

1 **CHAPTER 815. UNEMPLOYMENT INSURANCE**

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3 **PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS**
4 **REGISTER. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS**
5 **SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE TEXAS REGISTER.**
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7 **ON DECEMBER 4, 2018, THE TEXAS WORKFORCE COMMISSION PROPOSED THE**
8 **RULES BELOW WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS REGISTER.**
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10 Estimated Publication Date of the Proposal in the *Texas Register*: **December 21, 2018**
11 Estimated End of Comment Period: **January 21, 2019**
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13 The Texas Workforce Commission (TWC) proposes amendments to the following section of
14 Chapter 815, relating to Unemployment Insurance:
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16 Subchapter C. Tax Provisions, §815.134
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- 18 PART I. PURPOSE, BACKGROUND, AND AUTHORITY
 - 19 PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
 - 20 PART III. IMPACT STATEMENTS
 - 21 PART IV. COORDINATION ACTIVITIES
- 22

23 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

24 The purpose of the proposed Chapter 815 rule change is to develop an employment status
25 analysis for workers who use a marketplace platform's digital network to conduct their own
26 independent businesses. Excluded from this employment status analysis would be marketplace
27 platforms regulated as Professional Employer Organizations and professional employer services
28 under §91.001(14) and (15) of the Texas Labor Code; temporary employees and temporary help
29 firms as defined in §201.011(20) and (21); governmental entities, not-for-profit organizations,
30 and Indian tribes pursuant to the Federal Unemployment Tax Act; and services explicitly
31 exempted under any other state law. Also excluded would be employers or employment as
32 described in Texas Unemployment Compensation Act (TUCA) §§201.027, 201.028, 201.042,
33 201.047, and 204.009.
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35 TUCA (Chapter 201, Subchapter E) currently excludes from the definition of employment
36 certain workers whose personal services may be performed under the control or direction of the
37 contractor. Such workers may or may not be in employment under TWC's analysis for
38 determining the employment status of workers as set forth in TWC's Chapter 821 Texas Payday
39 Rules §821.5, which is used in determining employment status for the purposes of
40 unemployment insurance through §815.134. TUCA §201.041 tasks TWC with determining if the
41 service of an individual "has been and will continue to be free from control or direction under the
42 contract and in fact."
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44 However, by creating these exemptions from employment in Subchapter E, the legislature has
45 recognized that the unique nature of certain services requires a more tailored evaluation to
46 determine worker status. Of note, several employment exceptions enacted by the legislature

1 under TUCA, for example, §201.070 and §201.073, provide for modified versions of the status
2 analysis in §821.5. In adopting §821.5, TWC also contemplated that the 20-factor analysis may
3 need to be clarified in certain circumstances by including language that specifically provides that
4 "Depending upon the type of business and the services performed, not all 20 common law factors
5 may apply."
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7 The employment status analysis is generally predicated on determining whether direction and
8 control could exist in fact or in contract. Because marketplace platforms' business models are
9 becoming increasingly prevalent in our economy, clarification, through rule, of how direction
10 and control apply in these instances is needed as it applies to unemployment insurance.
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12 These rule amendments are proposed pursuant to TWC's broad rulemaking authority under
13 §301.0015(a)(6), Texas Labor Code, which provides TWC with the authority to adopt, amend, or
14 repeal such rules as it deems necessary for the effective administration of TWC services and
15 activities.
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17 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

18 (Note: Minor editorial changes are made that do not change the meaning of the rules and,
19 therefore, are not discussed in the Explanation of Individual Provisions.)
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21 **SUBCHAPTER C. TAX PROVISIONS**

22 **TWC proposes the following amendments to Subchapter C:**

23 **§815.134. Employment Status: Employee or Independent Contractor**

24 Section 815.134 is amended by designating existing rule language as subsection (a) and adding
25 new subsection (b), relating to an employment status analysis for marketplace platform
26 contractors, providing for conditions under which a marketplace contractor shall be treated as not
27 in employment.
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29
30 New subsection (b) defines the terms "digital network," "marketplace platform," and
31 "marketplace contractor," as follows:
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33 -- "Digital network" means an online-enabled application, software website, or system offered by
34 a marketplace platform for the public to use to find and contact a marketplace contractor to
35 perform one or more needed services.
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37 --"Marketplace platform" means a corporation, partnership, sole proprietorship, or other entity
38 operating in this state that:

39 --uses a digital network to connect marketplace contractors to third-party individuals or entities
40 seeking the type of service or services offered by the marketplace contractors;

41 --accepts service requests from the public only through its digital network, and does not accept
42 service requests by telephone, by facsimile, or in person at physical retail locations; and

43 --does not perform the services offered by the marketplace contractor at or from a physical
44 business location that is operated by the platform in the state.
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1 --"Marketplace contractor" or "contractor" means any individual, corporation, partnership, sole
2 proprietorship, or other entity that enters into an agreement with a marketplace platform to use
3 the platform's digital network to provide services to third-party individuals or entities seeking the
4 type of service or services offered by the marketplace contractor.

5
6 New subsection (b) also provides for conditions under which a marketplace contractor shall be
7 treated as not in employment. Those conditions are as follows:

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9 -- All or substantially all of the payment paid to the contractor shall be based on the performance
10 of services or per-job basis;

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12 -- The marketplace platform does not unilaterally prescribe specific hours during which the
13 marketplace contractor must be available to accept service requests from third-party individuals
14 or entities submitted through the marketplace platform's digital network;

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16 --The marketplace platform does not prohibit the marketplace contractor from using a digital
17 network offered by any other marketplace platform;

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19 --The marketplace platform does not restrict the contractor from engaging in any other
20 occupation or business;

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22 --The marketplace contractor is free from control by the marketplace platform as to where and
23 when the marketplace contractor works and when the marketplace contractor accesses the
24 marketplace platform's digital network;

25
26 --The marketplace contractor bears all or substantially all of the contractor's own expenses that
27 are incurred by the contractor in performing the service or services;

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29 --The marketplace contractor is responsible for providing the necessary tools, materials, and
30 equipment to perform the service or services;

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32 --The marketplace platform does not control the details or methods for the services performed by
33 a marketplace contractor by requiring the marketplace contractor to follow specified instructions
34 governing how to perform the services; and

35
36 --The marketplace platform does not require the contractor to attend mandatory meetings or
37 mandatory training.

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39 New subsection (b) stipulates that this employment status analysis does not apply to required
40 coverage under §3304(a)(6)(A) of the Federal Unemployment Tax Act and recognizes that when
41 the marketplace platform is a state or local governmental entity, not-for-profit organization, or
42 Indian tribe, the work must be deemed "in employment."

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44 Finally, amended §815.134 is effective no earlier than January 1, 2019.

1 **PART III. IMPACT STATEMENTS**

2 Randy Townsend, Chief Financial Officer, has determined that for each year of the first five
3 years the rules will be in effect, the following statements will apply:

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5 There are no additional estimated costs to the state and to local governments expected as a result
6 of enforcing or administering the rules.

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8 There are no estimated cost reductions to the state and to local governments as a result of
9 enforcing or administering the rules.

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11 There are no estimated losses or increases in revenue to the state or to local governments as a
12 result of enforcing or administering the rules.

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14 There are implications relating to costs or revenue of the state or local governments as a result of
15 enforcing or administering the rules. Staff anticipates a negligible impact to the Unemployment
16 Compensation Fund due to marketplace platform digital network operators no longer paying
17 unemployment contributions based on a status determination of "not in employment."

18
19 There are no anticipated economic costs to individuals required to comply with the rules.

20
21 There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural
22 communities as a result of enforcing or administering the rules.

23
24 Based on the analyses required by Texas Government Code §2001.024, TWC has determined
25 that the requirement to repeal or amend a rule, as required by House Bill 1290, 85th Texas
26 Legislature, Regular Session (2017) (to be codified at Texas Government Code §2001.0045),
27 does not apply to this rulemaking.

28
29 Takings Impact Assessment

30 Under Texas Government Code, §2007.002(5), "taking" means a governmental action that
31 affects private real property, in whole or in part or temporarily or permanently, in a manner that
32 requires the governmental entity to compensate the private real property owner as provided by
33 the Fifth and Fourteenth Amendments to the United States Constitution or the Texas
34 Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that
35 would otherwise exist in the absence of the governmental action, and is the producing cause of a
36 reduction of at least 25 percent in the market value of the affected private real property,
37 determined by comparing the market value of the property as if the governmental action is not in
38 effect and the market value of the property determined as if the governmental action is in
39 effect. TWC completed a Takings Impact Analysis for the proposed rulemaking action under
40 Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action,
41 as discussed elsewhere in this preamble, is to develop an employment status analysis for workers
42 who use a marketplace platform's digital network to conduct their own independent businesses.

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44 The proposed rulemaking action will not create any additional burden on private real property.
45 The proposed rulemaking action will not affect private real property in a manner that would
46 require compensation to private real property owners under the United States Constitution or the

1 Texas Constitution. The proposal also will not affect private real property in a manner that
2 restricts or limits an owner's right to the property that would otherwise exist in the absence of the
3 governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas
4 Government Code, Chapter 2007.

5
6 Government Growth Impact Statement

7 TWC has determined that during the first five years the proposed amendments will be in effect:

- 8 --the proposed amendments will not create or eliminate a government program;
- 9 --implementation of the proposed amendments will not require the creation or elimination of
10 employee positions;
- 11 --implementation of the proposed amendments will not require an increase or decrease in future
12 legislative appropriations to TWC;
- 13 --the proposed amendments will not require an increase or decrease in fees paid to TWC;
- 14 --the proposed amendments will not create a new regulation;
- 15 --the proposed amendments will limit an existing regulation;
- 16 --the proposed amendments will reduce the number of individuals subject to the rules; and
- 17 --the proposed amendments will not positively or adversely affect the state's economy.

18
19 Economic Impact Statement and Regulatory Flexibility Analysis

20 TWC has determined that the proposed rule will not have an adverse economic impact on small
21 businesses or rural communities, as these proposed rules place no requirements on small
22 businesses or rural communities.

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24 Mariana Vega, Director of Labor Market and Career Information, has determined that there is no
25 significant negative impact upon employment conditions in the state as a result of the rules.

26
27 Clay Cole, Interim Director, Unemployment Insurance Division, has determined that for each
28 year of the first five years the rules are in effect, the public benefit anticipated as a result of
29 enforcing the proposed rules will be to provide clarity to marketplace platform businesses with
30 respect to direction and control as it applies to unemployment insurance coverage.

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32 TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be
33 within TWC's legal authority to adopt.

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35 **PART IV. COORDINATION ACTIVITIES**

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37 Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce
38 Program Policy, Attn: Workforce Editing, 101 East 15th Street, Room 459T, Austin, Texas
39 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us.
40 Comments must be received or postmarked no later than 30 days from the date this proposal is
41 published in the *Texas Register*.

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43 The rules are proposed under Texas Labor Code §301.0015, which provides TWC with the
44 authority to adopt, amend, or repeal such rules as it deems necessary for the effective
45 administration of TWC services and activities.

1 The proposed rules affect Texas Labor Code, Title 4.
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- (A) That all or substantially all of the payment paid to the contractor shall be based on the performance of services on a per-job or transaction basis;
 - (B) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third-party individuals or entities submitted through the marketplace platform's digital network;
 - (C) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;
 - (D) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;
 - (E) The marketplace contractor is free from control by the marketplace platform as to where and when the marketplace contractor works and when the marketplace contractor accesses the marketplace platform's digital network;
 - (F) The marketplace contractor bears all or substantially all of the contractor's own expenses that are incurred by the contractor in performing the service or services;
 - (G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;
 - (H) The marketplace platform does not control the details or methods for the services performed by a marketplace contractor by requiring the marketplace contractor to follow specified instructions governing how to perform the services; and.
 - (I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.
- (3) This section shall not apply to any of the following:
- (A) Services performed in the employ of a state, or any political subdivision of the state, or in the employ of an Indian tribe, or any instrumentality of a state, any political subdivision of a state, or any Indian tribe that is wholly owned by one or more states or political subdivisions or Indian tribes, but only if the services are excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. §3301 - 3311, solely by reason of §3306(c)(7) of that Act.

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- (B) Services performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if the services are excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. §§3301 - 3311, solely by reason of §3306(c)(8) of that Act.
- (C) Services performed by marketplace platforms regulated as Professional Employer Organizations and professional employer services under §§91.001(14) and (15) of the Texas Labor Code.
- (D) Services performed by temporary employees and temporary help firms as defined in §§201.011(20) and (21) of the Texas Labor Code.
- (E) Services explicitly exempted under any other state law.