

1 **CHAPTER 815. UNEMPLOYMENT INSURANCE**

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3 **PROPOSED 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.**  
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7 The Texas Workforce Commission (TWC) proposes amendments to the following section of  
8 Chapter 815, relating to Unemployment Insurance:

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10 Subchapter C. Tax Provisions, §815.134

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12 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**  
13 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**  
14 **PART III. IMPACT STATEMENTS**  
15 **PART IV. COORDINATION ACTIVITIES**  
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17 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

18 The purpose of the proposed Chapter 815 rule change is to develop an employment status  
19 analysis for workers who use a marketplace platform's digital network to conduct their own  
20 independent businesses. Excluded from this employment status analysis would be marketplace  
21 platforms regulated as Professional Employer Organizations and professional employer services  
22 under §91.001(14) and (15) of the Texas Labor Code; temporary employees and temporary help  
23 firms as defined in §201.011(20) and (21); governmental entities, not-for-profit organizations,  
24 and Indian tribes pursuant to the Federal Unemployment Tax Act; and services explicitly  
25 exempted under any other state law. Also excluded would be employers or employment as  
26 described in Texas Unemployment Compensation Act (TUCA) §§201.027, 201.028, 201.042,  
27 201.047, and 204.009.  
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29 TUCA (Chapter 201, Subchapter E) currently excludes from the definition of employment  
30 certain workers whose personal services may be performed under the control or direction of the  
31 contractor. Such workers may or may not be in employment under TWC's analysis for  
32 determining the employment status of workers as set forth in TWC's Chapter 821 Texas Payday  
33 Rules §821.5, which is used in determining employment status for the purposes of  
34 unemployment insurance through §815.134. TUCA §201.041 tasks TWC with determining if the  
35 service of an individual "has been and will continue to be free from control or direction under the  
36 contract and in fact."  
37

38 However, by creating these exemptions from employment in Subchapter E, the legislature has  
39 recognized that the unique nature of certain services requires a more tailored evaluation to  
40 determine worker status. Of note, several employment exceptions enacted by the legislature  
41 under TUCA, for example, §201.070 and §201.073, provide for modified versions of the status  
42 analysis in §821.5. In adopting §821.5, TWC also contemplated that the 20-factor analysis may  
43 need to be clarified in certain circumstances by including language that specifically provides that  
44 "Depending upon the type of business and the services performed, not all 20 common law factors  
45 may apply."  
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1 The employment status analysis is generally predicated on determining whether direction and  
2 control could exist in fact or in contract. Because marketplace platforms' business models are  
3 becoming increasingly prevalent in our economy, clarification, through rule, of how direction  
4 and control apply in these instances is needed as it applies to unemployment insurance.

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

## 10 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

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

### 13 **SUBCHAPTER C. TAX PROVISIONS**

#### 14 **TWC proposes the following amendments to Subchapter C:**

##### 15 **§815.134. Employment Status: Employee or Independent Contractor**

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

20  
21 New subsection (b) defines the terms "digital network," "marketplace platform," and  
22 "marketplace contractor," as follows:

23  
24 -- "Digital network" means an online-enabled application, software website, or system offered by  
25 a marketplace platform for the public to use to find and contact a marketplace contractor to  
26 perform one or more needed services.

27  
28 --"Marketplace platform" means a corporation, partnership, sole proprietorship, or other entity  
29 operating in this state that:

30  
31 --uses a digital network to connect marketplace contractors to third-party individuals or entities  
32 seeking the type of service or services offered by the marketplace contractors;

33  
34 --accepts service requests from the public only through its digital network, and does not accept  
35 service requests by telephone, by facsimile, or in person at physical retail locations; and

36  
37 --does not perform the services offered by the marketplace contractor at or from a physical  
38 business location that is operated by the platform in the state.

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

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

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2 -- All or substantially all of the payment paid to the contractor shall be based on the performance  
3 of services or per-job basis;

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

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

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

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

18  
19 --The marketplace contractor bears all or substantially all of the contractor's own expenses that  
20 are incurred by the contractor in performing the service or services;

21  
22 --The marketplace contractor is responsible for providing the necessary tools, materials, and  
23 equipment to perform the service or services;

24  
25 --The marketplace platform does not control the details or methods for the services performed by  
26 a marketplace contractor by requiring the marketplace contractor to follow specified instructions  
27 governing how to perform the services; and

28  
29 --The marketplace platform does not require the contractor to attend mandatory meetings or  
30 mandatory training.

31  
32 New subsection (b) stipulates that this employment status analysis does not apply to required  
33 coverage under §3304(a)(6)(A) of the Federal Unemployment Tax Act and recognizes that when  
34 the marketplace platform is a state or local governmental entity, not-for-profit organization, or  
35 Indian tribe, the work must be deemed "in employment."

36  
37 Finally, amended §815.134 is effective no earlier than January 1, 2019.

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39 **PART III. IMPACT STATEMENTS**

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

42  
43 There are no additional estimated costs to the state and to local governments expected as a result  
44 of enforcing or administering the rules.  
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1 There are no estimated cost reductions to the state and to local governments as a result of  
2 enforcing or administering the rules.

3  
4 There are no estimated losses or increases in revenue to the state or to local governments as a  
5 result of enforcing or administering the rules.

6  
7 There are implications relating to costs or revenue of the state or local governments as a result of  
8 enforcing or administering the rules. Staff anticipates a negligible impact to the Unemployment  
9 Compensation Fund due to marketplace platform digital network operators no longer paying  
10 unemployment contributions based on a status determination of "not in employment."

11  
12 There are no anticipated economic costs to individuals required to comply with the rules.

13  
14 There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural  
15 communities as a result of enforcing or administering the rules.

16  
17 Based on the analyses required by Texas Government Code §2001.024, TWC has determined  
18 that the requirement to repeal or amend a rule, as required by House Bill 1290, 85th Texas  
19 Legislature, Regular Session (2017) (to be codified at Texas Government Code §2001.0045),  
20 does not apply to this rulemaking.

#### 21 22 Takings Impact Assessment

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

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

#### 44 45 Government Growth Impact Statement

46 TWC has determined that during the first five years the proposed amendments will be in effect:

- 1 --the proposed amendments will not create or eliminate a government program;
- 2 --implementation of the proposed amendments will not require the creation or elimination of
- 3 employee positions;
- 4 --implementation of the proposed amendments will not require an increase or decrease in future
- 5 legislative appropriations to TWC;
- 6 --the proposed amendments will not require an increase or decrease in fees paid to TWC;
- 7 --the proposed amendments will not create a new regulation;
- 8 --the proposed amendments will limit an existing regulation;
- 9 --the proposed amendments will reduce the number of individuals subject to the rules; and
- 10 --the proposed amendments will not positively or adversely affect the state's economy.

#### 11 Economic Impact Statement and Regulatory Flexibility Analysis

12 TWC has determined that the proposed rule will not have an adverse economic impact on small  
13 businesses or rural communities, as these proposed rules place no requirements on small  
14 businesses or rural communities.  
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17 Mariana Vega, Director of Labor Market and Career Information, has determined that there is no  
18 significant negative impact upon employment conditions in the state as a result of the rules.  
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20 Clay Cole, Interim Director, Unemployment Insurance Division, has determined that for each  
21 year of the first five years the rules are in effect, the public benefit anticipated as a result of  
22 enforcing the proposed rules will be to provide clarity to marketplace platform businesses with  
23 respect to direction and control as it applies to unemployment insurance coverage.  
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25 TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be  
26 within TWC's legal authority to adopt.  
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#### 28 **PART IV. COORDINATION ACTIVITIES**

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30 Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce  
31 Program Policy, Attn: Workforce Editing, 101 East 15th Street, Room 459T, Austin, Texas  
32 78778; faxed to (512) 475-3577; or e-mailed to [TWCPolicyComments@twc.state.tx.us](mailto:TWCPolicyComments@twc.state.tx.us).  
33 Comments must be received or postmarked no later than 30 days from the date this proposal is  
34 published in the *Texas Register*.  
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36 The rules are proposed under Texas Labor Code §301.0015, which provides TWC with the  
37 authority to adopt, amend, or repeal such rules as it deems necessary for the effective  
38 administration of TWC services and activities.  
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40 The proposed rules affect Texas Labor Code, Title 4.  
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- (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.

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(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.

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(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.