

TEXAS WORKFORCE COMMISSION

UI TAX LETTER

TO: Unemployment Insurance Division Staff
Fraud Deterrence and Compliance Monitoring Directors
Appellate Services Division Directors

FROM: Division Director of Unemployment Insurance, Eric Holen

DATE: September 12, 2024

SUBJECT: UI Tax Letter 03-24: Revised Guidance on Commission Rule 815.134,
Employment Status: Employee or Independent Contractor
Marketplace Platform Contractors

Purpose

To provide revised guidance to agency personnel on applying Texas Workforce Commission (TWC) Rule [815.134](#) to Unemployment Insurance (UI) Tax investigations.

Background

Effective April 29, 2019, TUCA 815.134 was amended to create an exception to “employment” for marketplace contractors, providing all conditions of §815.134(b) are met.

Previous guidance closely aligned the nine (9) marketplace contractor conditions with a specific subset of the twenty common law factors. However, changes in the digital marketplace, *also referred to as the gig economy*, warrant clarification on how the analysis of some of the marketplace contractor conditions differ from their common law factor counterparts.

This letter seeks to clarify some of the questions and issues that have arisen with evaluating the marketplace platform (MPP), marketplace contractor (MPC), and exclusion factors. It also provides additional guidance on evaluating the MPP and MPC relationship under §815.134(b).

Procedure

The following procedures should be used by staff when evaluating and determining whether a business entity meets the conditions to serve as an MPP, whether an entity meets any of the exclusion factors, and whether an individual meets all of the conditions required for a MPC to be excluded from employment.

A review of the MPP rule should occur when the business entity states that they act as a MPP. If the entity does not seek a review under the MPP rule, then staff should default to reviewing under the common law factors found in [821.5](#). If the entity does not seek a review under the MPP rule but the entity appears to meet the MPP, staff will bring this review to regional management for additional review.

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Draft determinations under the MPP/MPC rule requires a review by management and UI Tax Operations (TaxOps) before a final determination is issued.

1. Evaluate 815.134(b)(1)(B)(i – iii) to determine whether the entity meets **ALL** three conditions to operate as a MPP. *Note: the conditions relate to the MPP and not to the business entity that contracts with the MPC.*

1.1 Does the entity use a digital network (an app webpage or other means of electronic listing) 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?

1.2 Does the entity accept service requests from the public (including third-party individuals and entities) only through its digital network?

In determining whether the entity accepts requests from the public it is necessary to understand whether the entity restricts who may place service requests on its digital network. If the entity only allows its clients, with whom the entity contracts or has other less formal agreements, to place requests through the digital network, that is a strong indication it is NOT offered to the public. However, if the entity restricts who may use the network to only those entities that offer the sort of work offered by the platform (manufacturing, assembly, programming, etc.) and does not exclude entities that offer that form of work, that would meet the requirement for an offering to the public. In example, a MPP that connects MPCs to manufacturing work, could refuse to accept offers of programming or health care work on the platform and still meet this condition.

An entity seeking to be a MPP may not accept service requests by telephone, by facsimile, or in person at physical retail locations. If they do, they do NOT meet this condition.

1.3 Does the entity refrain from performing the services offered by the marketplace contractor at or from a physical business location that is operated by the platform in the state?

A MPP or entity seeking to be a MPP may not itself, or through an affiliated entity, perform the same services that are offered by the marketplace contractors, at or from a physical location operated by the marketplace platform, or an affiliated entity, in Texas. In determining whether an entity is affiliated with the MPP or entity seeking to be a MPP, in this context the determination is whether they have common ownership or common management and control of the two entities.

If YES, *the entity meets ALL three conditions*, proceed to step 2.

If NO, summarize the finding that the entity does not meet the conditions as an MPP and proceed with a standard 821.5 analysis (20 common law factor test). Submit the findings and draft determination to management and UI TaxOps for review.

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2. Evaluate 815.134(b)(2)(A – I) to determine whether the MPP and MPCs meet **ALL** nine conditions for the MPCs to NOT be found in employment.”

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

Additional guidance on subsection (A)

Since 2019 and with the expansion of marketplace platforms and contractors into other industries and services, the definition of “per-job” or “transaction basis”, while still following the common law factors found in [821.5](#) has some differences.

For a MPC, hourly compensation may translate to a per-job or per transaction basis. A MPC, *who before accepting the work sets or agrees to the rate of compensation and agrees to an adjustment of the compensation offered based upon the amount of time required to complete the work* may have the functional equivalent of an hourly pay rate for a job or transaction. ***The number of hours may fluctuate (less or more) depending on the client’s needs or contract requirements.*** This differs from the factor under 821.5 where an employer pays regular amounts in stated intervals.

(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;

Additional guidance on subsection (G)

This does not prevent the business client, *not the marketplace platform*, from providing tools and equipment necessary to operate their business. Some examples include providing the marketplace contractor with and/or access to:

- equipment that is owned by the business client,
- computer and preloaded software needed to work with the clients’ systems and services,

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- equipment that is heavily regulated and/or legally required to be owned by the client, and
- equipment that requires a substantial capital investment, such as facilities, manufacturing or testing equipment, necessary to perform the services offered by the client.

(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

Additional guidance on section (H)

This condition IS specific to the marketplace platform and does NOT apply to the business client who contracts with the marketplace contractor. It is reasonable for the business client, *not the marketplace contractor*, to provide instructions on how services should be performed.

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

If YES, *the entity meets ALL nine conditions*, proceed to step 3.

If NO, summarize the findings that the individual does not meet the conditions as an MPC and proceed with a standard 821.5 analysis (20 common law factor test). Submit the findings and draft determination to management and UI TaxOps for review.

3. Evaluate 815.134(b)(3)(A - E) to determine whether any of the exclusion conditions apply.

Exclusion applies if the Services performed are:

(A) 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.
OR

(B) 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
OR

(C) performed by marketplace platforms regulated as Professional Employer Organizations and professional employer services under §§91.001(14) and (15) of the Texas Labor Code.
OR

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(D) Services performed by temporary employees and temporary help firms as defined in §§201.011(20) and (21) of the Texas Labor Code. (See Guidance for staff below for additional information.)

Additional guidance on subsection (D)

Services performed by temporary employees and temporary help firms as defined in [§§201.011](#)(20) and (21) of the Texas Labor Code.

(20) “Temporary employee” means an individual employed by a temporary help firm for the purpose of being assigned to work for the clients of a temporary help firm.

(21) “Temporary help firm” means a person who employs individuals for the purpose of assigning those individuals to work for the clients of the temporary help firm to support or supplement a client’s work force during employee absences, temporary skill shortages, seasonal workloads, special assignments and projects, and other similar work situations.

3.1. Is your business a temporary help firm?

If YES, the entity is a temporary help firm and is excluded from acting as a MPP, issue a determination, and continue with a standard 821.5 analysis (20 common law factor test)

If NO, proceed with the next step.

3.2. Ask the business what type of entity and service(s) do they provide? *Continue review*

3.3. Is there a contract agreement in place between the business and the workers or the business and the clients? *(This question is seeking to clarify if this entity is a Temporary help firm or a Marketplace Platform)*

If YES, staff obtains and reviews the agreement for details.

If NO, move on with additional review.

3.4. Does your business assign the workers *to specific companies* based on their skill set?

If YES, the entity is a temporary help firm and is excluded from acting as a MPP, issue a determination, and continue with a standard 821.5 analysis (20 common law factor test)

If NO, proceed with the next step.

3.5. Do workers select their clients?

If YES, *this is a positive indicator for MPP/MPC*, proceed with the next step.

If NO, proceed with the next step.

3.6. Are individuals required to report back after each job assignment is complete?

If YES, the entity is a temporary help firm and is excluded from acting as a MPP, continue with reviewing the 20 common law factors.

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If NO, proceed with the next step.

(E) Services explicitly exempted under any other state law.

If A, B, C, D and/or E is YES, then the entity and/or individual are excluded from MPP/MPC and proceed with a standard 821.5 analysis (20 common law factor test).

If ALL the exclusion conditions are NO, complete a summary of the MPP findings.

In both cases, submit the findings and draft determination to management and UI TaxOps for review.

Action Required

All UI Tax staff, supervisors, and managers should be aware of the information in this letter.

Inquiries

Email questions to [Tax OPS](#).

Attachments

UI Tax Letter 03-24, Attachment A

UI Tax Letter 03-19

Reference

Adopted amendments to Chapter 815, relating to Unemployment Insurance, Subchapter C, Tax Provisions, §815.134(b) effective April 29, 2019.

Tax Letter 03-19: Commission Rule 815.134, Employment Status: Employee or Independent Contractor Marketplace Platform Contractors

Chapter 821, Subchapter A, [§821.5](#) effective March 13, 2007 - Employment a Comparative Approach (Twenty Common Law Factor).

Keywords

marketplace, contractor, platform, digital, common law factor, temporary help firm

Recissions: None

Expiration: None