

1 **CHAPTER 815. UNEMPLOYMENT INSURANCE**

2  
3 **ADOPTED 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.**  
6

7 The Texas Workforce Commission (TWC) adopts amendments to the following section of  
8 Chapter 815, relating to Unemployment Insurance, *with* changes, as published in the December  
9 14, 2018, issue of the *Texas Register* (43 TexReg 8277):

10 Subchapter C. Tax Provisions, §815.134

11  
12  
13 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

14 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND**  
15 **RESPONSES**

16  
17 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

18 The purpose of the Chapter 815 rule change is to develop an employment status analysis for  
19 workers who use a marketplace platform's digital network to conduct their own independent  
20 businesses. Excluded from this employment status analysis would be marketplace platforms  
21 regulated as Professional Employer Organizations and professional employer services under  
22 Labor Code §§91.001(14) and (15); temporary employees and temporary help firms as defined in  
23 Labor Code §§201.011(20) and (21); governmental entities, not-for-profit organizations, and  
24 Indian tribes pursuant to the Federal Unemployment Tax Act; and services explicitly exempted  
25 under any other state law. Also excluded would be employers or employment as described in  
26 Texas Unemployment Compensation Act (TUCA) Labor Code §§201.027, 201.028, 201.042,  
27 201.047, and 204.009.

28  
29 TUCA (Chapter 201, Subchapter E) currently excludes from the definition of employment  
30 certain workers whose personal services may be performed under the control or direction of the  
31 contractor. Such workers may or may not be in employment under TWC's analysis for  
32 determining the employment status of workers as set forth in TWC's Chapter 821 Texas Payday  
33 Rules §821.5, which is used in determining employment status for the purposes of  
34 unemployment insurance through Unemployment Insurance §815.134. Labor Code §201.041  
35 tasks TWC with determining if the service of an individual "has been and will continue to be free  
36 from control or direction under the contract and in fact."

37  
38 However, by creating these exemptions from employment in Subchapter E, the legislature has  
39 recognized that the unique nature of certain services requires a more tailored evaluation to  
40 determine worker status. Of note, several employment exceptions enacted by the legislature  
41 under TUCA, for example, Labor Code §§201.070 and 201.073, provide for modified versions of  
42 the status analysis in §821.5. In adopting §821.5, TWC also contemplated that the 20-factor  
43 analysis may need to be clarified in certain circumstances by including language that specifically  
44 provides that "Depending upon the type of business and the services performed, not all 20  
45 common law factors may apply."  
46

1 The employment status analysis is generally predicated on determining whether direction and  
2 control could exist in fact or in contract. Because marketplace platforms' business models are  
3 becoming increasingly prevalent in our economy, clarification, through rule, of how direction  
4 and control apply in these instances is needed as it applies to unemployment insurance.

5  
6 These rule amendments are adopted pursuant to TWC's broad rulemaking authority under Labor  
7 Code §301.0015(a)(6) which provides TWC with the authority to adopt, amend, or repeal such  
8 rules as it deems necessary for the effective administration of TWC services and activities.

9  
10 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND**  
11 **RESPONSES**

12 (Note: Minor editorial changes are made that do not change the meaning of the rules and,  
13 therefore, are not discussed in the Explanation of Individual Provisions.)

14  
15 **SUBCHAPTER C. TAX PROVISIONS**

16 **TWC adopts the following amendments to Subchapter C:**

17  
18 **§815.134. Employment Status: Employee or Independent Contractor**

19 §815.134 is amended by designating existing rule language as subsection (a) and adding new  
20 subsection (b), relating to an employment status analysis for marketplace platform contractors,  
21 providing for conditions under which a marketplace contractor shall be treated as not in  
22 employment.

23  
24 New subsection (b) defines the terms "digital network," "marketplace platform," and  
25 "marketplace contractor," as follows:

26  
27 -- "Digital network" means an online-enabled application, software website, or system offered by  
28 a marketplace platform for the public (including third-party individuals and entities) to use to  
29 find and contact a marketplace contractor to perform one or more needed services.

30  
31 --"Marketplace platform" means a corporation, partnership, sole proprietorship, or other entity  
32 operating in this state that:

33 --uses a digital network to connect marketplace contractors to the public (including third-party  
34 individuals and entities) seeking the type of service or services offered by the marketplace  
35 contractors;

36 --accepts service requests from the public (including third-party individuals and entities) only  
37 through its digital network, and does not accept service requests by telephone, by facsimile, or in  
38 person at physical retail locations; and

39 --does not perform the services offered by the marketplace contractor at or from a physical  
40 business location that is operated by the platform in the state.

41  
42 --"Marketplace contractor" or "contractor" means any individual, corporation, partnership, sole  
43 proprietorship, or other entity that enters into an agreement with a marketplace platform to use  
44 the platform's digital network to provide services to the public (including third-party individuals  
45 and entities) seeking the type of service or services offered by the marketplace contractor.

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

3  
4 -- All or substantially all of the payment paid to the contractor shall be based on a per-job or  
5 transaction basis;

6  
7 -- The marketplace platform does not unilaterally prescribe specific hours during which the  
8 marketplace contractor must be available to accept service requests from the public (including  
9 third-party individuals and entities) submitted through the marketplace platform's digital  
10 network;

11  
12 --The marketplace platform does not prohibit the marketplace contractor from using a digital  
13 network offered by any other marketplace platform;

14  
15 --The marketplace platform does not restrict the contractor from engaging in any other  
16 occupation or business;

17  
18 --The marketplace contractor is free from control by the marketplace platform as to where and  
19 when the marketplace contractor works and when the marketplace contractor accesses the  
20 marketplace platform's digital network;

21  
22 --The marketplace contractor bears all or substantially all of the contractor's own expenses that  
23 are incurred by the contractor in performing the service or services;

24  
25 --The marketplace contractor is responsible for providing the necessary tools, materials, and  
26 equipment to perform the service or services;

27  
28 --The marketplace platform does not control the details or methods for the services performed by  
29 a marketplace contractor by requiring the marketplace contractor to follow specified instructions  
30 governing how to perform the services; and

31  
32 --The marketplace platform does not require the contractor to attend mandatory meetings or  
33 mandatory training.

34  
35 New subsection (b) stipulates that this employment status analysis does not apply to required  
36 coverage under §3304(a)(6)(A) of the Federal Unemployment Tax Act and recognizes that when  
37 the marketplace platform is a state or local governmental entity, not-for-profit organization, or  
38 Indian tribe, the work must be deemed "in employment."

39  
40 Finally, amended §815.134 is effective no earlier than April 29, 2019.

41  
42 **Summary of comments and agency responses.**

43 The public comment period on the proposal began December 21, 2018 and ended January 21,  
44 2019. There were 211 timely comments received by TWC. Of those, 13 expressed support for  
45 the proposal, 2 comments were neutral, and 196 expressed concerns about the proposal. Of those  
46 comments expressing concern, approximately 130 comments contained identical text. The

1 following is a summary of all public comments received, in aggregate, and corresponding agency  
2 responses:

3  
4  
5 **Comment: Some commenters have noted that they believe the proposed rules will**  
6 **have a negative impact as it relates to the Fair Labor Standards Act, Workers**  
7 **Compensation, Social Security, and Medicare.**

8  
9 Response: Chapter 815 of TWC's administrative rules only pertain to its administration  
10 of the unemployment insurance program. Therefore, §815.134(b) only authorizes TWC  
11 to utilize this clarification of the Employee or Independent Contractor test solely related  
12 to TWC's administration of the unemployment insurance program.

13  
14 **Comment: Multiple commenters have stated their belief that this rulemaking is not**  
15 **within the purview of TWC.**

16  
17 Response: Through Labor Code §301.001(a), the Texas Legislature has tasked TWC with  
18 administering the State's unemployment compensation insurance program. Labor Code  
19 §201.041 tasks TWC with determining if the service of an individual "has been and will  
20 continue to be free from control or direction under the contract and in fact."

21  
22 Through Labor Code §301.0015(a)(6) and in accordance with Labor Code §201.041,  
23 TWC has the same authority to provide further clarification concerning this emerging  
24 business model as it did to adopt §821.5, applied to unemployment through §815.134, as  
25 its official guideline for use in determining employment status.

26  
27 §815.134(b) operates to provide clarification and a more tailored evaluation to determine  
28 worker status as it relates to the unemployment compensation insurance program.  
29 Therefore, this amendment is within the purview of TWC's administration of the  
30 program.

31  
32 **Comment: Multiple commenters have stated their belief that §815.134(b) exceeds**  
33 **TWC's rulemaking authority.**

34  
35 Response: Through Labor Code §301.001(a), the Texas Legislature has tasked TWC with  
36 administering the State's unemployment compensation insurance program. Labor Code  
37 §201.041 tasks TWC with determining if the service of an individual "has been and will  
38 continue to be free from control or direction under the contract and in fact."

39  
40 Through Labor Code §301.0015(a)(6), the Texas Legislature has granted TWC broad  
41 authority to adopt rules it deems necessary to administer Title 4, Employment Services  
42 and Unemployment. In accordance with Labor Code §201.041, TWC has the same  
43 authority to provide further clarification concerning this emerging business model as it  
44 did to adopt §821.5, applied to unemployment through §815.134, as its official guideline  
45 for use in determining employment status.

1 As part of this administration, TWC has determined that the marketplace platform  
2 business model has become increasingly prevalent in the Texas economy, and that all  
3 parties involved would be better served by a clarification of §821.5, adapted to address  
4 this growing sector as it relates to unemployment insurance.  
5

6 **Comment: Several commenters referenced the coverage of ride sharing concerns**  
7 **under §815.134(b), including in relation to the provisions of Subtitle C, Title 14,**  
8 **Texas Occupations Code, Chapter 2402, specifically, §2402.114.**  
9

10 Response: The rules would not apply to parties covered under this section of the Texas  
11 Occupations Code because of the exemption provided in §815.134(b)(3)(E), i.e. services  
12 explicitly exempted under any other law.  
13

14 **Comment: Multiple commenters stated that they believe the status test in §821.5, as**  
15 **applied to unemployment through §815.134, is already adequate to address the**  
16 **marketplace economy.**  
17

18 Response: TWC has determined that the marketplace platform business model has  
19 become increasingly prevalent in the Texas economy, and that all parties involved would  
20 be better served by a clarification of §821.5, adapted to address this growing sector as it  
21 relates to unemployment insurance. §815.134(b) will better serve the parties involved in  
22 the novel and expanding “gig economy” by providing a more tailored clarification of  
23 §821.5.  
24

25 **Comment: Some commenters believed that the proposed rules would cause harm to**  
26 **workers.**  
27

28 Response: §815.134(b) provides clarity to the parties involved in a marketplace platform  
29 business model as it pertains to unemployment compensation benefits. By removing  
30 ambiguity, §815.134(b) enhances the understanding of all parties entering into an  
31 arrangement under a marketplace platform business model. §815.134(b) is designed to  
32 ensure a consistent application of the considerations relevant and applicable to this  
33 working relationship. Whether the individual’s performance of the service has been and  
34 will continue to be free from control or direction under §815.134(b) will be determined  
35 on a case-by-case basis by TWC based upon the facts of each marketplace  
36 contractor/platform working relationship.  
37

38 **Comment: One commenter believed that the proposed rule would cause harm to**  
39 **immigrant workers.**  
40

41 Response: The commenter has not explained how the clarification in §815.134(b) would  
42 incentivize the hiring of undocumented workers. §815.134(b) only authorizes TWC to  
43 utilize this clarification of the Employee or Independent Contractor test solely related to  
44 TWC’s administration of the unemployment insurance program. There are no changes to  
45 residency/citizenship requirements as they pertain to the unemployment insurance  
46 program.

1  
2 **Comment: Multiple commenters stated their concern that the proposed rules would**  
3 **allow employers to escape liability.**  
4

5 Response: TWC respectfully disagrees. Marketplace platforms and contractors  
6 potentially subject to §815.134(b) will still be required to meet each of the 9 specified  
7 conditions, which in themselves are a clarification of the test in §821.5.  
8

9 **Comment: Several commenters stated the proposed rules are not consistent with**  
10 **Federal status tests.**  
11

12 Response: The Federal government does not dictate which test for TWC to use to  
13 determine a worker's status. TWC has adopted the test in §821.5 for this determination.  
14 TWC, however, has also determined that all parties involved would be better served by a  
15 clarification of §821.5, adapted to address this new and growing sector of the economy as  
16 it relates to unemployment insurance. To that end, §815.134(b) provides clarification and  
17 a more tailored evaluation to determine worker status as it relates to the unemployment  
18 compensation insurance program.  
19

20 **Comment: Some commenters were concerned that TWC would deem a worker to**  
21 **be a contractor simply because the marketplace platform had a website or other**  
22 **online presence.**  
23

24 Response: §815.134(b) would require more than the existence of a marketplace  
25 platform's website for a marketplace contractor to be considered not in employment. For  
26 example, there are additional restrictions as to what constitutes a marketplace contractor,  
27 9 conditions which must be met, and certain exclusions.  
28

29 These rules will provide for a robust consideration of all facts and circumstances  
30 applicable to the marketplace platform/contractor working relationship and help ensure a  
31 consistent approach while preserving a case-by-case analysis on the precise aspects  
32 present in a particular case. Whether an individual's performance of the service has been  
33 and will continue to be free from control or direction under the contract and in fact under  
34 §815.134(b) will be determined by TWC based upon the unique facts of each  
35 relationship.  
36

37 Additionally, the following entities made specific comments which identified additional issues.  
38 These comments are summarized below with TWC's responses.  
39

#### 40 **The United States Department of Labor:** 41

42 **Comment: The US Department of Labor (Department) reviewed the proposed rules**  
43 **as required by federal regulations and determined that they do not present a**  
44 **conformity issue vis-à-vis federal unemployment compensation law. The**  
45 **Department thanked TWC for taking into account the informal feedback that was**  
46 **provided when TWC sought technical guidance from the Department with respect**

1 to federal-law conformity and compliance at the inception of the proposed rule  
2 drafting process. That technical guidance noted the following:  
3

4 “We have consulted with the Division of Legislation in the Office of Unemployment  
5 Insurance regarding your request for an informal opinion whether an amendment  
6 to Commission Rule § 815.134 that would clarify which elements of the TWC’s  
7 current employment status test applies to marketplace platform companies would  
8 create an issue. We would not have an issue with TWC pursuing this clarification  
9 on marketplace platform companies via rulemaking as opposed to amending the  
10 state’s UI law.  
11

12 States are free to designate marketplace contractors as independent contractors,  
13 and thus exclude them from coverage under the state’s [Unemployment  
14 Compensation] UC law, so long as the services are not performed for a  
15 governmental entity, Indian tribe, or non-profit organization that is exempt from  
16 taxation under Section 501(c)(3) of the Internal Revenue Code. Any services  
17 performed for the aforementioned entities must be covered.  
18

19 Although the Commission has given a lot of thought to this proposal, we need to  
20 provide some important reminders. If a state excludes marketplace contractors  
21 from coverage, contributions would not be due to the unemployment fund based on  
22 the services, and the individuals would not be eligible to receive UC. States must be  
23 aware that such a designation may result in negative tax consequences for  
24 employers. For purposes of the Federal unemployment tax imposed by Section 3301  
25 of FUTA, whether these services are in an employer/employee relationship is  
26 determined under Federal, not state law. As such, if under the 20-factor “direction  
27 and control” test used by the IRS to determine an employer/employee relationship  
28 and if the services by a marketplace contractor are employment, the employer  
29 would be required to pay the full FUTA tax (currently 6.0% on the first \$7,000  
30 paid) without any credit against the tax as no state contributions would have been  
31 paid on the services. Whether the services are determined to be in an independent  
32 contractor relationship under state law is not relevant to the IRS determination.”  
33

34 Response: TWC appreciates the review and findings from the US Department of Labor  
35 in accordance with their responsibility under federal law.  
36

37 **Daniel Guzman, Managing Counsel, NeighborFavor, Inc., Austin, Texas and David**  
38 **Edmonson, Executive Director, TechNet, Austin, Texas:**  
39

40 **Comments: TWC received substantive comments from two commenters supporting**  
41 **the proposed rules which raise additional issues. These comments express**  
42 **appreciation for the rules stating they give marketplace platforms the certainty**  
43 **needed to continue investing in Texas.**  
44

45 **These commenters also requested clarification and offered suggestions to amend the**  
46 **proposed rules. Their comments are as follows:**

1  
2 **1. Amend §815.134(b)(1)(B)(ii) to allow for additional means of submission for**  
3 **individuals with a disability.**  
4

5 Response: TWC appreciates the commenters' support and responses.  
6 No changes have been made in response to this comment. The suggested change to allow  
7 telephone or additional communication methods would exceed the scope of coverage  
8 contemplated by these rules under the definitions in §815.134(b)(1). The marketplace  
9 platform is encouraged to incorporate or develop accessible technology within the  
10 constraints of a marketplace platform's digital network that supports individuals with a  
11 disability such as use of a smart phone's accessibility features to integrate with a  
12 marketplace platform's app.  
13

14 **2. Amend §815.134(b) to use the language “the public (including third-party**  
15 **individuals or entities)” instead of using “public” and “third-party individuals or**  
16 **entities” interchangeably.**  
17

18 Response: TWC has made a change in response to this comment. To address the concern  
19 of consistency, TWC has changed references to “the public (including third-party  
20 individuals and entities).”  
21

22 **3. Amend §815.134(b)(2)(A) to address *completion* of services instead of *performance***  
23 **of services.**  
24

25 Response: This provision is a clarification of §821.5 #12 “PAYMENT BY THE HOUR,  
26 WEEK OR MONTH” which states in part: “An Independent Contractor is normally paid  
27 by the job, either a negotiated flat rate or upon submission of a bid.” Because the core  
28 element that §815.134(b)(2)(A) seeks to address is the basis of payment, TWC will  
29 remove the reference to “on the performance of services” from §815.134(b)(2)(A) as  
30 originally proposed.  
31

32 **4. Amend §815.134(b)(2)(B) to clarify that allowing a contractor to “voluntarily**  
33 **schedule themselves does not constitute a prescription of hours.”**  
34

35 Response: No changes have been made in response to this comment. This provision is a  
36 clarification of §821.5 #7 “SET HOURS OF WORK” which states in part: “A true  
37 Independent Contractor is the master of his or her own time and works the days and hours  
38 he or she chooses.” Any voluntary scheduling would be considered within these  
39 parameters as clarified by §815.134(b)(2)(B).  
40

41 **5. One commenter expressed concern that §815.134(b)(2)(H) would not allow**  
42 **contractors to utilize in-app maps and guidance tools, and would disallow**  
43 **community behavior standards for contractors. The commenter suggested language**  
44 **“[f]or the purposes of this section, a marketplace platform shall not be deemed to**  
45 **control the detail or methods for the services performed by a marketplace**  
46 **contractor by maintaining deactivation standards related to health and safety, the**



1 **completion of services, and customer ratings; facilitating the provision of**  
2 **instructions between marketplace participants; or enabling the marketplace**  
3 **contractor to follow maps-based directions.”**  
4

5 Response: No changes have been made in response to this comment. TWC will  
6 determine whether a particular marketplace platform controls the details or methods for  
7 services performed in such a manner that a marketplace contractor is required to follow  
8 specified instructions governing performance on a case by case basis based upon the facts  
9 of each marketplace contractor/platform working relationship. Considerations in reaching  
10 this conclusion will include whether a contractor is given instructions, sets their own  
11 order of work, is required to perform the services personally, and can hire helpers, though  
12 no individual weight is given to a particular consideration. TWC will balance all relevant  
13 details in reaching its determination under §815.134(b)(2)(H), however, TWC is unable  
14 to make a predetermination on all potential permutations in rule.  
15

16 **6. One commenter expressed concern that under §815.134(b)(2)(G), an insulated**  
17 **bag may be considered a tool and suggested amending the language to read “[t]he**  
18 **marketplace contractor is *substantially* responsible for providing the necessary**  
19 **tools.”**  
20

21 Response: No changes have been made in response to this comment. A contractor  
22 ordinarily provides the tools, materials, and equipment necessary for the job. TWC will  
23 determine whether a particular marketplace contractor has provided items which are  
24 tools, materials, and equipment necessary to perform a service on a case by case basis  
25 based upon the facts of each marketplace contractor/platform working relationship. TWC  
26 will consider all relevant details in reaching its determination under §815.134(b)(2)(G).  
27

28 **7. One commenter requested clarification that under §815.134(b)(2)(I) basic**  
29 **orientation or “education on the use of the marketplace platform” not be considered**  
30 **training.**  
31

32 Response: No changes have been made in response to this comment. This provision is a  
33 clarification of §821.5 #2 “TRAINING” and as such TWC must make its evaluation  
34 under these parameters. TWC will determine whether a particular orientation or  
35 “education” session would qualify as a “mandatory meeting” or “mandatory training” on  
36 a case by case basis based upon the facts of each marketplace contractor/platform  
37 working relationship. TWC will consider all relevant details in reaching its determination  
38 under §815.134(b)(2)(I).  
39

40 **8. One commenter suggested making an allowance under §815.134(b)(2)(A) to allow**  
41 **for payment by the hour.**  
42

43 Response: No changes have been made in response to this comment. This provision is a  
44 clarification of §821.5 #12 “PAYMENT BY THE HOUR, WEEK OR MONTH” which  
45 states in part: “An Independent Contractor is normally paid by the job, either a negotiated  
46 flat rate or upon submission of a bid.”

1  
 2 **Ana Gonzalez, Worker’s Defense Project, Austin, Texas; Kathryn J. Youker, Texas Rio**  
 3 **Grande Legal Aid and the Equal Justice Center, Brownsville, Texas; and Rebecca Smith,**  
 4 **the National Employment Law Project, Seattle, Washington:**

5  
 6 **Comments: TWC received substantive comments from three commenters against**  
 7 **the proposed rules which raise additional issues. These comments express concern**  
 8 **with the rules. Their comments are as follows:**

9  
 10 **1. Commenters expressed concern that §815.134(b) relaxes employment**  
 11 **classification standards and that it is less rigorous than the 20 factor test in §821.5.**  
 12 **There was also concern that it creates an entirely new status test that examines only**  
 13 **9 factors instead of 20. One commenter stated their belief the proposed rules are**  
 14 **arbitrary, capricious, and contrary to law.**

15  
 16 Response: Labor Code §201.041 contains a presumption of employment. TWC  
 17 previously utilized its authority under Labor Code §201.041 to adopt §821.5, applied to  
 18 unemployment through §815.134, as its official guideline for use in determining  
 19 employment status. §815.134(b) is a clarification of §821.5. The presumption of  
 20 employment in Labor Code §201.041 remains as the conditions in §815.134(b) must still  
 21 be met to the satisfaction of TWC before it is determined a marketplace contractor is not  
 22 in the employment of a marketplace platform.

23  
 24 §815.134(b)(2) is not less rigorous than the standard test in §821.5. As part of the  
 25 adoption of §821.5, TWC included language specifying that, “Depending upon the type  
 26 of business and the services performed, not all 20 common law factors may apply.” The  
 27 rule does not require that all 20 factors apply to every business model and service, nor  
 28 does it designate what weight should be given to a particular factor. TWC evaluated the  
 29 factors applicable to the marketplace platform/contractor working relationship and  
 30 determined that §821.5 should be clarified to assist the parties in determining  
 31 employment status for this emerging economy sector.

32  
 33 §815.134(b)(2) requires that all 9 conditions must be met, in contract and in fact, before a  
 34 marketplace contractor is not treated as being in employment for purposes of the Texas  
 35 Unemployment Compensation Act. Although 9 mandatory conditions are listed, some of  
 36 these conditions integrate multiple factors from §821.5 into a single element (see below).  
 37 The result is a comprehensive, yet tailored, test which provides clarification for the  
 38 parties.

39

Conditions	Factor(s)
(A) That all or substantially all of the payment paid to the contractor shall be on a per-job or transaction basis;	Payment by Hour, Week, Month

Conditions	Factor(s)
(B) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from the public (including third-party individuals and entities) submitted through the marketplace platform's digital network;	Set Hours of Work
(C) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;	Working for More than one Firm at a Time Full Time Required Making Service Available to the Public
(D) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;	Working for More than one Firm at a Time Full Time Required Making Service Available to the Public
(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;	Location Where Services Performed Full Time Required
(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;	Payment of Business and Travel Expenses Realize Profit or Loss
(G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;	Furnishing Tools and Equipment
(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.	Instructions Order of Sequence Set Services Rendered Personally Hiring Helpers
(I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.	Training

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2  
3  
4  
5  
6  
7

**2. Some commenters believe the proposed rules will increase misclassification, and that workers who would be considered employees under §821.5 will now be considered independent contractors.**

Response: TWC respectfully notes that this comment lacks the specificity necessary to address it in a substantive manner. TWC will continue to analyze employment status on a

1 case by case basis, however, that analysis will now be informed by the clarifications  
2 provided under §815.134(b). Whether an individual’s performance of the service has  
3 been and will continue to be free from control or direction under the contract and in fact  
4 under §815.134(b) will be determined by TWC based upon the unique facts of each  
5 relationship. No changes have been made based on this comment.  
6

7 **3. Commenters stated that TWC does not have the statutory authority to exempt**  
8 **certain sectors of the Texas workforce from the definition of employment. In a**  
9 **similar vein, commenters noted their belief that the proposed rules create a broad**  
10 **exception to the statutory definition in Labor Code §201.041 by removing the**  
11 **presumption of employment and shifting the burden of establishing whether an**  
12 **employment relationship exists from the employer to the employee. There was also a**  
13 **statement that the rules would displace the centrality of the right to control.**  
14

15 Response: §815.134(b) does not create any exemptions from the definition of  
16 employment. The rules provide clarification as to how the factors in §821.5 apply to a  
17 marketplace contractor/platform working relationship. Simply put, the rule outlines the  
18 considerations TWC will undertake when making a case-by-case determination on the  
19 issue of direction and control within this unique marketplace platform economic sector.  
20

21 Through Labor Code §301.0015(a)(6) and in accordance with Labor Code §201.041,  
22 TWC has the same authority to provide further clarification concerning this emerging  
23 business model as it did to adopt §821.5, applied to unemployment through §815.134, as  
24 its official guideline for use in determining employment status.  
25

26 TWC will not grant a platform any form of automatic exception from employment. A  
27 worker would be found to be in the employment of any marketplace platform that does  
28 not meet the required 9 conditions in contract and in fact. The presumption of  
29 employment in Labor Code §201.041 remains as the conditions in §815.134(b) must still  
30 be met to the satisfaction of TWC before it is determined a marketplace contractor is not  
31 in the employment of a marketplace platform.  
32

33 Whether the individual’s performance of the service has been and will continue to be free  
34 from control or direction under §815.134(b) will be determined on a case-by-case basis  
35 by TWC based upon the facts of each marketplace contractor/platform working  
36 relationship.  
37

38 **4. Some commenters expressed that only the legislature has authority to clarify how**  
39 **“direct & control” apply in the context of unemployment insurance to workers who**  
40 **use marketplace platforms. They stated these rules should be done through law and**  
41 **not rule.**  
42

43 Response: The legislature specifically delegated the authority to determine direction and  
44 control to TWC by passing Labor Code §201.041:  
45

1 “Sec. 201.041. GENERAL DEFINITION OF EMPLOYMENT. In this subtitle,  
2 "employment" means a service, including service in interstate commerce, performed by  
3 an individual for wages or under an express or implied contract of hire, unless it is shown  
4 to the satisfaction of the commission that the individual's performance of the service has  
5 been and will continue to be free from control or direction under the contract and in fact.”  
6

7 Furthermore, through Labor Code §301.0015(a)(6), the Legislature has bestowed TWC  
8 with the broad authority to adopt rules to administer the Texas Unemployment  
9 Compensation Act. TWC previously utilized this authority to adopt §821.5, applied to  
10 unemployment through §815.134, as its official guideline for use in determining  
11 employment status. This has greatly assisted TWC in fulfilling its statutory obligation  
12 and provided clarity to the parties, just as §815.134(b) will achieve for the newly  
13 emerging marketplace economy.  
14

15 **5. Comments also referenced existing case law, *Critical Health Connection, Inc. v.***  
16 ***Tex. Workforce Comm’n*, 338 S.W.3d 758 (2011) *Tochiril, Inc. v. Tex. Workforce***  
17 ***Comm’n*, No. 06-15-00078-CV, 2016 Tex. App. LEXIS 6444 (Tex. App.—Texarkana**  
18 **June 17, 2016), stating that Texas courts have found workers in similar situations to**  
19 **marketplace contractors to be employees. The proposed rules would therefore be**  
20 **contrary to law.**  
21

22 Response: TWC respectfully notes that *Critical Health Connection, Inc. v. Tex.*  
23 *Workforce Comm’n*, 338 S.W.3d 758 (2011) *Tochiril, Inc. v. Tex. Workforce Comm’n*,  
24 No. 06-15-00078-CV, 2016 Tex. App. LEXIS 6444 (Tex. App.—Texarkana June 17,  
25 2016), concern employers which are temporary help firms. Because of their status as  
26 temporary help firms, these employers would not be eligible for consideration under the  
27 new rules because they would be excluded under §815.134(b)(3)(D).  
28

29 **6. Some commenters stated the proposed rules are contrary to the purpose of the**  
30 **Unemployment Insurance program.**  
31

32 Response: In accordance with a clear reading of the Labor Code §201.041, §815.134(b)  
33 is a proper and necessary part of TWC’s administration of the State’s unemployment  
34 compensation insurance program. §815.134(b) clarifies the application of §821.5,  
35 providing a more tailored evaluation to determine worker status for this emerging  
36 marketplace economy as it relates to the unemployment program. TWC is furthering its  
37 responsibility to administer an effective program by providing this clarification which  
38 will assist the parties in determining employment status for this emerging economy.  
39

40 **7. Some commenters asserted that an agency’s interpretation of a statute it is**  
41 **charged with enforcing must be reasonable and not contradict the plain language of**  
42 **the statute. Their belief is that these rules are unreasonable because it establishes a**  
43 **different definition of employment for network-based and brick-and-mortar**  
44 **businesses without justification or explanation.**  
45

1 Response: The presumption of employment in Labor Code §201.041 remains for both  
 2 network-based and brick-and-mortar businesses. As currently stated in §821.5,  
 3 “Depending upon the type of business and the services performed, not all 20 common  
 4 law factors may apply.” The rule does not require that all 20 factors apply to every  
 5 business model and service, nor does it designate what weight should be given to a  
 6 particular factor. Since different business models and services will have different factors  
 7 and weights which apply to them, it is reasonable for TWC to create §815.134(b) which  
 8 clarifies the status test for this new sector of the economy.  
 9

10 TWC evaluated the factors applicable to the marketplace platform/contractor working  
 11 relationship and determined that §821.5 should be clarified to assist the parties in  
 12 determining employment status for this emerging economy.  
 13

14 §815.134(b)(2) requires that all 9 conditions must be met, in contract and in fact, before a  
 15 marketplace contractor is not treated as being in employment for purposes of the Texas  
 16 Unemployment Compensation Act. Although 9 mandatory conditions are listed, some of  
 17 these conditions integrate multiple factors from §821.5 into a single element. (see below).  
 18 The result is a comprehensive, yet tailored, test which provides clarification for the  
 19 parties.  
 20

<b>Conditions</b>	<b>Factor(s)</b>
(A) That all or substantially all of the payment paid to the contractor shall be on a per-job or transaction basis;	Payment by Hour, Week, Month
(B) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from the public (including third-party individuals and entities) submitted through the marketplace platform's digital network;	Set Hours of Work
(C) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;	Working for More than one Firm at a Time Full Time Required Making Service Available to the Public
(D) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;	Working for More than one Firm at a Time Full Time Required Making Service Available to the Public
(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;	Location Where Services Performed Full Time Required

Conditions	Factor(s)
(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;	Payment of Business and Travel Expenses Realize Profit or Loss
(G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;	Furnishing Tools and Equipment
(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.	Instructions Order of Sequence Set Services Rendered Personally Hiring Helpers
(I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.	Training

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**8. Commenters also stated that the proposed rules are not expressly authorized in state law and TWC has not attempted to explain why marketplace platforms are sufficiently different from other companies and that a separate test is necessary or desirable. Furthermore, TWC has not explained why the current test does not work to determine “employment” for marketplace platform companies. Commenters also pointed out their belief that many of the 20 factors listed in §821.5 were valuable and excluded from the proposed rules.**

Response: Through Labor Code §301.0015(a)(6), the Legislature has bestowed TWC with the broad authority to adopt rules to administer the Texas Unemployment Compensation Act. In accordance with Labor Code §201.041, TWC previously utilized this authority to adopt §821.5, applied to unemployment through §815.134, as its official guideline for use in determining employment status. This has greatly assisted TWC in fulfilling its statutory obligation and provided clarity to the parties, just as §815.134(b) will achieve for the newly emerging marketplace economy.

As currently stated in §821.5, “Depending upon the type of business and the services performed, not all 20 common law factors may apply.” The rule does not require that all 20 factors apply to every business model and service, nor does it designate what weight should be given to a particular factor. Since different business models and services will have different factors and weights which apply to them, it is reasonable for TWC to create §815.134(b) which clarifies the status test for this new sector of the economy.

TWC evaluated the factors applicable to the marketplace platform/contractor working relationship and determined that §821.5 should be clarified to assist the parties in determining employment status for this emerging economy.

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§815.134(b)(2) requires that all 9 conditions must be met, in contract and in fact, before a marketplace contractor is not treated as being in employment for purposes of the Texas Unemployment Compensation Act. Although 9 mandatory conditions are listed, some of these conditions integrate multiple factors from §821.5 into a single element. (see below). The result is a comprehensive, yet tailored, test which provides clarification for the parties.

<b>Conditions</b>	<b>Factor(s)</b>
(A) That all or substantially all of the payment paid to the contractor shall be on a per-job or transaction basis;	Payment by Hour, Week, Month
(B) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from the public (including third-party individuals and entities) submitted through the marketplace platform's digital network;	Set Hours of Work
(C) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;	Working for More than one Firm at a Time Full Time Required Making Service Available to the Public
(D) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;	Working for More than one Firm at a Time Full Time Required Making Service Available to the Public
(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;	Location Where Services Performed Full Time Required
(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;	Payment of Business and Travel Expenses Realize Profit or Loss
(G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;	Furnishing Tools and Equipment



Conditions	Factor(s)
(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.	<p style="text-align: right;">Instructions Order of Sequence Set Services Rendered Personally Hiring Helpers</p>
(I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.	<p style="text-align: right;">Training</p>

- 1
- 2 **Comments were received from:**
- 3 Keith Ribnick, US Department of Labor
- 4 Rene Lara, Texas AFL-CIO, Austin, Texas
- 5 Gary Warren, Political Director, Central South Carpenters Regional Council, Austin, Texas
- 6 Alejandro Sills
- 7 Ben Brennehan, Business Manager, IBEW Local 520, Austin, Texas
- 8 Christian Brooks, General Counsel, FieldFocus, Austin, Texas
- 9 Al Hergenroeder
- 10 Virginia Clark, Houston, Texas
- 11 Greg Devenish, Houston, Texas
- 12 Anne Pearson, San Antonio, Texas
- 13 Marc LaRoe
- 14 Dennis Keel
- 15 R. K. Entrekin, Houston, Texas
- 16 Laura Stokes
- 17 Joshua Karam, CEO, Hyr Inc., New York, NY
- 18 Steven Kimbrell
- 19 Judy Hummel, San Antonio, Texas
- 20 Richard Elliott, San Antonio, Texas
- 21 Glenna Dawson, Houston, Texas
- 22 Edward Castor, San Antonio, Texas
- 23 Murry Cohen, Arbitrator and Appellate Advocate, First Court of Appeals Justice (Ret.)
- 24 Patrick T. Fogarty
- 25 Joe B., Houston, Texas
- 26 Bryan Domning
- 27 William B. Cockran
- 28 Rick Morneau
- 29 James Franklin, San Antonio, Texas
- 30 Mark Turpin, CEO, The HT Group, Austin, Texas
- 31 Aintre Antonoff
- 32 Roy A. Bobo II, League City, Texas
- 33 Garry Hammit, MBA
- 34 Tony Galaviz, San Antonio, Texas
- 35 J. S. Fernandi

1 Stephen P. Amberg, Associate Professor, Department of Political Science, UT–San Antonio, San  
2 Antonio, Texas  
3 David Schubert, Houston, Texas  
4 Chris Trimmer  
5 Tobias Read  
6 John Hull  
7 Todd Phillips, DVM  
8 Cynthia Wine, San Antonio, Texas  
9 Nancy Edwards, Houston, Texas  
10 Paula Traffas, Austin, Texas  
11 David Goldweitz, Co-Founder and Chief Strategy Officer, Glamsquad, New York, NY  
12 Mary Needham, President, Reserve Technology Institute, Houston, Texas  
13 Xuan Yong, CEO, RigUp, Austin, Texas  
14 Amber Gunst, CEO and Head of Sales & Member Services, Austin Technology Council, Austin,  
15 Texas  
16 Justin Yancy, President, Texas Business Leadership Council, Austin, Texas  
17 Viviano Flores  
18 Rosa Flores  
19 Pamela Bratton, VP Contracts & Compliance, Meador Staffing Services, Inc., Pasadena, Texas  
20 John Glover, Attorney, Sheiness, Glover & Grossman, LLP, Houston, Texas  
21 Michael Clark & Sarah Morian, Houston, Texas  
22 Jeff Moseley, President and CEO, The Texas Association of Business, Austin, Texas  
23 David Edmonson, Executive Director, Texas & Southeast, TechNet, Austin, Texas  
24 Melanie Goggins, Compliance Manager, Lyft, San Francisco, CA  
25 Rebecca Smith, Director of Work Structures, National Employment Law Project, Seattle, WA  
26 Glenn Whitcomb, Baytown, Texas  
27 Bill Smith, Founder and CEO, Shipt, Inc., Birmingham, AL  
28 Daniel Guzman, Managing Counsel, NeighborFavor, Inc., Austin, Texas  
29 Glenn Laumeister, CEO, AllWork Inc., New York, NY  
30 Michael Inman, Owner, Auto Rescue, Lewisville, Texas  
31 Kathryn Youker, Labor & Employment Group Coordinator, Texas RioGrande Legal Aid,  
32 Brownsville, Texas, and Rebecca Eisenbrey, Staff Attorney, Equal Justice Center  
33 Susan Motley, Lawyer, Texas Employment Lawyers Association  
34 Ana Gonzalez, Policy Director, Workers Defense Project, Austin, Texas  
35 Jason Boulette, Attorney, Boulette Golden & Marin L.L.P., Austin, Texas  
36 Amy Kamp, Austin, Texas  
37 Margaret Garza, San Antonio, Texas  
38 Roel Cantu, Mission, Texas  
39 A Patterson, Dallas, Texas  
40 Heather Buen, Hurst, Texas  
41 Summer Lollie, DeSoto, Texas  
42 Mark Maldonado, Austin, Texas  
43 Jessie Casteel, Houston, Texas  
44 Bob Rankin, Austin, Texas  
45 Traci Dunlap, Austin, Texas  
46 Robert Maldonado, Cypress, Texas

- 1 David Edmonds, Cameron, Texas
- 2 Clyff Curry, Waco, Texas
- 3 Sharon Salih, Fort Worth, Texas
- 4 Rick Potthoff, Houston, Texas
- 5 Jack Janow, Lubbock, Texas
- 6 Dallas Windham, Irving, Texas
- 7 Carolyn Burton, Lewisville, Texas
- 8 Michele Chapman, Georgetown, Texas
- 9 Joshua Seff, McKinney, Texas
- 10 Bonnie MacKinnon, Georgetown, Texas
- 11 Elmer McKeegan, Flower Mound, Texas
- 12 Rusty Kuciemba, Woodville, Texas
- 13 Sean Mendoza, Fort Worth, Texas
- 14 Mary Schmidt, Devine, Texas
- 15 Paul Garza, San Antonio, Texas
- 16 Gene Lantz, Dallas, Texas
- 17 Lori Sustaita, Longview, Texas
- 18 Robert Parrott, San Antonio, Texas
- 19 Nancy Crowther, Austin, Texas
- 20 Amy Mullin, Austin, Texas
- 21 Sonia Lara, Austin, Texas
- 22 Amanda Cavazos Weems, Austin, Texas
- 23 Jacob Aronowitz, Austin, Texas
- 24 Pauline Mims, Grand Prairie, Texas
- 25 Cynthia Sanders, Pearland, Texas
- 26 Latife Bechara-Medina, Corpus Christi, Texas
- 27 Justin Bautista, Houston, Texas
- 28 Tara Havner, Abilene, Texas
- 29 Emily Carter, Wimberley, Texas
- 30 Pamela Bendix, Bainbridge Island, WA
- 31 Greg Lahner, La Marque, Texas
- 32 Kenneth Dearing, Pasadena, Texas
- 33 Jason Lopez, Austin, Texas
- 34 Rick Levy, Austin, Texas
- 35 Ellen Wakefield, Watauga, Texas
- 36 Angela Orr Heath, Dallas, Texas
- 37 Kris Bentley, Dallas, Texas
- 38 William Jordan, San Antonio, Texas
- 39 Carl Webb, Austin, Texas
- 40 Sophia Castillo, Houston, Texas
- 41 Joanna Vaughn, Austin, Texas
- 42 Erica Robinson
- 43 Phyllis Goines, Fort Worth, Texas
- 44 Enrique Mata, Houston, Texas
- 45 Rose Brown, Dallas, Texas
- 46 Jeffrey Darby, Nederland, Texas

- 1 Marsaleene Nesmith, Beaumont, Texas
- 2 Kristen O'Brien, Austin, Texas
- 3 Howard Haralson, Lipan, Texas
- 4 Phil Bunker, Austin, Texas
- 5 Daniel Stender, Seguin, Texas
- 6 Kimberly Hildreth, Dallas, Texas
- 7 Albert Dirla, Irving, Texas
- 8 Shwe Aung, Houston, Texas
- 9 Pam Evans, Kemp, Texas
- 10 Sean Forkner, Austin, Texas
- 11 Gary Peterson, Fort Worth, Texas
- 12 Stevan Ruiz, Hurst, Texas
- 13 Sam Bortnick, Dallas, Texas
- 14 Mason Cutchins, Midlothian, Texas
- 15 Bob Cash, Austin, Texas
- 16 Debra Birkholz, El Paso, Texas
- 17 Barbara Mayo, Cedar Park, Texas
- 18 James Ryan, Galveston, Texas
- 19 Linda Durden, Beaumont, Texas
- 20 Sarah Jarratt, New Braunfels, Texas
- 21 Timothy Jorgensen, Lubbock, Texas
- 22 Beverly Deutsch, Austin, Texas
- 23 Laurel Hays, Houston, Texas
- 24 Steven Sprenger, Dallas, Texas
- 25 Mary Fitzgibbon, Copperas Cove, Texas
- 26 Cathy Hazzard, San Antonio, Texas
- 27 Jo-El Onstad, San Antonio, Texas
- 28 Kay Burnett, Sunset, Texas
- 29 Earl Ehlers, La Porte, Texas
- 30 Eldon Ehlers, Houston, Texas
- 31 Daniel Wedelich, Lake Jackson, Texas
- 32 Darrell Garza, Pleasanton, Texas
- 33 Paul Arebalo Jr., Austin, Texas
- 34 Michelle Quiter, San Antonio, Texas
- 35 Jennifer Trybom
- 36 Jim Vogas, Friendswood, Texas
- 37 Scott Emerson, Communities Organized for Public Service and the Metro Alliance, San Antonio,  
38 Texas
- 39 Montserrat Garibay, Austin, Texas
- 40 Ashley Hammitt, Cedar Park, Texas
- 41 Craig Deats, Austin, Texas
- 42 James David, San Antonio, Texas
- 43 Thomas Jones, San Antonio, Texas
- 44 Michael Botson, Houston, Texas
- 45 Mark Mckim, Austin, Texas
- 46 Martha Eberle, Dripping Springs, Texas

1 Jenette Champagne, The Woodlands, Texas  
2 Jim Washington, Pearland, Texas  
3 Sarah Swallow, Austin, Texas  
4 Gary Martinez, Cedar Creek, Texas  
5 Mary Cato, Arlington, Texas  
6 Erik Garcia, Clint, Texas  
7 Ben Lilienfeld, Baytown, Texas  
8 Amanda Vermillion, Seabrook, Texas  
9 Ed Perry, New Braunfels, Texas  
10 Tom Cummins, San Antonio, Texas  
11 Linda Palomo, La Marque, Texas  
12 Craig Miller, Waco, Texas  
13 Larry Chamberlain, Midlothian, Texas  
14 Elizabeth ODear, Bellaire, Texas  
15 Henry Dietz, Austin, Texas  
16 Taneaia Lednicky, Irving, Texas  
17 Diana Adamson, Austin, Texas  
18 William Mason, Fort Worth, Texas  
19 Paul Sawyer, Dallas, Texas  
20 Jana Reid, Granbury, Texas  
21 Rebecca Rodriguez  
22 Leslie Cunningham  
23 Michael T. Milligan, Attorney, El Paso, Texas  
24 Sheri Reiter, El Paso, Texas  
25 Ruben Garza, Baytown, Texas  
26 Brian McClusky  
27 Michelle Lehman, Austin, Texas  
28 Richard Lee Griffin, Attorney, Fort Worth, Texas  
29 Tina Harris, Arlington, Texas  
30 Maria Thomas, Austin, Texas  
31 Gary Buresh, Arlington, Texas  
32 Joe Arabie, Austin, Texas  
33 Leonard Aguilar, San Antonio, Texas  
34 Joseph Arabie, Director of Field Ed and Research, Texas AFL-CIO, Austin, Texas  
35 Annette Spanhel, Driftwood, Texas  
36 Delan Decker, Thorndale, Texas  
37 Thomas Lessner, San Antonio, Texas  
38 Silvia Chicas, Houston, Texas  
39 Chris Wager Saldivar, Houston, Texas  
40 Elaine Lantz, Dallas, Texas  
41 Synthia Almanza, Baytown, Texas  
42 Peg and Bernie Jezercak, Carrollton, Texas  
43 Brian J. Miller, General Counsel, Handy Technologies, New York, New York  
44 Constance Heiland, Huntsville, Texas  
45

1 TWC hereby certifies that the adoption has been reviewed by legal counsel and found to be  
2 within TWC's legal authority to adopt.

3  
4 The rules are adopted under Texas Labor Code §301.0015, which provides TWC with the  
5 authority to adopt, amend, or repeal such rules as it deems necessary for the effective  
6 administration of TWC services and activities.

7  
8 The adopted rules affect Texas Labor Code, Title 4.

9  
10

1 **CHAPTER 815. UNEMPLOYMENT INSURANCE**

2  
3 **SUBCHAPTER C. TAX PROVISIONS**

4  
5 **§815.134. Employment Status: Employee or Independent Contractor.**

6  
7 (a) Subject to specific inclusions and exceptions to employment enumerated in Chapter  
8 201 of the Act, the **Agency and the** Commission shall use the guidelines referenced  
9 in §821.5 of this title as the official guidelines for use in determining employment  
10 status.

11  
12 (b) Notwithstanding subsection (a) of this section, in Title 4, Subtitle A of the Texas  
13 Labor Code, "employment" does not include a marketplace contractor that satisfies  
14 the requirements of paragraph (2) of this subsection.

15  
16 (1) For purposes of this subsection:

17  
18 (A) The term "digital network" means an online-enabled application or  
19 website offered by a marketplace platform for the public (including third-party  
20 individuals and entities) to use to find and contact a marketplace contractor to  
21 perform one or more needed services.

22  
23 (B) The term "marketplace platform" means a corporation, partnership, sole  
24 proprietorship, or other entity operating in this state that:

25  
26 (i) uses a digital network to connect marketplace contractors to the  
27 public (including third-party individuals and entities) seeking the  
28 type of service or services offered by the marketplace contractors;

29  
30 (ii) accepts service requests from the public (including third-party  
31 individuals and entities) only through its digital network, and does  
32 not accept service requests by telephone, by facsimile, or in person  
33 at physical retail locations; and

34  
35 (iii) does not perform the services offered by the marketplace contractor  
36 at or from a physical business location that is operated by the  
37 platform in the state.

38  
39 (C) The term "marketplace contractor" or "contractor" means any individual,  
40 corporation, partnership, sole proprietorship, or other entity that enters  
41 into an agreement with a marketplace platform to use the platform's  
42 digital network to provide services to the public (including third-party  
43 individuals or entities) seeking the type of service or services offered by  
44 the marketplace contractor.

1           (2) A marketplace contractor shall not be treated as being in employment of the  
2           marketplace platform for the purposes of Title 4, Subtitle A of the Texas Labor  
3           Code, if in contract and in fact all of the following conditions are met:

4  
5           (A) That all or substantially all of the payment paid to the contractor shall be  
6           on a per-job or transaction basis;

7  
8           (B) The marketplace platform does not unilaterally prescribe specific hours  
9           during which the marketplace contractor must be available to accept  
10          service requests from the public (including third-party individuals or  
11          entities) submitted through the marketplace platform's digital network;

12  
13          (C) The marketplace platform does not prohibit the marketplace contractor  
14          from using a digital network offered by any other marketplace platform;

15  
16          (D) The marketplace platform does not restrict the contractor from engaging  
17          in any other occupation or business;

18  
19          (E) The marketplace contractor is free from control by the marketplace  
20          platform as to where and when the marketplace contractor works and  
21          when the marketplace contractor accesses the marketplace platform's  
22          digital network;

23  
24          (F) The marketplace contractor bears all or substantially all of the  
25          contractor's own expenses that are incurred by the contractor in  
26          performing the service or services;

27  
28          (G) The marketplace contractor is responsible for providing the necessary  
29          tools, materials, and equipment to perform the service or services;

30  
31          (H) The marketplace platform does not control the details or methods for the  
32          services performed by a marketplace contractor by requiring the  
33          marketplace contractor to follow specified instructions governing how to  
34          perform the services; and.

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

38  
39          (3) This section shall not apply to any of the following:

40  
41          (A) Services performed in the employ of a state, or any political subdivision  
42          of the state, or in the employ of an Indian tribe, or any instrumentality of  
43          a state, any political subdivision of a state, or any Indian tribe that is  
44          wholly owned by one or more states or political subdivisions or Indian  
45          tribes, but only if the services are excluded from employment as defined



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in the Federal Unemployment Tax Act, 26 U.S.C. §3301 - 3311, solely by reason of §3306(c)(7) of that Act.

(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.