CRITERIA FOR DETERMINING WHETHER A CLAIMANT IS A SEPARATE BUSINESS ENTITY PURSUANT TO THE FAIR PLAY ACT CLARIFIED; MATTER REMITTED TO THE UNEMPLOYMENT INSURANCE APPEAL BOARD FOR A DECISION WHETHER CLAIMANT WAS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR USING THE CORRECT ANALYTICAL CRITERIA (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Devine, reversing the Unemployment Insurance Appeal Board and remitting the matter, clarified the meaning of the first criterion for determining whether claimant is an employee or an independent contractor pursuant to the so-called separate business entity test under the Fair Play Act. Here, the Board found that the claimant was an employee of Adelchi entitled to unemployment benefits, but the Third Department, agreeing with Adelchi's argument, held the Board had not applied the proper criteria to its analysis:

> The issue [is] whether claimant could be viewed as a separate business entity and, in that regard, Adelchi argues that the Board misconstrued the first criterion of the separate business entity test by demanding proof of a total lack of direction or control over a business entity (see Labor Law § 861-c [2] [a]). Adelchi contends that this criterion of the separate business entity test instead codifies the common-law rule that "[a]n employer-employee relationship exists when the evidence demonstrates that the employer exercises control over the results produced by claimant or the means used to achieve the results" … , which involves a fact-specific inquiry where "the relevant indicia of control will necessarily vary depending on the nature of the work" … . * * *
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> We … conclude that the first criterion in the separate business entity test does not require a contractor to show a total lack of direction or control over a business entity, but instead that their relationship as a whole did not show sufficient "control over the results produced or the means used to achieve the results" by the contractor to reflect an employer-employee relationship … . Although the factual findings already made by the Board would appear to permit the determination that Adelchi did not meet the first criterion under the proper analysis, we are constrained to reverse and remit so that the Board may answer that question in the first instance … . Matter of Tuerk (Adelchi Inc.–Commissioner of Labor), 2020 NY Slip Op 03441, Third Dept 6-18-20

FINDING THAT CLAIMANT MADE A WILLFUL FALSE STATEMENT TO OBTAIN UNEMPLOYMENT INSURANCE BENEFITS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; ALTHOUGH CLAIMANT DENIED SHE WAS GUILTY OF CRIMINAL CHARGES RELATED TO HER FIRING, SHE PROVIDED THE COURT DOCUMENTS WHICH INDICATED SHE HAD PLED GUILTY (THIRD DEPT).

The Third Department determined claimant should not have been found to have made a willful misrepresentation to obtain unemployment benefits. Claimant had been fired for allegedly hiding a coworker's wallet that she found in lunchroom. Although she denied being guilty of the charges arising out of the incident, she provided the Department of Labor with the court document stating she had pled guilty to criminal mischief and disorderly conduct:

> The record establishes that claimant spoke, in Mandarin, to a representative from the Department of Labor and informed the representative about the incident that led to her separation from employment, including that she was arrested on the charge of grand larceny in the fourth degree. According to claimant's statement, she denied being guilty of the charges and, thereafter, readily provided the Department of Labor with a court document. That court document, however, reflects that claimant had already pleaded guilty to criminal mischief in the fourth degree and disorderly conduct and was required to perform five days of community service. Claimant's statement reflects a misunderstanding on her part, as she indicates that the court would not be determining her guilt until July 2018. Notwithstanding the inconsistent information provided by claimant and the court document provided to the Department of Labor, claimant did not withhold any information regarding the nature of the conviction, and, in fact, provided the pertinent information with regard to her conviction. In view of this, claimant cannot be deemed to have made a knowing, intentional and deliberate false statement to obtain benefits … . As such, the Board's finding that claimant made a willful false statement is not supported by substantial evidence … . Matter of Hua Fan (Commissioner of Labor), 2020 NY Slip Op 02350, Third Dept 4-23-20

A PART-TIME COLLEGE INSTRUCTOR SHOULD NOT HAVE BEEN AWARDED

UNEMPLOYMENT BENEFITS BECAUSE HE HAD BEEN ASSURED OF EMPLOYMENT IN THE SEMESTER FOLLOWING THE SUMMER BREAK; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, over a two-justice dissent, determined claimant, a part-time community college instructor, should not have been awarded unemployment benefits because he had been notified he would be employed in the semester after the summer break. The dissenters argued his employment depended upon course-enrollment which was uncertain:

> Pursuant to Labor Law § 590 (10), "professionals who are employed by educational institutions are precluded from receiving unemployment insurance benefits during the period between two successive academic periods if they have received a reasonable assurance of continued employment" … . "A reasonable assurance has been interpreted as a representation by the employer that substantially the same economic terms and conditions will continue to apply to the extent that the claimant will receive at least 90% of the earnings received during the first academic period … . * * *
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> On the record before us, the Board's decision was not supported by substantial evidence … . inasmuch as claimant received a reasonable assurance of continued employment for the 2018 fall semester such that he was ineligible to receive unemployment insurance benefits … . Matter of Barnett (Broome County Community Coll.–Commissioner of Labor), 2020 NY Slip Op 02229, Third Dept 4-9-20

CLAIMANT, A COURIER, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT BENEFITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, over a concurrence and a two-judge dissent, determined the claimant courier was an employee of Postmates and was therefore entitled to unemployment benefits:

> Postmates is a delivery business that uses a website and smartphone application to dispatch couriers to pick-up and deliver goods from local restaurants and stores to customers in cities across the United States—deliveries that are, for the most part, completed within an hour. Postmates solicits and hires its couriers, who undergo background checks before being approved to work by Postmates. Once they are approved, the couriers decide when to log into the application and which delivery jobs to accept. Once a courier accepts a delivery job made available through the application, the courier receives additional information about the job from Postmates, including the destination for the delivery. After completing a job, Postmates pays the couriers 80% of the delivery fees charged to customers, and payments are made by the customer directly to Postmates, which pays its couriers even when the fees are not collected from customers. Couriers' pay and the delivery fee are both nonnegotiable. * * *
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> Postmates exercises more than "incidental control" over its couriers—low-paid workers performing unskilled labor who possess limited discretion over how to do their jobs. That the couriers retain some independence to choose their work schedule and delivery route does not mean that they have actual control over their work or the service Postmates provides its customers; indeed, there is substantial evidence for the Board's conclusion that Postmates dominates the significant aspects of its couriers' work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment. Matter of Vega (Postmates Inc.–Commissioner of Labor), 2020 NY Slip Op 02094, CtApp 3-26-20

SECURITIES TRADER IS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined claimant, a securities trader who worked for Quad Capital, LLC, was an employee entitled to unemployment benefits:

> The record establishes that claimant submitted a resume and was interviewed by a managing partner at Quad Capital. After certain criteria, such as a trading license, fingerprints and background check were completed, claimant entered into an Ordinary Member Agreement and was given a trader handbook. The record also establishes that, despite being designated by the contract as a member of the limited liability company, claimant did not make a monetary investment in the company, was paid based upon the net profit only from his portfolio, did not have any managerial duties, did not make any financial or managerial decisions and was not liable for any losses from the company — unlike managing members of Quad Capital. Further, claimant had regularly-scheduled work hours in

Quad Capital's office and was required to notify his manager if he would be absent. Claimant was expected to attend morning meetings, his work was regularly reviewed and monitored by a manger and he was subject to a dress code for which a fine would be imposed if violated. Matter of Giampa (Quad Capital, LLC–Commissioner of Labor), 2020 NY Slip Op 01877, Third Dept 3-16-20

DRIVERS FOR A LIMOUSINE SERVICE WERE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS, UNEMPLOYMENT INSURANCE APPEAL BOARD REVERSED (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined the drivers for the Park West limousine service were not employees and were not entitled to receive unemployment insurance benefits:

> A driver apparently had full flexibility in deciding how much and how often to work; drivers would log on to the mobile application at the time and in the geographic zone in which they wanted to work, without an apparent requirement or expectation as to frequency or duration in any given period. The dispatch system would match the driver with work once the driver decided when and where to work … . The drivers determined the routes they wanted to take in transporting the passengers. Drivers had the freedom to utilize substitutes and to work for competitors while working for Park West, and they risked nonpayment of both fares and reimbursement of expenses in the event that the corporate client did not remit payment … . A witness for Park West testified that it encouraged drivers to attend informational sessions to learn how the dispatch system and application operated, as well as to dress and act professionally, so that drivers could maximize their own profits and have success in their entrepreneurial activity, but there was no set dress code … . Although Park West offered window signs to the drivers so that passengers could identify their rides, their use was not required.
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> … [T]he day-to- day activities of the drivers, including when and where they worked, were controlled by the decisions the drivers made themselves. The drivers had ultimate control over their vehicles and were solely responsible for maintenance and other related expenses in the ownership of their respective vehicles … . The requirements that Park West imposed with respect to licensing, registration and safety were necessitated by laws governing the industry and the rules of the New York City Taxi and Limousine Commission … . Although Park West acted as a liaison between drivers and clients when complaints arose, managing complaints from clients is not conclusive as to the type of employment relationship, as the "requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee" … . As such, we find that Park West's control over the drivers was, at most, incidental … . Matter of Escoffery (Park W. Exec. Servs. Inc.–Commissioner of Labor), 2020 NY Slip Op 01422, Third Dept 2-27-20

CLAIMANT, A FIELD INSPECTOR FOR A VACANT PROPERTY PRESERVATION COMPANY, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined claimant field inspector was an employee of Safeguard Properties, a property preservation company that preserves vacant properties for lenders on homes that have delinquent loans. Claimant, who performed property occupancy inspections, was not an independent contractor and was therefore entitled to unemployment insurance benefits:

> The record establishes that claimant, who did not have an inspection business or any other business entity, applied for the field inspector job upon a recommendation of a friend. Inspectors, such as claimant, were sent work orders to perform inspections on properties and were required to complete such inspections within a time frame set by Safeguard. Field inspectors were assigned a regional supervisor to contact regarding questions and problems that arose in connection with the inspections, or to request extensions of time to complete a work assignment. Safeguard prioritized the work order assignments, required field inspectors to adhere to a dress code, provided instructions as to various aspects of how a work assignment was to be completed and, with regard to claimant, paid her every two weeks. Safeguard provided a replacement if a field inspector could not perform an assignment and required field inspectors to provide 30 days' notice of scheduled vacations, reserving the right to deny such vacation requests. Any complaints by customers or clients were handled by Safeguard.
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> The record also discloses that field inspectors were required to use a computer compatible with software provided by Safeguard. Safeguard provided stickers and door hangers to inspectors and required that stickers bearing Safeguard's name be affixed to vacant properties. Safeguard tracked field inspectors' productivity and required their participation in regular mandatory telephone conferences to discuss work quality. Disciplinary action would be imposed upon field inspectors who failed to respond to Safeguard's

contacts. Matter of Sischo (Safeguard Props. LLC–Commissioner of Labor), 2020 NY Slip Op 00894, Third Dept 2-6-20

INSPECTORS HIRED TO ASSESS DAMAGE TO PROPERTY CAUSED BY HURRICANE SANDY WERE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined inspectors hired by Partnership for Response and Recovery (PaRR) to inspect damage to property caused by Hurricane Sandy were employees entitled to Unemployment Insurance benefits:

> Before the inspectors were deployed to a particular disaster area, PaRR set up a field operation near the site where it distributed FEMA-issued computers and cameras to the inspectors. In addition, for the inspectors' convenience, it provided them with invoice forms containing the information required by FEMA to be used to receive payment. PaRR also supplied them with an identification badge bearing its logo and offered them training on how to utilize the FEMA computer system and comply with FEMA's requirements. PaRR set the rate of pay at $62.50 per inspection, paid inspectors even if it had not yet received payment from FEMA, reimbursed them for travel to the site of the assignment and provided compensation for prepositioning to the site. Moreover, it conducted a quality review of 3% of the inspection reports and encouraged inspectors to complete their reports within three days as requested by FEMA. PaRR also provided field support to the inspectors to assist them with completing their inspection reports and using the FEMA computer system.
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> Although claimant and the other inspectors worked independently and without any supervision from PaRR in conducting the actual inspections, the evidence demonstrates that PaRR retained overall control over many important aspects of their work. Although some of this control emanated from the regulatory requirements imposed by FEMA, this was not to such an extent as to negate the existence of an employment relationship … . Matter of Jensen (Partnership for Response & Recovery, LLP–Commissioner of Labor), 2019 NY Slip Op 09073, Third Dept 12-19-19

CLAIMANT, WHO DISTRIBUTED NEWSPAPERS, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined claimant, who distributed newspaper and other publications, was an employee of Gannett Satellite Information Network and was therefore entitled to unemployment insurance benefits:

> Claimant was assigned delivery routes within a defined area, was required to deliver the newspapers by a certain time and was paid at a specified per-paper rate … . Additionally, claimant was required to provide proof of a valid driver's license and insurance, was offered (and declined) additional accident coverage provided by a carrier utilized by Gannett and was precluded from placing any inserts or additional materials in the newspapers that he was delivering … . Finally, one of the two agreements signed by claimant reflects that he elected to purchase a tablet from Gannett — with the purchase price paid via weekly deductions from the moneys owed to claimant for his delivery services. **Matter of Clifford (Gannett Satellite Info. Network, Inc.–Commissioner of Labor), 2019 NY Slip Op 08898, Second Dept 12-12-19**

CLAIMANT WAS AN EMPLOYEE OF A RESIDENTIAL NEWSPAPER DELIVERY SERVICE AND WAS ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department determined claimant was an employee of a residential newspaper delivery service (Gannett) and was therefore entitled to unemployment insurance benefits:

> … [W]e find that the indicators of control retained and exercised by Gannett in its contract and dealings with claimant are not materially distinguishable from those previously found to have established an employer-employee relationship between newspaper publishers and delivery workers … . Although Gannett "points out numerous factors that would support a finding that claimant was

an independent contractor, we find, consistent with our holdings in similar appeals, that the record contains substantial evidence to support the Board's finding of an employment relationship, precluding further judicial review" … . Matter of DiFalco (Gannett Satellite Info. Network, Inc.–Commissioner of Labor), 2019 NY Slip Op 07965, Third Dept 11-6-19