decisions to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, Social Security Bulletin, Vol. 70:4 (2010), <https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html>.

<sup>5</sup> Maria Figueroa, et al., *Essential but Unprotected: App-Based Food Couriers in New York City*, Cornell University Industrial and Labor Relations School & Workers' Justice Project, at 23 (Sept. 14, 2021), <https://img1.wsimg.com/blobby/go/6c0bc951-f473-4720-be3e-797bd8c26b8e/09142021CHARTSLos%20Deliveristas%20Unidos-v02.pdf>.

<sup>6</sup> See Laura Huizar and Tsedeye Gebreselassie, *What a \$15 Minimum Wage Means for Women and Workers of Color*, National Employment Law Project (Dec. 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf> ("A \$15 minimum wage could make significant inroads in helping women and people of color make ends meet, closing persistent gender and race-based pay and wealth gaps, and improving educational and health prospects for children.").