

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 **ON APRIL 9, 2019, THE TEXAS WORKFORCE COMMISSION ADOPTED THE RULES**
8 **BELOW WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS REGISTER.**

9
10 Estimated date of publication in the *Texas Register*: **April 26, 2019**
11 The rules will take effect: **April 29, 2019**

12
13 The Texas Workforce Commission (TWC) adopts amendments to the following section of
14 Chapter 815, relating to Unemployment Insurance, *with* changes, as published in the December
15 14, 2018, issue of the *Texas Register* (43 TexReg 8277):

16
17 Subchapter C. Tax Provisions, §815.134

18
19 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

20 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND**
21 **RESPONSES**

22
23 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

24 The purpose of the Chapter 815 rule change is to develop an employment status analysis for
25 workers who use a marketplace platform's digital network to conduct their own independent
26 businesses. Excluded from this employment status analysis would be marketplace platforms
27 regulated as Professional Employer Organizations and professional employer services under
28 Labor Code §91.001(14) and (15); temporary employees and temporary help firms as defined in
29 Labor Code §201.011(20) and (21); governmental entities, not-for-profit organizations, and
30 Indian tribes pursuant to the Federal Unemployment Tax Act; and services explicitly exempted
31 under any other state law. Also excluded would be employers or employment as described in
32 Texas Unemployment Compensation Act (TUCA) Labor Code §§201.027, 201.028, 201.042,
33 201.047, and 204.009.

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

43
44 However, by creating these exemptions from employment in Subchapter E, the legislature has
45 recognized that the unique nature of certain services requires a more tailored evaluation to
46 determine worker status. Of note, several employment exceptions enacted by the legislature

1 under TUCA, for example, Labor Code §§201.070 and 201.073, provide for modified versions of
2 the status analysis in §821.5. In adopting §821.5, TWC also contemplated that the 20-factor
3 analysis may need to be clarified in certain circumstances by including language that specifically
4 provides that “Depending upon the type of business and the services performed, not all 20
5 common law factors may apply.”

6
7 The employment status analysis is generally predicated on determining whether direction and
8 control could exist in fact or in contract. Because marketplace platforms' business models are
9 becoming increasingly prevalent in our economy, clarification, through rule, of how direction
10 and control apply in these instances is needed as it applies to unemployment insurance.

11
12 These rule amendments are adopted pursuant to TWC’s broad rulemaking authority under Labor
13 Code §301.0015(a)(6), which provides TWC with the authority to adopt, amend, or repeal such
14 rules as it deems necessary for the effective administration of TWC services and activities.

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

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

20
21 **SUBCHAPTER C. TAX PROVISIONS**

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

23
24 **§815.134. Employment Status: Employee or Independent Contractor**

25 §815.134 is amended by designating existing rule language as subsection (a) and adding new
26 subsection (b), relating to an employment status analysis for marketplace platform contractors,
27 providing for conditions under which a marketplace contractor shall be treated as not in
28 employment.

29
30 New subsection (b) defines the terms “digital network,” “marketplace platform,” and
31 “marketplace contractor,” as follows:

32
33 --“Digital network” means an online-enabled application, software website, or system offered by
34 a marketplace platform for the public (including third-party individuals and entities) to use to
35 find and contact a marketplace contractor to perform one or more needed services.

36
37 --“Marketplace platform” means a corporation, partnership, sole proprietorship, or other entity
38 operating in this state that:

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

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

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

1
2 --“Marketplace contractor” or “contractor” means any individual, corporation, partnership, sole
3 proprietorship, or other entity that enters into an agreement with a marketplace platform to use
4 the platform's digital network to provide services to the public (including third-party individuals
5 and entities) seeking the type of service or services offered by the marketplace contractor.
6

7 New subsection (b) also provides for conditions under which a marketplace contractor shall be
8 treated as not in employment. Those conditions are as follows:
9

10 --All or substantially all of the payment paid to the contractor shall be based on a per-job or
11 transaction basis;
12

13 --The marketplace platform does not unilaterally prescribe specific hours during which the
14 marketplace contractor must be available to accept service requests from the public (including
15 third-party individuals and entities) submitted through the marketplace platform's digital
16 network;
17

18 --The marketplace platform does not prohibit the marketplace contractor from using a digital
19 network offered by any other marketplace platform;
20

21 --The marketplace platform does not restrict the contractor from engaging in any other
22 occupation or business;
23

24 --The marketplace contractor is free from control by the marketplace platform as to where and
25 when the marketplace contractor works and when the marketplace contractor accesses the
26 marketplace platform’s digital network;
27

28 --The marketplace contractor bears all or substantially all of the contractor’s own expenses that
29 are incurred by the contractor in performing the service or services;
30

31 --The marketplace contractor is responsible for providing the necessary tools, materials, and
32 equipment to perform the service or services;
33

34 --The marketplace platform does not control the details or methods for the services performed by
35 a marketplace contractor by requiring the marketplace contractor to follow specified instructions
36 governing how to perform the services; and
37

38 --The marketplace platform does not require the contractor to attend mandatory meetings or
39 mandatory training.
40

41 New subsection (b) stipulates that this employment status analysis does not apply to required
42 coverage under §3304(a)(6)(A) of the Federal Unemployment Tax Act and recognizes that when
43 the marketplace platform is a state or local governmental entity, not-for-profit organization, or
44 Indian tribe, the work must be deemed “in employment.”
45

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

1
2 **Summary of comments and agency responses.**

3 The public comment period on the proposal began December 21, 2018, and ended January 21,
4 2019. There were 211 timely comments received by TWC. Of those, 13 expressed support for
5 the proposal, 2 comments were neutral, and 196 expressed concerns about the proposal. Of those
6 comments expressing concern, approximately 130 comments contained identical text. The
7 following is a summary of all public comments received, in aggregate, and corresponding agency
8 responses:
9

10
11 **Comment: Some commenters have noted that they believe the proposed rules will**
12 **have a negative impact as it relates to the Fair Labor Standards Act, Workers**
13 **Compensation, Social Security, and Medicare.**
14

15 Response: Chapter 815 of TWC’s administrative rules only pertain to its administration
16 of the unemployment insurance program. Therefore, §815.134(b) only authorizes TWC
17 to utilize this clarification of the Employee or Independent Contractor test solely related
18 to TWC’s administration of the unemployment insurance program.
19

20 **Comment: Multiple commenters have stated their belief that this rulemaking is not**
21 **within the purview of TWC.**
22

23 Response: Through Labor Code §301.001(a), the Texas legislature has tasked TWC with
24 administering the state’s unemployment compensation insurance program. Labor Code
25 §201.041 tasks TWC with determining if the service of an individual “has been and will
26 continue to be free from control or direction under the contract and in fact.”
27

28 Through Labor Code §301.0015(a)(6) and in accordance with Labor Code §201.041,
29 TWC has the same authority to provide further clarification concerning this emerging
30 business model as it did to adopt §821.5, applied to unemployment through §815.134, as
31 its official guideline for use in determining employment status.
32

33 §815.134(b) operates to provide clarification and a more tailored evaluation to determine
34 worker status as it relates to the unemployment compensation insurance program.
35 Therefore, this amendment is within the purview of TWC’s administration of the
36 program.
37

38 **Comment: Multiple commenters have stated their belief that §815.134(b) exceeds**
39 **TWC’s rulemaking authority.**
40

41 Response: Through Labor Code §301.001(a), the Texas legislature has tasked TWC with
42 administering the state’s unemployment compensation insurance program. Labor Code
43 §201.041 tasks TWC with determining if the service of an individual “has been and will
44 continue to be free from control or direction under the contract and in fact.”
45

1 Through Labor Code §301.0015(a)(6), the Texas legislature has granted TWC broad
2 authority to adopt rules it deems necessary to administer Title 4, Employment Services
3 and Unemployment. In accordance with Labor Code §201.041, TWC has the same
4 authority to provide further clarification concerning this emerging business model as it
5 did to adopt §821.5, applied to unemployment through §815.134, as its official guideline
6 for use in determining employment status.
7

8 As part of this administration, TWC has determined that the marketplace platform
9 business model has become increasingly prevalent in the Texas economy, and that all
10 parties involved would be better served by a clarification of §821.5, adapted to address
11 this growing sector as it relates to unemployment insurance.
12

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

16
17 Response: The rules would not apply to parties covered under this section of the Texas
18 Occupations Code because of the exemption provided in §815.134(b)(3)(E), that is,
19 services explicitly exempted under any other law.
20

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

24
25 Response: TWC has determined that the marketplace platform business model has
26 become increasingly prevalent in the Texas economy, and that all parties involved would
27 be better served by a clarification of §821.5, adapted to address this growing sector as it
28 relates to unemployment insurance. Section 815.134(b) will better serve the parties
29 involved in the novel and expanding “gig economy” by providing a more tailored
30 clarification of §821.5.
31

32 **Comment: Some commenters believed that the proposed rules would cause harm to**
33 **workers.**

34
35 Response: Section 815.134(b) provides clarity to the parties involved in a marketplace
36 platform business model as it pertains to unemployment compensation benefits. By
37 removing ambiguity, §815.134(b) enhances the understanding of all parties entering into
38 an arrangement under a marketplace platform business model. Section 815.134(b) is
39 designed to ensure a consistent application of the considerations relevant and applicable
40 to this working relationship. Whether the individual’s performance of the service has
41 been and will continue to be free from control or direction under §815.134(b) will be
42 determined on a case-by-case basis by TWC based upon the facts of each marketplace
43 contractor/platform working relationship.
44

45 **Comment: One commenter believed that the proposed rule would cause harm to**
46 **immigrant workers.**

1
2 Response: The commenter has not explained how the clarification in §815.134(b) would
3 incentivize the hiring of undocumented workers. Section 815.134(b) only authorizes
4 TWC to utilize this clarification of the Employee or Independent Contractor test solely
5 related to TWC’s administration of the unemployment insurance program. There are no
6 changes to residency/citizenship requirements as they pertain to the unemployment
7 insurance program.

8
9 **Comment: Multiple commenters stated their concern that the proposed rules would**
10 **allow employers to escape liability.**

11
12 Response: TWC respectfully disagrees. Marketplace platforms and contractors
13 potentially subject to §815.134(b) will still be required to meet each of the nine specified
14 conditions, which in themselves are a clarification of the test in §821.5.

15
16 **Comment: Several commenters stated the proposed rules are not consistent with**
17 **federal status tests.**

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

26
27 **Comment: Some commenters were concerned that TWC would deem a worker to be**
28 **a contractor simply because the marketplace platform had a website or other online**
29 **presence.**

30
31 Response: Section 815.134(b) would require more than the existence of a marketplace
32 platform’s website for a marketplace contractor to be considered not in employment. For
33 example, there are additional restrictions as to what constitutes a marketplace contractor,
34 nine conditions that must be met, and certain exclusions.

35
36 These rules will provide for a robust consideration of all facts and circumstances
37 applicable to the marketplace platform/contractor working relationship and help ensure a
38 consistent approach while preserving a case-by-case analysis on the precise aspects
39 present in a particular case. Whether an individual’s performance of the service has been
40 and will continue to be free from control or direction under the contract and in fact under
41 §815.134(b) will be determined by TWC based upon the unique facts of each
42 relationship.

43
44 Additionally, the following entities made specific comments that identified additional issues.
45 These comments are summarized below with TWC’s responses.

1 **The United States Department of Labor:**

2
3 **Comment: The US Department of Labor (Department) reviewed the proposed rules**
4 **as required by federal regulations and determined that they do not present a**
5 **conformity issue vis-à-vis federal unemployment compensation law. The**
6 **Department thanked TWC for taking into account the informal feedback that was**
7 **provided when TWC sought technical guidance from the Department with respect**
8 **to federal-law conformity and compliance at the inception of the proposed rule**
9 **drafting process. That technical guidance noted the following:**

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

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

25
26 **Although the Commission has given a lot of thought to this proposal, we need to**
27 **provide some important reminders. If a state excludes marketplace contractors**
28 **from coverage, contributions would not be due to the unemployment fund based on**
29 **the services, and the individuals would not be eligible to receive UC. States must be**
30 **aware that such a designation may result in negative tax consequences for**
31 **employers. For purposes of the Federal unemployment tax imposed by Section 3301**
32 **of FUTA, whether these services are in an employer/employee relationship is**
33 **determined under Federal, not state law. As such, if under the 20-factor “direction**
34 **and control” test used by the IRS to determine an employer/employee relationship**
35 **and if the services by a marketplace contractor are employment, the employer**
36 **would be required to pay the full FUTA tax (currently 6.0 percent on the first**
37 **\$7,000 paid) without any credit against the tax as no state contributions would have**
38 **been paid on the services. Whether the services are determined to be in an**
39 **independent contractor relationship under state law is not relevant to the IRS**
40 **determination.”**

41
42 **Response: TWC appreciates the review and findings from the US Department of Labor in**
43 **accordance with their responsibility under federal law.**

44
45 **Daniel Guzman, Managing Counsel, NeighborFavor, Inc., Austin, Texas and David**
46 **Edmonson, Executive Director, TechNet, Austin, Texas:**

1
2 **Comments: TWC received substantive comments from two commenters supporting**
3 **the proposed rules that raise additional issues. These comments express**
4 **appreciation for the rules stating they give marketplace platforms the certainty**
5 **needed to continue investing in Texas.**
6

7 **These commenters also requested clarification and offered suggestions to amend the**
8 **proposed rules. Their comments are as follows:**
9

10 **1. Amend §815.134(b)(1)(B)(ii) to allow for additional means of submission for**
11 **individuals with a disability.**
12

13 Response: TWC appreciates the commenters' support and responses. No changes have
14 been made in response to this comment. The suggested change to allow telephone or
15 additional communication methods would exceed the scope of coverage contemplated by
16 these rules under the definitions in §815.134(b)(1). The marketplace platform is
17 encouraged to incorporate or develop accessible technology within the constraints of a
18 marketplace platform's digital network that supports individuals with a disability such as
19 use of a smart phone's accessibility features to integrate with a marketplace platform's
20 app.
21

22 **2. Amend §815.134(b) to use the language “the public (including third-party**
23 **individuals or entities)” instead of using “public” and “third-party individuals or**
24 **entities” interchangeably.**
25

26 Response: TWC has made a change in response to this comment. To address the concern
27 of consistency, TWC has changed references to “the public (including third-party
28 individuals and entities).”
29

30 **3. Amend §815.134(b)(2)(A) to address *completion* of services instead of *performance***
31 **of services.**
32

33 Response: This provision is a clarification of §821.5 #12 “PAYMENT BY THE HOUR,
34 WEEK OR MONTH,” which states in part: “An Independent Contractor is normally paid
35 by the job, either a negotiated flat rate or upon submission of a bid.” Because the core
36 element that §815.134(b)(2)(A) seeks to address is the basis of payment, TWC will
37 remove the reference to “on the performance of services” from §815.134(b)(2)(A) as
38 originally proposed.
39

40 **4. Amend §815.134(b)(2)(B) to clarify that allowing a contractor to “voluntarily**
41 **schedule themselves does not constitute a prescription of hours.”**
42

43 Response: No changes have been made in response to this comment. This provision is a
44 clarification of §821.5 #7 “SET HOURS OF WORK,” which states in part: “A true
45 Independent Contractor is the master of his or her own time and works the days and hours

1 he or she chooses.” Any voluntary scheduling would be considered within these
2 parameters as clarified by §815.134(b)(2)(B).
3

4 **5. One commenter expressed concern that §815.134(b)(2)(H) would not allow**
5 **contractors to utilize in-app maps and guidance tools, and would disallow**
6 **community behavior standards for contractors. The commenter suggested language**
7 **“[f]or the purposes of this section, a marketplace platform shall not be deemed to**
8 **control the detail or methods for the services performed by a marketplace**
9 **contractor by maintaining deactivation standards related to health and safety, the**
10 **completion of services, and customer ratings; facilitating the provision of**
11 **instructions between marketplace participants; or enabling the marketplace**
12 **contractor to follow maps-based directions.”**
13

14 Response: No changes have been made in response to this comment. TWC will determine
15 whether a particular marketplace platform controls the details or methods for services
16 performed in such a manner that a marketplace contractor is required to follow specified
17 instructions governing performance on a case-by-case basis based upon the facts of each
18 marketplace contractor/platform working relationship. Considerations in reaching this
19 conclusion will include whether a contractor is given instructions, sets its own order of
20 work, is required to perform the services personally, and can hire helpers, though no
21 individual weight is given to a particular consideration. TWC will balance all relevant
22 details in reaching its determination under §815.134(b)(2)(H), however, TWC is unable
23 to make a predetermination on all potential permutations in rule.
24

25 **6. One commenter expressed concern that under §815.134(b)(2)(G), an insulated**
26 **bag may be considered a tool and suggested amending the language to read “[t]he**
27 **marketplace contractor is *substantially* responsible for providing the necessary**
28 **tools.”**
29

30 Response: No changes have been made in response to this comment. A contractor
31 ordinarily provides the tools, materials, and equipment necessary for the job. TWC will
32 determine whether a particular marketplace contractor has provided items which are
33 tools, materials, and equipment necessary to perform a service on a case by case basis
34 based upon the facts of each marketplace contractor/platform working relationship. TWC
35 will consider all relevant details in reaching its determination under §815.134(b)(2)(G).
36

37 **7. One commenter requested clarification that under §815.134(b)(2)(I) basic**
38 **orientation or “education on the use of the marketplace platform” not be considered**
39 **training.**
40

41 Response: No changes have been made in response to this comment. This provision is a
42 clarification of §821.5 #2 “TRAINING” and as such TWC must make its evaluation
43 under these parameters. TWC will determine whether a particular orientation or
44 “education” session would qualify as a “mandatory meeting” or “mandatory training” on
45 a case-by-case basis based upon the facts of each marketplace contractor/platform

1 working relationship. TWC will consider all relevant details in reaching its determination
2 under §815.134(b)(2)(I).
3

4 **8. One commenter suggested making an allowance under §815.134(b)(2)(A) to allow**
5 **for payment by the hour.**
6

7 Response: No changes have been made in response to this comment. This provision is a
8 clarification of §821.5 #12 “PAYMENT BY THE HOUR, WEEK OR MONTH,” which
9 states in part: “An Independent Contractor is normally paid by the job, either a negotiated
10 flat rate or upon submission of a bid.”
11

12 **Ana Gonzalez, Workers Defense Project, Austin, Texas; Kathryn J. Youker, Texas Rio**
13 **Grande Legal Aid and the Equal Justice Center, Brownsville, Texas; and Rebecca Smith,**
14 **the National Employment Law Project, Seattle, Washington:**
15

16 **Comments: TWC received substantive comments from three commenters against**
17 **the proposed rules that raise additional issues. These comments express concern**
18 **with the rules. Their comments are as follows:**
19

20 **1. Commenters expressed concern that §815.134(b) relaxes employment**
21 **classification standards and that it is less rigorous than the 20-factor test in §821.5.**
22 **There was also concern that it creates an entirely new status test that examines only**
23 **9 factors instead of 20. One commenter stated his or her belief that the proposed**
24 **rules are arbitrary, capricious, and contrary to law.**
25

26 Response: Labor Code §201.041 contains a presumption of employment. TWC
27 previously utilized its authority under Labor Code §201.041 to adopt §821.5, applied to
28 unemployment through §815.134, as its official guideline for use in determining
29 employment status. Section 815.134(b) is a clarification of §821.5. The presumption of
30 employment in Labor Code §201.041 remains as the conditions in §815.134(b) must still
31 be met to the satisfaction of TWC before it is determined a marketplace contractor is not
32 in the employment of a marketplace platform.
33

34 Section 815.134(b)(2) is not less rigorous than the standard test in §821.5. As part of the
35 adoption of §821.5, TWC included language specifying that, “Depending upon the type
36 of business and the services performed, not all 20 common law factors may apply.” The
37 rule does not require that all 20 factors apply to every business model and service, nor
38 does it designate what weight should be given to a particular factor. TWC evaluated the
39 factors applicable to the marketplace platform/contractor working relationship and
40 determined that §821.5 should be clarified to assist the parties in determining
41 employment status for this emerging economy sector.
42

43 Section 815.134(b)(2) requires that all nine conditions must be met, in contract and in
44 fact, before a marketplace contractor is not treated as being in employment for purposes
45 of the Texas Unemployment Compensation Act. Although nine mandatory conditions are
46 listed, some of these conditions integrate multiple factors from §821.5 into a single

1 element (see below). The result is a comprehensive, yet tailored, test that provides
 2 clarification for the parties.
 3

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
(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

1
2 **2. Some commenters believe the proposed rules will increase misclassification, and**
3 **that workers who would be considered employees under §821.5 will now be**
4 **considered independent contractors.**
5

6 Response: TWC respectfully notes that this comment lacks the specificity necessary to
7 address it in a substantive manner. TWC will continue to analyze employment status on a
8 case by case basis, however, that analysis will now be informed by the clarifications
9 provided under §815.134(b). Whether an individual’s performance of the service has
10 been and will continue to be free from control or direction under the contract and in fact
11 under §815.134(b) will be determined by TWC based upon the unique facts of each
12 relationship. No changes have been made based on this comment.
13

14 **3. Commenters stated that TWC does not have the statutory authority to exempt**
15 **certain sectors of the Texas workforce from the definition of employment. In a**
16 **similar vein, commenters noted their belief that the proposed rules create a broad**
17 **exception to the statutory definition in Labor Code §201.041 by removing the**
18 **presumption of employment and shifting the burden of establishing whether an**
19 **employment relationship exists from the employer to the employee. There was also a**
20 **statement that the rules would displace the centrality of the right to control.**
21

22 Response: Section 815.134(b) does not create any exemptions from the definition of
23 employment. The rules provide clarification as to how the factors in §821.5 apply to a
24 marketplace contractor/platform working relationship. Simply put, the rule outlines the
25 considerations TWC will undertake when making a case-by-case determination on the
26 issue of direction and control within this unique marketplace platform economic sector.
27

28 Through Labor Code §301.0015(a)(6) and in accordance with Labor Code §201.041,
29 TWC has the same authority to provide further clarification concerning this emerging
30 business model as it did to adopt §821.5, applied to unemployment through §815.134, as
31 its official guideline for use in determining employment status.
32

33 TWC will not grant a platform any form of automatic exception from employment. A
34 worker would be found to be in the employment of any marketplace platform that does
35 not meet the required nine conditions in contract and in fact. The presumption of
36 employment in Labor Code §201.041 remains as the conditions in §815.134(b) must still
37 be met to the satisfaction of TWC before it is determined a marketplace contractor is not
38 in the employment of a marketplace platform.
39

40 Whether the individual’s performance of the service has been and will continue to be free
41 from control or direction, under §815.134(b) will be determined on a case-by-case basis
42 by TWC based upon the facts of each marketplace contractor/platform working
43 relationship.
44

45 **4. Some commenters expressed that only the legislature has authority to clarify how**
46 **“direct & control” apply in the context of unemployment insurance to workers who**

1 use marketplace platforms. They stated these rules should be done through law and
2 not rule.
3

4 Response: The legislature specifically delegated the authority to determine direction and
5 control to TWC by passing Labor Code §201.041:
6

7 “Sec. 201.041. GENERAL DEFINITION OF EMPLOYMENT. In this subtitle,
8 “employment” means a service, including service in interstate commerce, performed by
9 an individual for wages or under an express or implied contract of hire, *unless it is shown*
10 *to the satisfaction of the commission that the individual's performance of the service has*
11 *been and will continue to be free from control or direction under the contract and in*
12 *fact.”*
13

14 Furthermore, through Labor Code §301.0015(a)(6), the legislature has bestowed TWC
15 with the broad authority to adopt rules to administer the Texas Unemployment
16 Compensation Act. TWC previously utilized this authority to adopt §821.5, applied to
17 unemployment through §815.134, as its official guideline for use in determining
18 employment status. This has greatly assisted TWC in fulfilling its statutory obligation
19 and provided clarity to the parties, just as §815.134(b) will achieve for the newly
20 emerging marketplace economy.
21

22 **5. Comments also referenced existing case law, *Critical Health Connection, Inc. v.***
23 ***Tex. Workforce Comm’n*, 338 S.W.3d 758 (2011) *Tochril, Inc. v. Tex. Workforce***
24 ***Comm’n*, No. 06-15-00078-CV, 2016 Tex. App. LEXIS 6444 (Tex. App.—Texarkana**
25 **June 17, 2016), stating that Texas courts have found workers in similar situations to**
26 **marketplace contractors to be employees. The proposed rules would therefore be**
27 **contrary to law.**
28

29 Response: TWC respectfully notes that *Critical Health Connection, Inc. v. Tex.*
30 *Workforce Comm’n*, 338 S.W.3d 758 (2011) *Tochril, Inc. v. Tex. Workforce Comm’n*,
31 No. 06-15-00078-CV, 2016 Tex. App. LEXIS 6444 (Tex. App.—Texarkana June 17,
32 2016), concern employers which are temporary help firms. Because of their status as
33 temporary help firms, these employers would not be eligible for consideration under the
34 new rules because they would be excluded under §815.134(b)(3)(D).
35

36 **6. Some commenters stated the proposed rules are contrary to the purpose of the**
37 **Unemployment Insurance program.**
38

39 Response: In accordance with a clear reading of the Labor Code §201.041, §815.134(b) is
40 a proper and necessary part of TWC’s administration of the state’s unemployment
41 compensation insurance program. Section 815.134(b) clarifies the application of §821.5,
42 providing a more tailored evaluation to determine worker status for this emerging
43 marketplace economy as it relates to the unemployment program. TWC is furthering its
44 responsibility to administer an effective program by providing this clarification which
45 will assist the parties in determining employment status for this emerging economy.
46

1 **7. Some commenters asserted that an agency’s interpretation of a statute it is**
 2 **charged with enforcing must be reasonable and not contradict the plain language of**
 3 **the statute. Their belief is that these rules are unreasonable because they establish a**
 4 **different definition of employment for network-based and brick-and-mortar**
 5 **businesses without justification or explanation.**
 6

7 Response: The presumption of employment in Labor Code §201.041 remains for both
 8 network-based and brick-and-mortar businesses. As currently stated in §821.5,
 9 “Depending upon the type of business and the services performed, not all 20 common
 10 law factors may apply.” The rule does not require that all 20 factors apply to every
 11 business model and service, nor does it designate what weight should be given to a
 12 particular factor. Since different business models and services will have different factors
 13 and weights that apply to them, it is reasonable for TWC to create §815.134(b), which
 14 clarifies the status test for this new sector of the economy.
 15

16 TWC evaluated the factors applicable to the marketplace platform/contractor working
 17 relationship and determined that §821.5 should be clarified to assist the parties in
 18 determining employment status for this emerging economy.
 19

20 Section 815.134(b)(2) requires that all nine conditions must be met, in contract and in
 21 fact, before a marketplace contractor is not treated as being in employment for purposes
 22 of the Texas Unemployment Compensation Act. Although nine mandatory conditions are
 23 listed, some of these conditions integrate multiple factors from §821.5 into a single
 24 element (see below). The result is a comprehensive, yet tailored, test that provides
 25 clarification for the parties.
 26

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
(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

Conditions	Factor(s)
(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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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

1 have different factors and weights that apply to them, it is reasonable for TWC to create
 2 §815.134(b), which clarifies the status test for this new sector of the economy.

3
 4 TWC evaluated the factors applicable to the marketplace platform/contractor working
 5 relationship and determined that §821.5 should be clarified to assist the parties in
 6 determining employment status for this emerging economy.

7
 8 Section 815.134(b)(2) requires that all nine conditions must be met, in contract and in
 9 fact, before a marketplace contractor is not treated as being in employment for purposes
 10 of the Texas Unemployment Compensation Act. Although nine mandatory conditions are
 11 listed, some of these conditions integrate multiple factors from §821.5 into a single
 12 element (see below). The result is a comprehensive, yet tailored, test which provides
 13 clarification for the parties.
 14

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
(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

Conditions	Factor(s)
(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

- 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 Breneman, 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

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

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

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

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

1 Brian J. Miller, General Counsel, Handy Technologies, New York, New York
2 Constance Heiland, Huntsville, Texas

3
4 TWC hereby certifies that the adoption has been reviewed by legal counsel and found to be
5 within TWC's legal authority to adopt.

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

10
11 The adopted rules affect Texas Labor Code, Title 4.

12
13

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

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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.