CHAPTER 815. UNEMPLOYMENT INSURANCE

ADOPTED RULES WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS REGISTER. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE TEXAS REGISTER.

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

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

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

Subchapter C. Tax Provisions, §815.134

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

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

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

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

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

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

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND
RESPONSES
(Note: Minor editorial changes are made that do not change the meaning of the rules and,
therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER C. TAX PROVISIONS
TWC adopts the following amendments to Subchapter C:

§815.134. Employment Status: Employee or Independent Contractor
§815.134 is amended by designating existing rule language as subsection (a) and adding new
subsection (b), relating to an employment status analysis for marketplace platform contractors,
providing for conditions under which a marketplace contractor shall be treated as not in
employment.

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

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

--“Marketplace platform” means a corporation, partnership, sole proprietorship, or other entity
operating in this state that:
--uses a digital network to connect marketplace contractors to the public (including third-party
individuals and entities) seeking the type of service or services offered by the marketplace
contractors;
--accepts service requests from the public (including third-party individuals and entities) only
through its digital network, and does not accept service requests by telephone, by facsimile, or in
person at physical retail locations; and
--does not perform the services offered by the marketplace contractor at or from a physical
business location that is operated by the platform in the state.
"Marketplace contractor" or "contractor" means any individual, corporation, partnership, sole proprietorship, or other entity that enters into an agreement with a marketplace platform to use the platform's digital network to provide services to the public (including third-party individuals and entities) seeking the type of service or services offered by the marketplace contractor.

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

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

-- 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;

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

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

-- 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;

-- 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;

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

-- 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

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

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

Finally, amended §815.134 is effective no earlier than April 29, 2019.
Summary of comments and agency responses.
The public comment period on the proposal began December 21, 2018, and ended January 21, 2019. There were 211 timely comments received by TWC. Of those, 13 expressed support for the proposal, 2 comments were neutral, and 196 expressed concerns about the proposal. Of those comments expressing concern, approximately 130 comments contained identical text. The following is a summary of all public comments received, in aggregate, and corresponding agency responses:

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

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

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

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

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

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

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

Response: Through Labor Code §301.001(a), the Texas legislature has tasked TWC with administering the state’s unemployment compensation insurance program. Labor Code §201.041 tasks TWC with determining if the service of an individual “has been and will continue to be free from control or direction under the contract and in fact.”
Through Labor Code §301.0015(a)(6), the Texas legislature has granted TWC broad authority to adopt rules it deems necessary to administer Title 4, Employment Services and Unemployment. In accordance with Labor Code §201.041, TWC has the same authority to provide further clarification concerning this emerging business model as it did to adopt §821.5, applied to unemployment through §815.134, as its official guideline for use in determining employment status.

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

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

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

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

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

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

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

Comment: One commenter believed that the proposed rule would cause harm to immigrant workers.
Response: The commenter has not explained how the clarification in §815.134(b) would incentivize the hiring of undocumented workers. Section 815.134(b) only authorizes TWC to utilize this clarification of the Employee or Independent Contractor test solely related to TWC’s administration of the unemployment insurance program. There are no changes to residency/citizenship requirements as they pertain to the unemployment insurance program.

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

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

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

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

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

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

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

Additionally, the following entities made specific comments that identified additional issues. These comments are summarized below with TWC’s responses.
The United States Department of Labor:

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

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

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

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

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

Daniel Guzman, Managing Counsel, NeighborFavor, Inc., Austin, Texas and David Edmonson, Executive Director, TechNet, Austin, Texas:
Comments: TWC received substantive comments from two commenters supporting the proposed rules that raise additional issues. These comments express appreciation for the rules stating they give marketplace platforms the certainty needed to continue investing in Texas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 815.134(b)(2) is not less rigorous than the standard test in §821.5. As part of the adoption of §821.5, TWC included language specifying that, “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. 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 sector.

Section 815.134(b)(2) requires that all nine 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 nine 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 that provides clarification for the parties.

<table>
<thead>
<tr>
<th>Conditions</th>
<th>Factor(s)</th>
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<td>Payment by Hour, Week, Month</td>
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<td>(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;</td>
<td>Set Hours of Work</td>
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<td>(C) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;</td>
<td>Working for More than one Firm at a Time</td>
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<td>(D) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;</td>
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<td>(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;</td>
<td>Location Where Services Performed</td>
</tr>
<tr>
<td>(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;</td>
<td>Payment of Business and Travel Expenses</td>
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<tr>
<td>(G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;</td>
<td>Furnishing Tools and Equipment</td>
</tr>
<tr>
<td>(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.</td>
<td>Instructions</td>
</tr>
<tr>
<td>(I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.</td>
<td>Training</td>
</tr>
</tbody>
</table>
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 case by case basis, however, that analysis will now be informed by the clarifications provided under §815.134(b). Whether an individual’s performance of the service has been and will continue to be free from control or direction under the contract and in fact under §815.134(b) will be determined by TWC based upon the unique facts of each relationship. No changes have been made based on this comment.

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

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

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

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

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

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

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

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

Furthermore, 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. 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.


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

Response: In accordance with a clear reading of the Labor Code §201.041, §815.134(b) is a proper and necessary part of TWC’s administration of the state’s unemployment compensation insurance program. Section 815.134(b) clarifies the application of §821.5, providing a more tailored evaluation to determine worker status for this emerging marketplace economy as it relates to the unemployment program. TWC is furthering its responsibility to administer an effective program by providing this clarification which will assist the parties in determining employment status for this emerging economy.
7. Some commenters asserted that an agency’s interpretation of a statute it is charged with enforcing must be reasonable and not contradict the plain language of the statute. Their belief is that these rules are unreasonable because they establish a different definition of employment for network-based and brick-and-mortar businesses without justification or explanation.

Response: The presumption of employment in Labor Code §201.041 remains for both network-based and brick-and-mortar businesses. 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 that 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.

Section 815.134(b)(2) requires that all nine 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 nine 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 that provides clarification for the parties.

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<td>Working for More than one Firm at a Time Full Time Required Making Service Available to the Public</td>
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<td>(E) The marketplace contractor is free from control by the marketplace</td>
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<td>platform as to where and when the marketplace contractor works and when</td>
<td>Full Time Required</td>
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<td>Payment of Business and Travel Expenses</td>
</tr>
<tr>
<td>contractor’s own expenses that are incurred by the contractor in</td>
<td>Realize Profit or Loss</td>
</tr>
<tr>
<td>performing the service or services;</td>
<td></td>
</tr>
<tr>
<td>(G) The marketplace contractor is responsible for providing the necessary</td>
<td>Furnishing Tools and Equipment</td>
</tr>
<tr>
<td>tools, materials, and equipment to perform the service or services;</td>
<td></td>
</tr>
<tr>
<td>(H) The marketplace platform does not control the details or methods for</td>
<td>Instructions</td>
</tr>
<tr>
<td>the services performed by a marketplace contractor by requiring the</td>
<td>Order of Sequence Set</td>
</tr>
<tr>
<td>marketplace contractor to follow specified instructions governing how</td>
<td>Services Rendered Personally</td>
</tr>
<tr>
<td>to perform the services; and.</td>
<td>Hiring Helpers</td>
</tr>
<tr>
<td>(I) The marketplace platform does not require the contractor to attend</td>
<td>Training</td>
</tr>
<tr>
<td>mandatory meetings or mandatory training.</td>
<td></td>
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</tbody>
</table>

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 that 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.

Section 815.134(b)(2) requires that all nine 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 nine 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.

<table>
<thead>
<tr>
<th>Conditions</th>
<th>Factor(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) That all or substantially all of the payment paid to the contractor</td>
<td>Payment by Hour, Week, Month</td>
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<tr>
<td>shall be on a per-job or transaction basis;</td>
<td></td>
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<tr>
<td>(B) The marketplace platform does not unilaterally prescribe specific</td>
<td>Set Hours of Work</td>
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<td>hours during which the marketplace contractor must be available to</td>
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<tr>
<td>accept service requests from the public (including third-party</td>
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<tr>
<td>individuals and entities) submitted through the marketplace platform's</td>
<td></td>
</tr>
<tr>
<td>digital network;</td>
<td></td>
</tr>
<tr>
<td>(C) The marketplace platform does not prohibit the marketplace contractor</td>
<td>Working for More than one Firm at a Time</td>
</tr>
<tr>
<td>from using a digital network offered by any other marketplace platform;</td>
<td>Full Time Required</td>
</tr>
<tr>
<td>(D) The marketplace platform does not restrict the contractor from</td>
<td>Working for More than one Firm at a Time</td>
</tr>
<tr>
<td>engaging in any other occupation or business;</td>
<td>Full Time Required</td>
</tr>
<tr>
<td>(E) The marketplace contractor is free from control by the marketplace</td>
<td>Location Where Services Performed</td>
</tr>
<tr>
<td>platform as to where and when the marketplace contractor works and when</td>
<td>Full Time Required</td>
</tr>
<tr>
<td>the marketplace contractor accesses the marketplace platform’s digital</td>
<td></td>
</tr>
<tr>
<td>network;</td>
<td></td>
</tr>
<tr>
<td>(F) The marketplace contractor bears all or substantially all of the</td>
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<td>contractor’s own expenses that are incurred by the contractor in</td>
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<td>Conditions</td>
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<td>(G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;</td>
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<tr>
<td>(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.</td>
<td>Instructions</td>
</tr>
<tr>
<td>(I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.</td>
<td>Training</td>
</tr>
</tbody>
</table>

**Comments were received from:**
1. Keith Ribnick, US Department of Labor
2. Rene Lara, Texas AFL-CIO, Austin, Texas
3. Gary Warren, Political Director, Central South Carpenters Regional Council, Austin, Texas
4. Alejandro Sills
5. Ben Brenneman, Business Manager, IBEW Local 520, Austin, Texas
6. Christian Brooks, General Counsel, FieldFocus, Austin, Texas
7. Al Hergenroeder
8. Virginia Clark, Houston, Texas
9. Greg Devenish, Houston, Texas
10. Anne Pearson, San Antonio, Texas
11. Marc LaRoe
12. Dennis Keel
13. R. K. Entrekin, Houston, Texas
14. Laura Stokes
15. Joshua Karam, CEO, Hyr Inc., New York, NY
16. Steven Kimbrell
17. Judy Hummel, San Antonio, Texas
18. Richard Elliott, San Antonio, Texas
19. Glenna Dawson, Houston, Texas
20. Edward Castor, San Antonio, Texas
21. Murry Cohen, Arbitrator and Appellate Advocate, First Court of Appeals Justice (Ret.)
22. Patrick T. Fogarty
23. Joe B., Houston, Texas
24. Bryan Domning
25. William B. Cockran
26. Rick Morneau
27. James Franklin, San Antonio, Texas
28. Mark Turpin, CEO, The HT Group, Austin, Texas
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Glenn Laumeister, CEO, AllWork Inc., New York, NY
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Kathryn Youker, Labor & Employment Group Coordinator, Texas RioGrande Legal Aid,
Brownsville, Texas, and Rebecca Eisenbrey, Staff Attorney, Equal Justice Center
Susan Motley, Lawyer, Texas Employment Lawyers Association
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A Patterson, Dallas, Texas
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Jason Lopez, Austin, Texas
Rick Levy, Austin, Texas
Ellen Wakefield, Watauga, Texas
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Phyllis Goines, Fort Worth, Texas
Enrique Mata, Houston, Texas
Rose Brown, Dallas, Texas
Jeffrey Darby, Nederland, Texas
Marsaleene Nesmith, Beaumont, Texas
Kristen O’Brien, Austin, Texas
Howard Haralson, Lipan, Texas
Phil Bunker, Austin, Texas
Daniel Stender, Seguin, Texas
Kimberly Hildreth, Dallas, Texas
Albert Dirla, Irving, Texas
Shwe Aung, Houston, Texas
Pam Evans, Kemp, Texas
Sean Forkner, Austin, Texas
Gary Peterson, Fort Worth, Texas
Stevan Ruiz, Hurst, Texas
Sam Borntick, Dallas, Texas
Mason Cutchins, Midlothian, Texas
Bob Cash, Austin, Texas
Debra Birkholz, El Paso, Texas
Barbara Mayo, Cedar Park, Texas
James Ryan, Galveston, Texas
Linda Durden, Beaumont, Texas
Sarah Jarratt, New Braunfels, Texas
Timothy Jorgensen, Lubbock, Texas
Beverly Deutsch, Austin, Texas
Laurel Hays, Houston, Texas
Steven Sprenger, Dallas, Texas
Mary Fitzgibbon, Copperas Cove, Texas
Cathy Hazzard, San Antonio, Texas
Jo-El Onstad, San Antonio, Texas
Kay Burnett, Sunset, Texas
Earl Ehlers, La Porte, Texas
Eldon Ehlers, Houston, Texas
Daniel Wedelich, Lake Jackson, Texas
Darrell Garza, Pleasanton, Texas
Paul Arebalo Jr., Austin, Texas
Michelle Quiter, San Antonio, Texas
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Jim Vogas, Friendswood, Texas
Scott Emerson, Communities Organized for Public Service and the Metro Alliance, San Antonio, Texas
Montserrat Garibay, Austin, Texas
Ashley Hammitt, Cedar Park, Texas
Craig Deats, Austin, Texas
James David, San Antonio, Texas
Thomas Jones, San Antonio, Texas
Michael Botson, Houston, Texas
Mark Mckim, Austin, Texas
Martha Eberle, Dripping Springs, Texas
Janette Champagne, The Woodlands, Texas
Jim Washington, Pearland, Texas
Sarah Swallow, Austin, Texas
Gary Martinez, Cedar Creek, Texas
Mary Cato, Arlington, Texas
Erik Garcia, Clint, Texas
Ben Lilienfeld, Baytown, Texas
Amanda Vermillion, Seabrook, Texas
Ed Perry, New Braunfels, Texas
Tom Cummins, San Antonio, Texas
Linda Palomo, La Marque, Texas
Craig Miller, Waco, Texas
Larry Chamberlain, Midlothian, Texas
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Henry Dietz, Austin, Texas
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Brian McClusky
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Tina Harris, Arlington, Texas
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Gary Buresh, Arlington, Texas
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Leonard Aguilar, San Antonio, Texas
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Elaine Lantz, Dallas, Texas
Synthia Almanza, Baytown, Texas
Peg and Bernie Jezercak, Carrollton, Texas
TWC hereby certifies that the adoption has been reviewed by legal counsel and found to be within TWC’s legal authority to adopt.

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

The adopted rules affect Texas Labor Code, Title 4.
CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER C. TAX PROVISIONS

§815.134. Employment Status: Employee or Independent Contractor.

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

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

(1) For purposes of this subsection:

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

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

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

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

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

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

(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.