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TRANSCRIPT OF PROCEEDINGS
BEFORE THE
TEXAS WORKFORCE COMMISSION
AUSTIN, TEXAS

PUBLIC MEETING)
FOR THE TEXAS)
WORKFORCE COMMISSION)

COMMISSION MEETING
TUESDAY, APRIL 09, 2019

BE IT REMEMBERED THAT at 8:30 a.m. on
Tuesday, the 9th day of April, 2019, the above-entitled
matter came on for hearing at the Texas Workforce
Commission, TWC Building, 101 East 15th Street, Room 244,
Austin, Texas, before RUTH R. HUGHS, Chair; JULIAN ALVAREZ
and ROBERT D. THOMAS, Commissioners.

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P R O C E E D I N G S

TUESDAY, APRIL 9, 2019

(8:30 a.m.)

AGENDA ITEM NO. 1

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5 CHAIR HUGHS: All right, good morning. This
6 meeting is called to order. At the outset, I want to
7 outline the order of proceedings today. We're beginning
8 with the Unemployment Insurance Program docket, and we'll
9 take that up first, and then the general public comment item
10 for comments on the UI docket is what we'll hear now, or any
11 other matters not related to a specific policy agenda item.
12 Should any member of the public wish to address the
13 commission on a specific policy matter that's on today's
14 agenda, we'll recognize those persons when we take out that
15 policy item this morning.

16 But, to begin with, we'll take up the
17 Unemployment Insurance Program docket. So, for now, on this
18 part of the agenda list, do we have anyone who signed up who
19 wants to address the condition during our general public
20 comment period? All right, so thank you. So now I'll turn
21 the meeting over to Commissioner Thomas to preside over
22 agenda items 3 through 7.

AGENDA ITEM NO. 2

23 UNIDENTIFIED VOICE: We have Mr. Lotta.

24 MR. LOTTA: Thank you, commission members,
25

1 Madam Chair, my name is Rene Lotta. I am the Legislative
2 Director for the Texas AFL-CIO, which is a federation of
3 public sector and private sector labor unions around the
4 state. We represent affiliates that include merely a
5 quarter of a million working people in the State of Texas.
6 We represent their interest at the state capital of the
7 state agencies, and in the private sector as well.

8 Members of the commission, I'm here to speak
9 on the issue relating to Item, 8, related to marketplace
10 contractors. We feel that this is an extremely important
11 and even historic decision that this commission is about to
12 embark on and decide upon.

13 First, the item came up, and we testified in
14 January 15th, and after that the comments were taken, nearly
15 200 of Texans submitted comments and there has been a
16 response to this issue. So why all the fuss? First, if
17 employers apply these rules and change their business model
18 to rely on digital networks, they will be able to designate
19 employees as marketplace contractors rather than employees,
20 and that is extremely significant in terms of not just
21 unemployment insurance, but also all the other benefits that
22 follow once an employee is determined to be an independent
23 contractor, or a marketplace contractor.

24 And all of these benefits are extremely
25 important to the working people of this state and their

1 families. But what's also significant is that this, by your
2 own statements and the responses to the comments, this is an
3 emerging business model. You stated that the Texas
4 Workforce Commission has determined that the marketplace
5 platform business model has become increasingly prevalent in
6 the Texas economy, and you referred to it as a growing
7 sector. So, this has huge implications to the millions of
8 working people in the state. And what it means, is that a
9 larger and larger share of Texas workers will lose their
10 benefits if they are designated as marketplace or
11 independent contractors.

12 Finally, this will also impact small
13 businesses in the state, because they will have to compete
14 within business that changes their business model to this
15 new digital platform world. And so, for all these reasons,
16 we urge you to please vote against this proposed rule today,
17 thank you.

18 MS. BERMAN: Thank you, Mr. Lotta. And as
19 indicated previously, we're going to take public comments on
20 the policy items for anyone else who's interested in
21 speaking on this issue, when we get to the policy portion of
22 the agenda. Thank you. So, we're back to the agenda, and
23 I'll hand it back over to Commissioner Thomas.

24 AGENDA ITEM NO. 3

25 Discussion, Consideration and Possible Action

1 Regarding Whether to Assume Continuing Jurisdiction on
2 Unemployment Compensation Cases, Wage Claim Cases, and/or
3 Tax Liability Cases and Reconsideration of Unemployment
4 Compensation Cases, Wage Claim Cases, and/or Tax Liability
5 Cases, if Any.

6 No Discussion.

7 AGENDA ITEM NO. 4

8 Discussion, Consideration and Possible Action
9 Regarding Tax Liability Cases Listed on the Texas Workforce
10 Commission Docket 15.

11 The Commission considered and took action on
12 all tax liability cases listed on Docket 15.

13 AGENDA ITEM NO. 5

14 Discussion, Consideration and Possible Action
15 Regarding Fair Housing Cases listed on the Texas Workforce
16 Commission Docket 15.

17 No Discussion.

18 AGENDA ITEM NO. 6

19 Discussion, Consideration and Possible Action
20 Regarding Higher Level Appeals in Wage Claim Cases Listed on
21 the Texas Workforce Commission Docket 15.

22 The Commission considered and took action on
23 all wage claim cases listed on Docket 15.

24 AGENDA ITEM NO. 7

25 Discussion, Consideration and Possible Action

1 Regarding Higher Level Appeals in Unemployment Compensation
2 Cases Listed on the Texas Workforce Commission Docket 15.

3 The Commission considered and took action on
4 all unemployment compensation cases listed on Docket 15.

5 AGENDA ITEM NO. 8

6 CHAIR HUGHS: All right. We are back in
7 session. Fellow commissioners, before going into the first
8 item, I propose that we first ask staff to lay out this
9 matter, and then following that presentation I propose we
10 take public comment from any member of the public that wants
11 to speak on this item, and that the individual comments, if
12 you could please for courtesy to everyone limit your
13 comments to three minute, and then after all the commenters
14 have had the opportunity to speak, we can then proceed with
15 our deliberations. And, of course, we can offer questions
16 to staff, or commenters, at our discretion. Does that work
17 for both of you?

18 COMM. ALVAREZ: I'm fine with that.

19 COMM. THOMAS: Yeah, Chair Hughs. That works
20 for me. Thank you.

21 CHAIR HUGHS: Okay. Then with that, let's
22 get to Item 8, Discussion, Consideration and Possible Action
23 Regarding Adoption of Rules Relating to Marketplace Platform
24 Digital Networks Within the Unemployment Insurance Program.
25 Chuck Ross.

1 MR. ROSS: Good morning, Chair Hughs,
2 Commissioner Alvarez, Commissioner Thomas, Mr. Serna. For
3 the record, I'm Chuck Ross, Unemployment Insurance Policy.
4 Section 201.041 of the Texas Unemployment Compensation Act
5 tasks the TWC with determining if the service of an
6 individual has been, and will continue to be, free from
7 direction and control under contract and in fact. To that
8 end, proposed rules to amend Commission Rule 815.134,
9 Employment Status, were published in the Texas Register on
10 December 14, 2018 for a 30-day public comment period.

11 The proposed rules without a new section,
12 subsection b, which defines the term; digital network,
13 marketplace platform, and marketplace contractor, and
14 provides for conditions under which a marketplace contractor
15 should be treated as not in employment. Those conditions
16 established through nine conditions relevant to the
17 marketplace contractor business model, would inform the
18 decisions of staff and the commission when questions arise
19 regarding in employment and not in employment status for the
20 limited purposes of the Texas Unemployment Compensation Act.
21 Excluded would be Marketplace platforms regulated as
22 professional employer organizations, and professional
23 employer services under Chapter 91, Texas Labor Code,
24 temporary employees, and temporary health firms as defined
25 in the Texas Unemployment Compensation Act, and provisions

1 in state law which have -- which may have made such a
2 determination, for example, ridesharing concerns.

3 211 timely comments were received during a
4 comment period. Of those, 13 expressed support for the
5 proposal, 2 comments were deemed neutral, and 196 expressed
6 concerns. Of those comments expressing concern,
7 approximately 130 comments contained identical text. In
8 aggregate, commenters in support indicated proposed rules to
9 provide clarity to business who operate a marketplace
10 platform with respect to the correct classification of
11 contractors providing services to the platforms end-users
12 through platform's digital network. Two commenters in
13 support provided suggested language to amend a proposed
14 rule.

15 Upon careful consideration, two such language
16 changes were accepted. Those changes are melding the
17 discrete terms; the public, and third-party individuals or
18 entities, into one term and the second was the removal of
19 the term, on the performance of service, with respect to
20 Condition number 1 that all or substantially all of the
21 payment made to the contractor shall be on a per or transit
22 -- per job or transaction basis. No other changes to the
23 proposed rule have been incorporated.

24 In aggregate, commenters and opposition
25 expressed concerns the proposed rule would have a negative

1 impact beyond the limited scope of unemployment insurance to
2 include the Fair Labor Standards Act, Social Security, and
3 Medicare. Multiple commenters indicated the rulemaking was
4 beyond the purview of the TWC and exceeded its rulemaking
5 authority.

6 In response to specific comments in this
7 vein, the document before you this morning reiterates that
8 the legislature granted the condition through Labor Code
9 Section 301.001(a)(6), broad authority to adopt rules it
10 deems necessary to administer Title IV, employment services
11 and unemployment. In accordance with Labor Code Section
12 201.041, the TWC has the same authority to provide further
13 clarification concerning this emergency -- emerging economy
14 as it did to adopt Commission Rule 821.5, applied to
15 unemployment through Section -- through Rule 815.134 as its
16 official guideline for use in determining employment status.

17 Several commenters were concerned that the
18 TWC would deem a worker to be a contractor solely because
19 the marketplace platform had a website or other online
20 presence. The document before you this morning stipulates
21 that Rule 815.134(b) would require more than the existence
22 of a marketplace platform's website in order for a
23 marketplace contractor to be considered not in employment.
24 The rule provides for a robust investigation of all the
25 facts and circumstances applicable to the marketplace

1 platform contractor working relationship, and ensures
2 consistent -- a consistent approach, while preserving a
3 case-by-case analysis on the precise aspects present in a
4 particular case.

5 Specific commenters raised concern that the
6 rule creates an entirely new status test that examines nine
7 conditions rather than the 20 factors included in rule
8 821.5. The document before you this morning states that
9 rule 815.134(b)(2) is not less rigorous than the standard
10 test in 821.5. As part of the adoption of 821.5, the
11 commission included language specifying that depending on
12 the type of business and the services performed, not all 20
13 common law factors may apply. The rule does not require
14 that all 20 factors apply to every business model and
15 service, nor does it designate what way should be given to a
16 particular factor. Rule 815.134(b)(2) requires that all
17 nine conditions must be met in contract and in fact, before
18 a marketplace contractor is not treated as being in
19 employment for the limited purposes of the Texas
20 Unemployment Compensation Act.

21 Although nine mandatory conditions are
22 listed, some of these conditions integrate multiple factors
23 from 821.5 into a single element. The result is a
24 comprehensive, yet tailored test, which provides
25 clarification for the parties. As required by federal

1 regulations, the United States Department of Labor reviewed
2 the proposed rules and the document that is before you
3 today. The department determined that the rule does not
4 present a conformity issue because vis-à-vis federal
5 unemployment compensation law. States are free to designate
6 marketplace contractors as independent contractors, and thus
7 exclude them from coverage under the state's unemployment
8 compensation law. So long as the required coverage is under
9 the Federal Unemployment Tax Act are maintained, as they are
10 in the document before you today.

11 The department noted that if a state excludes
12 marketplace contractors from coverage, contributions would
13 not be due to the unemployment fund based on -- based upon
14 these services and the individuals would not be eligible to
15 receive unemployment benefits. States must be aware that
16 such a designation may result in a potentially negative tax
17 consequence for employers. For purposes of the federal
18 unemployment tax imposed by these federal -- under Section
19 301 of the FUTA, whether these services are an
20 employer/employee relationship is determined under federal,
21 not state, law. As such, if under the IRS's 20-factor
22 direction and control test, the services by a marketplace
23 contractor are determined to be employment. The employer
24 would be required to pay with full federal tax without the
25 state offset credit they currently receive, since no state

1 contributions would have been paid on the services. Whether
2 the services are determined to be in -- an independent
3 contractor relationship under state law, is not relevant to
4 the IRS determination.

5 The question before you this morning, is
6 adoption of the rule as included in Tab 8 of your notebooks
7 and published in the agency's public internet site. If the
8 rules are adopted, staff requests the ability to minor non-
9 substantive changes to the document in order to comply with
10 publication requirements of the Texas Register and the Texas
11 Secretary of State.

12 I am here this morning as a resource to
13 answer any technical questions you all may have.

14 CHAIR HUGHS: Thank you, Mr. Ross.
15 Commissioners, do you have any comments or questions, or do
16 you want to wait until after public comment? Maybe ask Mr.
17 Ross to come back up if there's any questions?

18 COMM. THOMAS: I suggest that we wait, Chair.

19 CHAIR HUGHS: Okay. If you don't mind, we're
20 going to --

21 COMM. ALVAREZ: I as well.

22 MS. BERMAN: Okay, great. Thank you.

23 MR. ROSS: I will.

24 CHAIR HUGHS: So, Les, at this time, are
25 there any public comments, or anyone signed up for public

1 comments on this item?

2 MR. TROBMAN: Yes. We do have commenters,
3 and comments are requested to state your name for the
4 record, and to maintain the three minutes limitation on
5 comments. We have Sean Fortner here.

6 MR. FORTNER: Good morning, commissioners.
7 My name is Sean Fortner, I'm a journeyman carpenter, and I
8 represent the Central South Carpenters Regional Council, as
9 a council representative, and I stand here in opposition to
10 this rule change. Personally, I have a lot of reservations
11 about the gig economy, as it's called, and their campaign to
12 side-step and just rewrite the definition of who is an
13 employee versus a contractor, and their assertion that
14 somehow, in employment, technology somehow changes the
15 definition of who is a worker.

16 But today I'm here especially to voice my
17 concern about the consequences this would have on my
18 industry, you know, as a construction worker, and carpenter,
19 specifically, every day we're out there face-to-face with
20 people who are being exploited by unscrupulous and
21 illegitimate contractors who misclassify their workers as
22 independent contractors and commit payroll fraud in doing
23 so, just so that they cannot pay their portion of the taxes
24 and push that burden onto the worker.

25 Essentially, we were already fighting a lack

1 of enforcement ability on the state, and to the rules that
2 already exist to prevent these things, and this rule change
3 would just use an app to legitimize that practice and bring
4 these guys out of the dark and allow them to continue this
5 practice legally. And I stand opposed to that.

6 CHAIR HUGHS: Thank you for your comments.
7 We certainly don't want any employers to get away with any
8 violation of laws, so we try to make sure that we don't
9 enforcing anything that would allow for that.

10 MR. TROBMAN: Garry Warren (ph).

11 MR. WARREN: Good morning, commissioners. My
12 name is Garry Warren, I represent Central South Carpenters
13 Regional Council. I'll be brief in that we, United
14 Brotherhood of Carpenters, stands opposed for the
15 marketplace platform rule. Mr. Fortner made reference to
16 labor brokers, who operate in the underground economy. They
17 pay cash, they don't pay any benefits to their workers, a
18 worker gets hurt and they drop them off at the emergency
19 room, and you and I have to pick up the tab on that.

20 And what's going to happen is, when this
21 rule's past, those labor brokers are just going to put an
22 app on their phone, suddenly they're legitimate, there's no
23 way to enforce what they do, it's going to circumvent that
24 employment insurance law, and this opens up a big can of
25 worms. We really want the construction industry carved out

1 of this. If it's for someone else, that's their problem,
2 but for construction, The United Brotherhood of Carpenters
3 spends over \$200-million a year on training. We have
4 collective bargaining agreements that provide protections
5 for our workers; they provide health insurance. They
6 provide pensions so that people can live in dignity when
7 they retire, and they provide ongoing training throughout
8 their life, and safety training. So, everything that we
9 stand for is going to get washed away when this rule passes.
10 And it will be overnight that this happens.

11 The gig economy is quietly undermining a
12 century of worker protections. It resembles the early
13 industrial age and has proven to be corrosive. The workers
14 will not be employees, and they will not have health
15 insurance, workers compensation protections, employer
16 contributions to Social Security, and payroll taxes, paid
17 time off, family leave protections, discrimination
18 protections, or unemployment insurance benefits. So, with
19 that, I would just ask you to seriously consider voting no
20 on this rule, and at the very least postpone the vote so
21 that maybe we could have a discussion about it and talk
22 about these unintended consequences that will occur. Thank
23 you so much for your time. Appreciate it.

24 CHAIR HUGHS: Thank you. Les.

25 MR. TROBMAN: Bill Beirdal.

1 MR. BEIRDAL: Commissioners, thank you for
2 the opportunity to speak with you. My name is Bill Beirdal,
3 I am the Executive Director of the Equal Justice Center,
4 which is a non-profit law firm that represents low wage
5 working people in central Texas and across the state on
6 basic employment justice.

7 You know, misclassification of workers as
8 independent contractors is already recognized as a rampant
9 problem in our economy. One that is becoming more
10 challenging and more rampant with the emergence of the
11 online digital gig economy.

12 And, in fact, what most socially conscious
13 government agencies and thinkers are realizing, is we need
14 to redefine the rules in order to be sure that those workers
15 are covered by the basic social safety net programs, like
16 the one you administer in the unemployment insurance system.

17 For decades in Texas all employers have been
18 treated equally in judging whether they're an employer or
19 merely utilizing independent contractors using the 20-factor
20 test. That applies to all employers, and -- equally, and
21 provides some clarity to workers. What -- the 20-factor
22 test looks at the full range of economic reality of the
23 employment relationship. Not just some parts of it.

24 What's happened here is that this rule that's
25 been proposed is really special interest rulemaking that is

1 designed to winnow that down to nine factors and, in fact,
2 restate those nine factors so that they will be stated in a
3 way that is the most favorable -- that is particularly
4 favorable to one subset of employers. That is those using a
5 digital, online platform to allocate jobs.

6 I'm going to suggest that one of the -- that
7 that is really -- ends up being contrary to the established
8 law. All employers ought to be judged by the same test, and
9 if they don't meet the 20 factors, then they should be
10 regarded as employers and required to submit to our --
11 support our public safety net program that unemployment
12 insurance is. This will both create a conflict. You just
13 heard it creates a conflict between the Federal Unemployment
14 Tax Act, the FUTA obligations, and the state obligations,
15 its' going to create a conflict and a disconnect between
16 unemployment insurance law and our wage laws and how
17 employment has defined their -- the Federal Unemployment
18 Law, Workers Comp, Social Security, the IRS rules. You're
19 going to create more conflict here.

20 But, secondly, you're creating a dangerous
21 precedent. It's not that hard, and it will become easier
22 and easier for employers to start to allocate their jobs
23 using a phone-based app, or some other digital mechanism,
24 and to fragment the work relationship among alleged
25 individual jobs and allocate jobs that way. This opens the

1 door and, in fact, encourages more employers to do that,
2 because they can avoid one of their basic social obligations
3 that protects the public and protects the state, that is
4 unemployment insurance, they can avoid all that if they'll
5 just modify their business to fit this rule. And so, it
6 puts us on a slippery slope that -- and remember, the
7 covering workers under unemployment insurance, that's a
8 benefit not just for those working people.

9 Those who need it most, those who, through no
10 fault of their own, end up losing their jobs and need that
11 social safety net, but it also protects the state. That
12 ensures that those folks don't have to go on some form of
13 welfare. That ensures that they don't end up being homeless
14 or hard pressed. This is a benefit for the entire state,
15 and this one subset of business online digital employers,
16 shouldn't be carved out and given a special interest set of
17 rules that's favorable to them, and that is different from
18 what other employers have to -- have to comply with.

19 I'd just suggest to you that it is really bad
20 for the state. It's bad public policy. It's contrary to
21 existing law. It's really an unfair thumb on the scale for
22 one subset of employers, and it's an unfair abandonment of
23 the interest of working families in Texas.

24 I would suggest that you withdraw the rule,
25 or suspend the implementation of the rule, and maybe convene

1 a thoughtful process, a study that all of the public can
2 participate in, to come up with rules that are better
3 adapted to what is genuinely emerging and changing part of -
4 - a way of doing business in our state and across the
5 nation. Thank you very much.

6 CHAIR HUGHS: Thank you. Thank you.

7 MR. TROBMAN: Fidel Guzman.

8 CHAIR HUGHS: (Speaking Spanish) If you could
9 please put your name on the record.

10 MR. GUZMAN: (Speaking Spanish)

11 INTERPRETER: Hi. I'm Karen, I'm going to be
12 interpreting.

13 MR. GUZMAN: (Speaking Spanish)

14 INTERPRETER: Good morning. My name is Fidel
15 Guzman. I am a member of Worker's Defense. We are here
16 today to state that this rule change will have a negative
17 impact on our community and our -- and on construction
18 workers.

19 MR. GUZMAN: (Speaking Spanish)

20 INTERPRETER: This rule change will
21 misclassify construction workers as independent contractors,
22 leaving workers to their own hands without access to basic
23 rights and benefits.

24 MR. GUZMAN: (Speaking Spanish)

25 INTERPRETER: Construction workers and their

1 families face many problems and barriers, such as wage theft
2 and lack of workers compensation.

3 MR. GUZMAN: (Speaking Spanish)

4 INTERPRETER: This rule change will make
5 working conditions worse for construction workers by making
6 us independent contractors. And for this reason, we oppose
7 it. Thank you.

8 MR. Guzman: Gracias.

9 CHAIR HUGHS: Thank you.

10 COMM. THOMAS: Thank you.

11 MR. TROBMAN: David King.

12 MR. KING: Thank you, commissioners, for your
13 service to our state and to our communities here. And thank
14 you for considering these proposed -- this proposed rule
15 from the perspective of equity and justice and fairness. I
16 hope those words really resonate with each of you. The
17 action you're about to take is going to harm -- if you pass
18 this rule, will no doubt harm the workers here today and
19 others. I worked in IT, that was my career, for the State
20 of Texas. It was a great career, and I appreciate that
21 opportunity, but I had worker's compensation unemployment
22 insurance here if I were to unfairly get laid off or fired.
23 When I was injured as a state employee, coming to work one
24 day I was covered by worker's comp insurance, and thank
25 goodness I had that.

1 But this rule is not fair, and it's not
2 equitable, and you know that. You all know that. Each one
3 of you know that. This is not an emerging industry. My
4 career was IT. I know this has been around for over a
5 decade. What may be new is more companies are jumping on
6 this bandwagon for the purpose of shielding themselves from
7 the cost of doing business and doing right by their
8 employees and doing right as a corporate citizen of this
9 state, and of this nation.

10 This is a fundamental change in the rules.
11 Handy is worth almost a half-billion dollars. The employees
12 of Handy, about 200 employees, they're covered by workers
13 comp insurance. They're covered by unemployment insurance,
14 and probably most of them were making six figures. But the
15 workers you see here today, they're not making that money.
16 They're working hard every day. They rely and depend on you
17 to look out for them and to have fair regulations and rules
18 that work for them too.

19 So, what I'm asking you to do is look at it
20 through the lens of equity injustice. This is unjust, it's
21 inequitable. You may hide behind the technical law and say
22 all, legally, the definition allows me to do this, but
23 that's not the only aspect you should be looking at when you
24 serve the citizens of Texas and the workers that are here
25 today, and that thousands of workers that are out there

1 right now doing their jobs that we all benefit from.

2 This great city we live in is built by these
3 workers here today that are just here to ask for equity and
4 fairness in the rules. They're not asking for a handout.
5 That's all they're asking you to do, is to be fair and
6 equitable. This is not fair. This is not equitable.

7 And Forbes, says that this so-called emerging
8 economy, as we call it, needs help, or you all -- some
9 people think it needs help, but Forbes has said that this
10 marketplace economy is going to be worth over \$1.2-trillion
11 by 2022. That's about two years away from now. \$1.2-
12 trillion. It does not need this handout. It does not need
13 this help. And is it fair that a company can come to your
14 doors and knock on it and say, we need this special rule to
15 help us out. And then behind the doors you create these
16 rules and then, boom, throw it out and say, Okay, you have
17 five minutes to get up here and tell me what you think?
18 That's not a fair and equitable process, either.

19 So, I'm asking you to deny this rule and look
20 at other rules that really will help these workers and other
21 workers and be fair and equitable. Thank you.

22 MR. TROBMAN: Ms. Gonzales.

23 CHAIR HUGHS: Good morning.

24 MS. GONZALES: Good morning, commissioners.

25 My name is Ana Gonzales. I am the Policy Director with

1 Workers Defense. I am here in opposition to Item 8.

2 Workers Defense is a statewide group that
3 empowers thousands of low-wage workers across Texas to
4 achieve fair employment. On behalf of Workers Defense and
5 our members we are here to oppose Proposed Rule 815.134.
6 Not only because it would harm Texas workers by stripping
7 them of essential benefits, but also because the rule is now
8 weighted down by a document of pattern of undue corporate
9 lobbyist influence.

10 We believe this rule would create a carveout
11 for employers who find workers platforms. It would allow
12 them to strip them from essential benefits. This rule would
13 no doubt will hurt Texas workers. Create an uneven playing
14 field for small businesses and rob the state's coffers from
15 necessary income. The Texas workforce Commission needs to
16 withdraw this rule for the Texans who depend on this agency.
17 We have serious concerns about how this rule came to be.
18 There is no denying who actually wrote this rule.

19 This an unprecedented rule that is outside
20 the legal authority of the commission, and it should be --
21 it should go through the legislator process. We urge the
22 commissioners to reject this rule for working people that
23 deserve better. Thank you.

24 MR. TROBMAN: Commissioners, that brings us
25 to the end of those who have signed in for public comment.

1 CHAIR HUGHS: Thank you. Mr. Ross, if you
2 could come back to the podium.

3 MR. ROSS: Again, for the record, Chuck Ross,
4 Unemployment Insurance Policy.

5 CHAIR HUGHS: Thank you. Commissioners, do
6 you have any questions or comments from Mr. Ross?

7 COMM. THOMAS: NO. Thank you, chair.

8 COMM. ALVAREZ: Not at this time.

9 CHAIR HUGHS: I do want to comment that I
10 appreciated the very thorough response that the staff went
11 through for all of the public comments that we received in
12 the 30-day period, and the way that you addressed each and
13 every one. I know that took a lot of work, and a lot of
14 consideration, and I really appreciate the time that was
15 spent in that.

16 I had further comments, but I wanted to give
17 you both opportunities before any motions, if you had
18 anything else you want to put on the record? Or I will.
19 Okay.

20 COMM. THOMAS: I may, Chair Hughs. I'd like
21 to -- I'd like to consider -- continue to listen for a
22 little bit.

23 CHAIR HUGHS: Okay. Well, I believe the
24 presentation has already been presented, and I appreciate
25 the comments made. I really want to highlight that this

1 rule's going to apply to unemployment related issues only,
2 not to other situations regarding the employee/independent
3 contractor analysis under state and federal wage an hour and
4 discrimination laws.

5 The issue of marketplace contractors is aimed
6 at helping Texas continue to have the best business climate
7 in the nation, and with the speed of development of
8 marketplace contractor initiatives around the nation, we
9 want to make sure as a state that we provide stability and
10 predictability in our rulings. Having said that, the
11 presumption will always be employment. We'll start from
12 there. Staff will take a case-by-case analysis, and I think
13 that the responses to public comments highlight that. And
14 time and again it seems that people might think that the
15 mere existence of a website is going to change the status,
16 and I know that that's not the case, and I really appreciate
17 the presentation that was put together today, and the
18 responses.

19 And so, you know, with that, I'm certainly
20 supportive of the rule, but I will -- I'm open to
21 deliberation or any other comments, or I can make a motion
22 or take a motion.

23 COMM. ALVAREZ: Chair Hughs, before you take
24 a motion, I have some comments that I'd like to add. First
25 of all, I'd like to thank all of those in attendance and

1 those that provided public comments, and those that actually
2 provided us with some opportunities to listen to their
3 concerns.

4 As Commissioner Representing Labor, again, I
5 want to thank each and every one of you for being here.
6 This level of interest really speaks to how complex these
7 issues are, and how careful we must be in our deliberations.

8 As I stated back in December 4, 2018,
9 commission meeting -- at our commission meeting, our current
10 rules provide a flexible framework that can be applied to a
11 variety of industries and workers. In the past year we have
12 had several tax cases dealing with marketplace platforms,
13 and digital networks that were properly analyzed using our
14 current rules. The exclusions from employment -- from
15 employment that currently exist in statute were all
16 legislatively, and again, legislatively created, including
17 House Bill 100, passed during the last legislative session,
18 that define transportation network drivers as independent
19 contractors.

20 Rules are meant to interpret statute where
21 there is ambiguity. There is no ambiguity in our statute.
22 To put it simply, there is no reason to draft a rule with a
23 different set of factors to determine direction and control
24 for marketplace contractors, because direction and control
25 has the same meaning for all workers. Any further

1 exemptions in any issue belongs within the purview of the
2 legislature, and not a state agency. Even DOL noted that
3 this major exemption would be better addressed by mending
4 the statute, not the rules.

5 I have also -- I have -- I also have concerns
6 about the unintended consequences. The proposed rules give
7 an advantage to out of state entities and industries that
8 are not able to shift their service request to an online
9 enabled application or website. This may -- this may give
10 an unfair advantage to those out of state entities over
11 established Texas employers.

12 Additionally, small employers, of which 2.2-
13 million call Texas home, which includes over 725,000 women
14 and minority-owned small businesses, according to the Office
15 of Economic Development, who may lack the financial and
16 technical resources to develop marketplace platforms would
17 be at a disadvantage.

18 For the purposes of federal unemployment tax
19 liability, the employer/employee relationship is determined
20 by federal, and not state, law. If the IRS determines that
21 a worker of a marketplace contractor are in employment, the
22 employer will be required to pay the full federal FUTA tax
23 without any credit, as no state contributions would have
24 been paid on the services.

25 Whether the services are determined to be an

1 independent contractor -- in an independent contractor
2 relationship under state law is not relevant to the IRS
3 determination. This will only create more confusion and not
4 clarity for Texas employers. Many workers might be
5 reclassified as independent contractors under these proposed
6 rules, and these rules may have a major effect on those who
7 are most vulnerable; landscapers, housekeepers, and general
8 laborers.

9 Our current rules have worked well for Texas
10 workers and employers, while allowing innovation -- for
11 innovation and a growing economy. As the Commissioner
12 Representing Labor, given the far-reaching impact of these
13 proposed rules, I ask my fellow commissioners that we take a
14 step back and we immediately begin organizing listening
15 sessions across the section of communities around the state,
16 to hear from those who may be affected, as a way to improve
17 the rules and provides for responsiveness to people's
18 concerns.

19 I believe that any direction on this issue
20 deserves this level of deliberate attention before action.
21 Therefore, I ask my fellow commissioners to hold off on
22 today's action and join me in additional listening and
23 deliberation. Those are my comments.

24 CHAIR HUGHS: Commissioner Thomas.

25 COMM. THOMAS: Do you have anything after

1 that?

2 CHAIR HUGHS: Well, sure. I mean, certainly
3 we have the, as pointed out by staff, we have the authority
4 to pass these rules. In fact, the 20-factor test is a rule
5 that this agency passed, so we're certainly acting within
6 our authority, and DOL did find we were in conformity.

7 I agree that if employers are found to be in
8 violation of the analysis that would have somebody an
9 independent contractor, they will be met with the full FUTA
10 tax, and I think that's a well-earned protection that we
11 have for all employers so that here is no unscrupulous
12 activity, and this rule addresses that.

13 I also feel that we had a very thorough
14 process of having the 30 days of public comment, and all of
15 the responses that we received to those public comments, and
16 in that regard I'm comfortable proceeding today.

17 COMM. ALVAREZ: Chair Hughs, I appreciate
18 your comments. I just, for the record, would like to state
19 that, again, I feel like the IRS had indicated, or the DOL
20 has indicated, and by the remarks that I made, that this
21 could be somewhat confusing to employers.

22 I'd also like to say that in the future when
23 we get these types of briefings, that we go into more detail
24 on the specifics of any initiatives that come out of, or at
25 least are addressed to, my office.

1 COMM. ALVAREZ: I've had the good fortune and
2 pleasure of serving in this capacity for just at six months.
3 It has been an outstanding experience, and this rulemaking
4 process in particular has been an example of democracy at
5 its best.

6 The 200 plus people who submitted comments,
7 including Labor, who came to visit me, and the work of our
8 staff, show that our process work. I have bene deeply,
9 deeply impressed with the work of our staff, the concern and
10 care that you've taken associated with this particular
11 process and this particular rule. And, most importantly, I
12 am deeply impressed and deeply thankful for the ethics, the
13 values, and the morals that my colleagues on this dais have
14 shown under less than ideal circumstances.

15 If I did not before today appreciate the
16 significance of the seat, Commissioner Representing the
17 Public, I absolutely represent -- I absolutely feel and
18 respect that role today.

19 For those of you that have been participating
20 in our dockets, our unemployment wage and our tax cases,
21 you've seen the level of sincerity significance that our
22 office has taken associated with trying to get it right.
23 These are not easy decisions. As the chair pointed out last
24 week, these are inherently fact-specific circumstances and
25 situations, and we are, in fact, human.

1 I am very thoroughly convinced, in light of
2 the briefing from council and staff, that the agency in fact
3 does have the authority to proceed in the consideration and
4 deliberation of this rule. With the guidance of staff and
5 council, I'm thoroughly convinced that all of the steps that
6 needed to be vetted have, in fact, been vetted, and that the
7 commissioners are invested now, at this point, with the
8 authority to make an appropriate decision as each person
9 deems fit.

10 I will tell you that the significance of our
11 responsibilities falls squarely and heavily on each of our
12 shoulders, as I think you've heard today. This is not the
13 beginning, and it's certainly not the end of the discussions
14 associated with employment circumstances and situations in
15 the State of Texas. But there are, in fact, unique
16 circumstances which are driving and changing our economy,
17 and the State of Texas needs to be flexible and nimble in
18 evaluating those to optimize economic development and
19 opportunity for all Texans.

20 I am thoroughly committed, as I believe are
21 my colleagues on the dais, to aggressively reviewing every,
22 single case that comes before us to ensure that we fairly,
23 consistently, and accurately apply our rules for the benefit
24 of all Texans, and all Texans means all Texas employers, and
25 all Texas employees and, in fact, all Texans. As

1 Commissioner Representing the Public, I take that particular
2 role very seriously.

3 Madam Chair, I move that we adopt the
4 amendments to Chapter 18 relating to unemployment insurance
5 with changes as previously published in the Texas Register,
6 with permission for staff to make minor non-substantive
7 changes.

8 CHAIR HUGHS: I second the motion. Just
9 clarifying that it is Title 40, Texas Administrative Code
10 Section 815.134, and I second that motion.

11 COMM. THOMAS: Thank you.

12 COMM. ALVAREZ: For the record, as
13 Commissioner Representing Labor, I cannot support this
14 proposed rule.

15 CHAIR HUGHS: Thank you, Chuck.

16 AGENDA ITEM NO. 11

17 CHAIR HUGHS: That brings us to Item 11 --
18 there's no -- there's nothing on Item 9 or 10. It brings us
19 to Item 11, Discussion, Consideration and Possible Action
20 Regarding Guidance on Resource Utilization and
21 Implementation of Services and Strategies, Including Those
22 Funded with the Department of Labor's Disaster Dislocated
23 Worker Grant, in Response to Hurricane Harvey.

24 MS. TROKE: Good morning, Chair Hughs,
25 commissioners, Mr. Serna. For the record, Jen Troke,

1 Workforce Division.

2 Today TWC has approved and awarded grants
3 totaling \$26-million to 8 local board in support of
4 Hurricane Harvey recovery. Board are near exhaustion of
5 their current funds and require funds to continue temporary
6 employment for participants who are providing needed
7 disaster relief to their communities.

8 Golden Crescent is in immediate need of funds
9 and has expended 98 percent of their current distribution.
10 Staff seeks direction on approving an additional \$300,000 to
11 continue implementing dislocated worker activities by Golden
12 Crescent. In addition, I am pleased to report that we
13 received the \$5-million grant modification from DOL
14 yesterday, so I will return next week for additional
15 approvals on those distributions. Thank you, any questions?

16 CHAIR HUGHS: There are no questions. Do I
17 have a motion?

18 COMM. ALVAREZ: I move that we approve the
19 300,000 for Golden Crescent as recommended.

20 COMM. THOMAS: Second.

21 CHAIR HUGHS: We are unanimous. Thank you.
22 Thank you.

23 COMM. THOMAS: Well, second; sorry.

24 COMM. ALVAREZ: Excuse me. I'd like to add
25 something, Jen, if I may.

1 MS. TROKE: Yes.

2 COMM. ALVAREZ: Since we're talking about
3 Hurricane Harvey recovery, can you provide my office with
4 the list of those that are being trained, how many have
5 successfully completed the training, and what institutions
6 of higher ed are doing the training?

7 MS. TROKE: Yes.

8 COMM. ALVAREZ: And I'd like a briefing in my
9 office. I want a total number of people that have been
10 trained using Hurricane Harvey funds.

11 MS. TROKE: Yes, sir.

12 COMM. THOMAS: I'd like that as well, please.

13 MS. TROKE: Absolutely.

14 CHAIR HUGHS: Me as well, thank you.

15 AGENDA ITEM NO. 13

16 CHAIR HUGHS: All right, that was -- there's
17 nothing for Item 12. 13, are there any updates regarding
18 enacted, proposed, or considered federal or state
19 legislation? Anything?

20 Mr. Serna: No, ma'am.

21 CHAIR HUGHS: No. Okay.

22 AGENDA ITEM NO. 14

23 CHAIR HUGHS: Item 14; do we have any
24 updates?

25 MR. SERNA: No, ma'am. No updates.

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AGENDA ITEM NO. 15

CHAIR HUGHS: All right, is there a motion to
adjourn?

COMM. THOMAS: So moved.

COMM. ALVAREZ: I'll second that.

CHAIR HUGHS: We are adjourned. Thank you.

(Proceedings concluded at 9:41:36 a.m.)

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C E R T I F I C A T E

STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Kimberly C. McCright, Certified Vendor and Notary in and for the State of Texas, do hereby certify that the above-mentioned matter occurred as hereinbefore set out.

I FURTHER CERTIFY THAT the proceedings of such were reported by me or under my supervision, later reduced to typewritten form under my supervision and control and that the foregoing pages are a full, true and correct transcription of the original notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of May, 2019.

/s/ Kimberly C. McCright
Kimberly C. McCright
Certified Vendor and Notary Public

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