CHAPTER 815. UNEMPLOYMENT INSURANCE

PROPOSED 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 DECEMBER 4, 2018, THE TEXAS WORKFORCE COMMISSION PROPOSED THE RULES BELOW WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS REGISTER.

Estimated Publication Date of the Proposal in the Texas Register: December 21, 2018
Estimated End of Comment Period: January 21, 2019

The Texas Workforce Commission (TWC) proposes amendments to the following section of Chapter 815, relating to Unemployment Insurance:

Subchapter C. Tax Provisions, §815.134

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed 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 §91.001(14) and (15) of the Texas Labor Code; temporary employees and temporary help firms as defined in §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) §§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 §815.134. TUCA §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, §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 proposed pursuant to TWC's broad rulemaking authority under
§301.0015(a)(6), Texas Labor Code, 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
(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 proposes the following amendments to Subchapter C:

§815.134. Employment Status: Employee or Independent Contractor
Section 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 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 third-party individuals or entities
seeking the type of service or services offered by the marketplace contractors;
-- accepts service requests from the public 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 third-party individuals or 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 the performance of services or per-job basis;

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

-- 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 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 January 1, 2019.
PART III. IMPACT STATEMENTS

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

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

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

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

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

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

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

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

Takings Impact Assessment

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

The proposed rulemaking action will not create any additional burden on private real property. The proposed rulemaking action will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the...
Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement
TWC has determined that during the first five years the proposed amendments will be in effect:
--the proposed amendments will not create or eliminate a government program;
--implementation of the proposed amendments will not require the creation or elimination of employee positions;
--implementation of the proposed amendments will not require an increase or decrease in future legislative appropriations to TWC;
--the proposed amendments will not require an increase or decrease in fees paid to TWC;
--the proposed amendments will not create a new regulation;
--the proposed amendments will limit an existing regulation;
--the proposed amendments will reduce the number of individuals subject to the rules; and
--the proposed amendments will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis
TWC has determined that the proposed rule will not have an adverse economic impact on small businesses or rural communities, as these proposed rules place no requirements on small businesses or rural communities.

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

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

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

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

The rules are proposed 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 proposed 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 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 third-party individuals or entities seeking the type of service or services offered by the marketplace contractors;

(ii) accepts service requests from the public 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 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 based on the performance of services on a per-job or transaction basis;

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

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

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

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

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

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

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

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

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

(A) Services performed in the employ of a state, or any political subdivision of the state, or in the employ of an Indian tribe, or any instrumentality of a state, any political subdivision of a state, or any Indian tribe that is wholly owned by one or more states or political subdivisions or Indian tribes, but only if the services are excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. §3301 - 3311, solely by reason of §3306(c)(7) of that Act.
(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.