



**WORK SESSION OF THE
TEXAS WORKFORCE COMMISSION**

DATE

JUNE 11, 2024

1 Work Session

2 Tuesday, June 11, 2024

3 CHAIRMAN DANIEL: All right, let's call this
4 work session to order. This work session is called to order. Mr.
5 Trobman, public commenters?

6 MR. TROBMAN: No, sir.

7 CHAIRMAN DANIEL: None signed up. All right.
8 We're here today, one issue commissioners, thank you for making
9 some time for this. So, 40 Texas Administrative Code, Chapter
10 815.134, which is the marketplace platform rules, is up for rule
11 review. There's a very formal process for that. Actually, just
12 recently had a fairly significant case under this, but rather
13 than subject it to the whole rule review process—and what I mean
14 by that is just immediately put it out for public comment,
15 taking public comment and doing that, I thought we might take
16 this intermediary step, or intermediate step, to talk through
17 this rule. If there's anything that concerns us about this rule,
18 obviously then we would move to the more formal process. In
19 anticipation of this work session I did ask the Office of
20 General Counsel to just take a look at the rule, give us a
21 little bit of information about the background, where we are
22 now, what we've seen, and then what our options are for
23 reviewing this rule, how we might deal with any ambiguities, any
24 things that we might have concerns about relative to this rule,
25 how those might get addressed. So if it's OK with you guys, I

1 think what we should do here is we're going to turn it over to
2 the general counsel. Maybe just talk through the materials that
3 you prepared for us. We don't need a recitation. I mean you can
4 summarize if you want. Kind of go through that and then
5 hopefully lay out any options we have for looking at this rule
6 and doing a proper review of this rule. So I'll turn it over to
7 you, Mr. Trobman.

8 MR. TROBMAN: Thank you. Good afternoon,
9 commissioners, Mr. Serna. Of course, for the record, Les
10 Trobman, general counsel. Joining me this afternoon is Eric
11 Holen, Unemployment Insurance Division director, Sergio Lopez,
12 director of Tax, and Nelson Kerr, also of the Office of General
13 Counsel. As you're aware, Section 201.041 of the Texas
14 Unemployment Compensation Act, defines employment and empowers
15 the commission to determine whether a person's performance of a
16 service is free from control and direction of an entity under
17 contract or in fact, such that the person is not in employment
18 but rather an independent contractor. In 2019, with the growth
19 and the use of the marketplace platform model in various sectors
20 of the economy, TWC proactively promulgated rules in order to
21 provide some clarity to those who might seek to operate within a
22 marketplace platform framework. Those rules are in 40 Texas
23 Administrative Code, Section 815.134, specifically (d)(2)
24 contains a nine-part test and dictates that an entity which
25 meets these factors will be considered a marketplace platform

1 and workers providing services through the platform are being
2 considered contractors. Since this time, TWC has had the
3 opportunity to assess specific models under the nine-part test
4 through two Tax Department audits and an additional nine appeal
5 proceedings. So while this volume relatively speaking is low,
6 this five-year anniversary, the rule review process, presents a
7 good opportunity for the commission to take a look at the
8 agency's experience to date and assess areas of policy
9 clarification, which might be valuable as the marketplace
10 platform business model continues to expand into novel areas of
11 the Texas economy. So Sergio is going to provide an overview of
12 the agency's application of the marketplace platform rules to
13 date and some trends that we're seeing. Sergio.

14 SERGIO LOPEZ: Thank you, commissioners, Mr.
15 Serna. For the record, Sergio Lopez, director of Tax. Our UI
16 taxing has a long history of evaluating employment status, that
17 is, employee or independent contractor. An individual is assumed
18 to be in employment unless evidence finds otherwise. An
19 investigation under the marketplace platform which UI Tax only
20 has investigated two instances to date, could come up through a
21 regular tax audit or a wage investigation in response to an
22 unemployment claim. Now, a wage investigation occurs when an
23 individual applies for unemployment compensation and believes
24 there are missing wages from an employer. Regardless of the
25 investigation, the UI Tax team starts by determining whether the

1 individual is an independent contractor and free from control
2 under the 20 common law factors in the Texas Administrative Code
3 821.5. Depending on the type of business and the services
4 performed, not all 20 common law factors may apply. In addition,
5 the weight assigned to a specific factor may vary depending on
6 the facts of the case. So if an individual is found to be in
7 employment, not an independent contractor, the investigation is
8 done. When a business entity states that they are a marketplace
9 platform and the individual is a marketplace contractor, UI Tax
10 will investigate under 815.134. The first step is to determine
11 whether the business entity operates under and meets the three
12 conditions as a marketplace platform. If the entity is found not
13 to operate as a marketplace platform, the investigation would
14 stop. The second step is whether the services performed meet any
15 of the five exclusion conditions. This involves understanding
16 the definitions of and exclusions such as professional employer
17 organizations, temporary employees, and temporary help firms as
18 defined under Texas Labor Code 91.001 and 201.011, respectively.
19 If any of the five exclusion conditions are met, the
20 investigation stops. The third and final step is to determine
21 whether the individual meets all nine conditions as a
22 marketplace contractor. Unlike the 20 common law factors where
23 only a portion need to be met, all nine of the marketplace
24 contractor conditions must be met. Since the rule was amended in
25 2019 to include marketplace, the UI Tax Department has conducted

1 two marketplace investigations. In both cases the individuals
2 were determined not to be marketplace contractors under two
3 conditions, condition (A), that all substantially all of their
4 payment was not on a per-job or transaction basis, and condition
5 (G), that the individual was not responsible for providing their
6 own tools, materials, and equipment to perform the services. If
7 the individual is found to not meet all nine marketplace
8 contractor conditions, the investigation is stopped. And that's
9 just a quick overview.

10 MR. TROBMAN: So, commissioners, as you are
11 discussing these trends and potential areas for clarification,
12 we would suggest that your direction take the form of multiple
13 staff actions. First off, we would recommend that you would
14 direct staff to prepare some sort of guidance memorandum to
15 bring back before you all for your consideration and
16 ratification. And then, additionally, we would suggest that the
17 commission direct staff to explore future rulemaking to codify
18 any guidance that you'll eventually endorse. So with that, we're
19 available for questions that you might have.

20 CHAIRMAN DANIEL: OK. We'll just open this
21 up then to questions for general counsel and general discussion.
22 So, questions for the general counsel.

23 COMMISSIONER TREVIÑO: I don't have
24 questions but a comment.

25

1 CHAIRMAN DANIEL: Yeah. We'll definitely—so
2 let's Commissioner Treviño, let's just move to commentary. Let
3 us make our comments and then if there's discussion we'll get
4 into that discussion.

5 COMMISSIONER TREVIÑO: I think it's
6 important for staff to continue to evaluate the marketplace
7 platform based on the nine-factor test, which require all nine
8 conditions to be met in order for workers to be considered
9 independent contractors. The nine-factor test acts as a
10 clarification for staff to determine if the marketplace platform
11 rules apply. Even if the marketplace contractor exceptions
12 hasn't been met, the 20-factor common law test is still
13 applicable to determine if the individual qualifies and is an
14 independent contractor. If we adjust the nine-factor test to a
15 balancing test rather than requiring all nine conditions to be
16 met, it will substitute our rule for the common law 20-factor
17 test for determining employment status.

18 COMMISSIONER ESPARZA: For the record, our
19 points, we believe the first inquiry in a potential marketplace
20 platform case is whether the alleged employer qualifies as a
21 marketplace platform [inaudible]. First item to be excluded
22 would be whether the entity is really a temporary help firm as
23 defined under Texas Unemployment Compensation Act or is a PEO
24 under Chapter 91 of the Texas Labor Code. If either of those is
25 true then the inquiry would shift to the 20-factor test.

1 Otherwise the inquiry would shift to whether the worker is a
2 marketplace contractor. Furthermore, addressing hourly pay, we
3 should distinguish between hourly pay that is incidental to the
4 gig being offered, the offer is focused on a shift day or other
5 specific period, the offer is for the shift work pay, in which
6 case the hourly rate is secondary, as opposed to a job of
7 intermediate duration paid an hourly rate. This is important
8 because a majority of the workers in a gig economy are looking
9 for predictable gig opportunities requiring predictable amounts
10 of time but they can work on other activities without too much
11 trouble. Moving on to supervision and equipment we should
12 distinguish between supervision and equipment requirements
13 imposed by the third parties or governmental agencies and
14 supervision and equipment requirements imposed by the alleged
15 employer. It's not always the situation in which the supervision
16 and equipment are supplied to comply with the law would be
17 different from one in which the company supplies those things
18 for its own benefit and convenience. Regarding training, we
19 should distinguish between project-specific training or training
20 unrelated to the work and training that is necessary for the
21 work to know how to perform the work in question. The former is
22 frequently found in specialized projects and clients and is more
23 than a category orientation where the latter is typical of
24 employees who would be unqualified to hold themselves out as
25 independent contractors under any normal tests. We do not agree

1 that the first inquiry should be whether the worker qualifies as
2 employee under the 20-factor test. The 20-factor test would be
3 relevant if the inquiry shows that the worker does not qualify
4 as a marketplace contractor. That concludes [inaudible] the
5 record.

6 CHAIRMAN DANIEL: I would say along the same
7 lines, I think we have a limited amount of cases that we've been
8 through. It's been five years.

9 COMMISSIONER ESPARZA: Two in five years?

10 CHAIRMAN DANIEL: Well, more than that. Two
11 that came as a tax investigation, some others came relative to
12 either UI or some wages issues or something like that. It's a
13 little under a dozen, I think.

14 MR. TROBMAN: Maybe nine or 10 that came
15 through the appeal process.

16 CHAIRMAN DANIEL: Yeah, so 11 total cases
17 but here's my point. There are some specific issues that
18 continue to come up. I think Commissioner Treviño's point about
19 the 20-factor test and where it is relative to our rules, I
20 don't think anything that we're talking about today would move
21 toward your concerns. I still see this framework where the 20-
22 factor test which is really just a part of our rules, it's
23 something that's been there for a long time. We use it. It's
24 effective for us. That's really not what we're talking about
25 today. This rule put on the books in 2019, I think Commissioner

1 Esparza makes an excellent point. Once the determination is made
2 that it's not a temporary employment firm, it's not a PEO, we're
3 being asked to do this test so we do this test. I do also
4 appreciate the idea that all of the factors have to be met for
5 you to pass that particular test. A concern I have, three
6 specific concerns that I have which will mirror Commissioner
7 Esparza's are, one, the idea that an hourly rate which you offer
8 through the platform is accepted by whomever is procuring the
9 service through the platform, that hourly rate could still be
10 kind of a gig basis. For example, a plumber comes to your house,
11 they're just as likely to charge you by the hour as anything
12 else to try to figure out what the problem is. If you engage
13 with an attorney, they do in fact bill by the hour. You might
14 engage with, you know, I'm thinking about things like other
15 types of machine repair technicians so like IT services to
16 troubleshoot a problem where they don't exactly know what
17 they're looking for. They might very well charge by the hour,
18 and no one would content that these types of engagements are an
19 employment engagement. You've hired someone to perform service,
20 they come in and perform that service. I don't think we're
21 disputing the independent contractor nature of that. However, I
22 am seeing through the application of this rule, I'm seeing
23 instances where it's not quite as clearcut because it's not a
24 traditional job. It's a new job. You know, we want to see that
25 payment being on the nature of a specific completion or some

1 aspect of the gig work, and we have not to date really been
2 willing to recognize hourly work as part of that, and I think we
3 can point to a lot of types of engagements where being paid by
4 the hour would not necessarily convey some type of employment
5 relationship. I think you more or less spoke to that which is
6 there are lots of different ways for someone to get paid, and
7 getting paid by the hour doesn't necessarily negate your ability
8 to say that, hey, I'm working on a gig basis through a platform,
9 maybe multiple platforms, and I'm doing these things in addition
10 to my other job or other things that I might be working on. The
11 second point which also mirrors Commissioner Esparza's is on
12 condition (G), the provision of tools, materials, and equipment,
13 I think we're seeing instances where entities will own certain
14 types of tools or equipment where either the regulatory
15 ownership of that is so onerous that a larger entity owns that.
16 Here I'm thinking of things like I think certainly some medical
17 equipment, x-ray machines and other things that are heavily
18 regulated, MRIs, I think we want these things heavily regulated
19 but it may very well be that the technicians working on those
20 are contracted because the ability to work on that is also
21 dependent on state licensure and you can bring and do that but I
22 can think of other jobs that would be very similar. Crane
23 operators, the large cranes we see around town, often those are
24 contract crane operators. It is not their crane. That crane has
25 been leased by yet a third company but we don't consider that

1 crane operator necessarily to be in the employment of someone.
2 They're independent contractors the general contractor has
3 employed. I was thinking in terms of pilots, I'm talking about
4 ship pilots in our ports. They certainly don't own the container
5 ship or the cruise ship that they drive from the pass into the
6 dock. In fact many of them work actually for a subdivision of
7 the state but they're contracted by those entities who use them.
8 So we see instances where we know independent contractors very
9 well may work on equipment that someone else owns but that
10 should not impede on their independent contractor status and it
11 typically doesn't when we see it as a more traditional
12 independent contractor engagement. I think that the gig economy
13 and the different types of platforms that we see create more
14 opportunities for people to do that. I'm thinking in terms of,
15 if I'm thinking of like medical professionals where you work at
16 one hospital but you want to pick up extra shifts, you might do
17 that through some gig network because you don't want or can't
18 have an employment relationship. You need to do this on an
19 independent basis and so again, if we're talking about
20 equipment, if you're an x-ray technician, we don't want to
21 impede your ability to hold down your fulltime x-ray technician
22 and perhaps work as an independent contractor on the side which
23 brings me to my third point. It's about condition (H) which is
24 the control of methods of service. I will admittedly, I have
25 done additional research and changed my view on this a little

1 bit. I think there are a number of instances where the state
2 requires some specific licensure, and that specific licensure
3 requires either the supervision of or the supervision from
4 another state license. There would be instances in the medical
5 fields where you would see this. There are some instances where
6 teachers are required to have certain certifications to provide
7 supervision. You'll see this with peace officers. There are a
8 number of examples from state both law and regulation where
9 regulatory bodies require specific licensure, and the licensure
10 uses the word "supervise" but it's only for the basis of a
11 license. In other words, they're not necessarily the boss but if
12 you look at a medical relationship, nurses would operate off of
13 a chart that a doctor has prepared which means any nurse could
14 operate off of any chart that any licensed physician prepared.
15 There are other types of medical professionals but specifically
16 looking at that, the law says specifically supervision but there
17 doesn't have to be an employment relationship between that nurse
18 and that physician, neither of whom may work for the hospital in
19 which they're operating because that's just simply the
20 marketplace that we live in these days. So if we look at those
21 three areas, if we look at condition (A), payment, if we look at
22 condition (G), provision of tools, materials, and equipment, and
23 condition (H), control of methods of service, I think five years
24 ago when we went through this, I think we thought we probably
25 knew a lot about the marketplace and we did. I would submit that

1 in the last five years, technology has changed a lot about a lot
2 of marketplaces and as we get additional facts online, I think
3 we owe it to Texas to continue to just look at what that means
4 for the marketplace and whether or not we're letting people
5 actually exercise their freedom to do the things they want. That
6 is a fair point. I think statutorily it would appear to me that
7 the state of Texas says you're in employment unless proven
8 otherwise. I think that's a fair point. I'm certainly not
9 arguing that point. The statute that says that also says that
10 honestly, you're in employment unless to the satisfaction of the
11 commission that you can prove that you're not in employment. All
12 right, so the three commissioners ultimately would decide that.
13 We always have the ability to set up other entities which we've
14 done with the way we do tax reviews and audits and different
15 things that we've done. We've exercised our authorities to do
16 that so I think as the marketplace continues to evolve, I think
17 it's incumbent on us to just always be looking at the mechanisms
18 that we've set in place to do that, and when we look at
19 condition (A), condition (G), and condition (H), I'm not
20 necessarily seeing the need to change the rule at this point. I
21 think probably what would benefit a whole lot of staff that are
22 working on this throughout the agency is if there was a way and
23 I'm asking, if there's a way for us to just prepare a document
24 that kind of represents the majority will of the commission on
25 how we view what these policies mean. It is also by statute

1 staff's responsibility to carry out those policies. Our
2 responsibility ends at such time as we've enumerated our policy
3 and what we believe that policy to mean. At that point it
4 becomes the executive director's responsibility to carry that
5 out and I'm suggesting that is there a mechanism by which we can
6 issue some written clarification of where we are much like an
7 order of the commission. We would probably want to vote on that
8 in open meeting, I think. I think that's probably the most
9 proper way to handle that. Is that a possibility? Is that
10 something that we could do?

11 MR. TROBMAN: I think as a vehicle it is. I
12 do think that depending on the types of specific changes we're
13 talking about, it may be prudent to follow that up with an
14 intent to codify [inaudible] in our rules because there will be
15 some—there are gray areas and I do think that there's enough
16 gray area certainly when we're talking about (A) and (G) to
17 provide that further explanation on how we interpret the per-job
18 and the hourly component as well as tools that may be not
19 legally or practically provided by a worker but I do think that
20 in the short term, I do think that the commission adopting a
21 guidance memorandum that is provided publicly facing is a
22 vehicle that could be [inaudible].

23 CHAIRMAN DANIEL: I think as we approach
24 this, just us being cognizant of the fact that marketplace is
25 going to be changing. There very well may come a day when

1 something is either antiquated or no longer applicable. I don't
2 think we're at that point now. That's why I'm really thinking if
3 we can clarify what these rules mean, I think we save a lot of
4 trouble of going through rulemaking only to end up exactly where
5 we are right now. I don't want to preclude that if that's what's
6 necessary but I think here it's just us acknowledging that in
7 five years the marketplace actually has continued to shift,
8 technology has continued to drive things in a different
9 direction, people have a lot more choices for different types of
10 revenue generation than they've ever had, and you see people
11 engage in lots of different combinations. I don't think it's an
12 unusual scenario where someone may engage in employment and at
13 the same time engage in gig work either outside their employment
14 hours, on the weekends, whatever the case may be, and I don't
15 want to put people's ability to do either one of these things in
16 jeopardy. It goes without saying the commission also has a
17 responsibility to ensure that employers are acting in good faith
18 in the marketplace. I think there is somewhat of an enforcement
19 concern here, and I don't think us doing this type of
20 clarification memorandum in any way impedes our ability to
21 address our efforts to ensure employers continue to operate in
22 good faith, and then people, hopefully they'll maintain their
23 freedoms to do what they feel they can do certainly within the
24 confines of the law to earn some kind of money for themselves
25 and their family, right? So I think we're trying to strike some

1 balance here and just recognize the realities of the marketplace
2 which is there will be at times things that seem more ambiguous
3 than rules that we put in place 25, 30 years ago. That's
4 probably true, and so taking an opportunity to clarify that here
5 with a rule that's five years old that was an attempt to clarify
6 those same rules, I don't think that's a bad thing. Gentlemen, I
7 don't want to monopolize the conversation. If there's other
8 thoughts or concerns, certainly I think we should probably at
9 least get that on the table now because I think where I'm headed
10 is we're going to ask the general counsel's office to start
11 preparing the basis of this memorandum in an attempt to bring
12 this back to the commission for a vote during one of our
13 regularly scheduled commission meetings.

14 COMMISSIONER ESPARZA: What's the timeframe
15 on some of these—are we on a deadline [inaudible]?

16 CHAIRMAN DANIEL: We don't have any
17 particular deadline. If we're going to do some kind of
18 rulemaking, we probably need to get that initiated by mid-July
19 if we're really going to kind of get that wrapped up before the
20 legislative session starts which everybody would want so if we
21 think we have to move to rulemaking in July, if not, I think we
22 have the summer to get this done. Does that seem reasonable?

23 MR. TROBMAN: Yeah, I think and starting the
24 rulemaking in July would be running into the late fall just
25 anticipating the way that rulemaking of this nature might go so.

1 CHAIRMAN DANIEL: There will be a lot of
2 public comment if-

3 COMMISSIONER ESPARZA: [Inaudible]
4 opportunity.

5 MR. TROBMAN: But certainly again we would-
6 pursuing the guidance memorandum type of a vehicle, we would
7 recognize that rulemaking will follow.

8 CHAIRMAN DANIEL: But not this year.

9 MR. TROBMAN: But not this year.

10 CHAIRMAN DANIEL: So perhaps at a later
11 time.

12 MR. TROBMAN: We would be able to gain the
13 benefit of course not only of this guidance memorandum being out
14 there but-

15 CHAIRMAN DANIEL: Who knows, there may very
16 well be legislative work on that. I think it's safe to say that
17 there are a number of interested parties in this and they may
18 choose to go take their concerns to the legislature which that's
19 how the Constitution in this state works so there may be things
20 coming out of the legislative session that we want to consider
21 as well so maybe this memorandum kind of puts us in a position
22 to do that, understand where we are, see what the legislature
23 chooses to do, and then come back maybe next summer in a better
24 position to do that kind of rulemaking.

25 COMMISSIONER ESPARZA: Understand, OK.

1 COMMISSIONER TREVIÑO: I like that guidance
2 memo and rulemaking guidance that we could call on.

3 COMMISSIONER ESPARZA: My only question I
4 think was the timing of it, was to clarify the order of the
5 issue, whether or not we issue a ruling or a rule, we submit
6 that, the legislature basically codifies it, and then we adjust
7 from there again after—if legislation is passed or adopted.
8 Obviously, we'll follow but we also serve as a resource for that
9 too so I think that's what we're providing, is the resource,
10 kind of the expert points.

11 CHAIRMAN DANIEL: So we're clarifying a rule
12 we already passed for the benefit of our staff. Certainly we're
13 obviously doing that in daylight because that's the way—that's
14 the best way to do it frankly. Staff will use that. I think it
15 does clarify the commission's position on a five-year-old rule.
16 If the legislature decides they're interested in this and there
17 is legislation on that, you're right, we'll be a resource on
18 that. I think where that brings us is whether the legislature
19 does or doesn't take this issue up, next summer we'll come back
20 around to this issue. We'll see if our guidance memorandum has
21 in fact clarified what I think all of us feel like might be some
22 murky ground, and then we'll know the need for additional
23 rulemaking at that point. I see prudence in waiting to see what
24 the legislature chooses to do solely because if they do, then we
25 just have to start rulemaking all over again. At least in this

1 way I think we can address an issue. Our issues were the same.
2 Commissioner Treviño had some additional concerns that I think
3 can be clarified and I think we can solve the issue for our
4 staff kind of understanding what we believe this rule means, and
5 then it's not really kicking the can down the road, it's
6 positioning us better next summer to deal with both that and
7 whatever legislative action may or may not takes place.

8 MR. TROBMAN: In terms of timeframe, we
9 certainly at the staff level be prepared to get to work
10 immediately and certainly in the next couple months get it
11 [inaudible].

12 CHAIRMAN DANIEL: So something like this
13 will not be open to public comment. There's not a process for
14 that but I would anticipate that each commission office may very
15 well receive communication from interested parties, whether they
16 be businesses, maybe some marketplace platforms, maybe some
17 business associations in the state. I've heard from several
18 people on this issue. I would assume then it's up to each
19 individual office as they work with their various constituencies
20 to incorporate those thoughts into our daily work which is part
21 of our responsibility to the state as well. It will not be
22 posted for public comment on the website or anything like that
23 so if the public wants some direct access, you know, if the
24 public wants it, I'm your guy. If the employers want it or if
25 labor folks want to comment on this, I assume they'd go through

1 their commissioners but mostly you can write the whole
2 commission any time you want to so there's lots of ways to
3 communicate with us and there's lots of entry points into this
4 agency. Am I understanding that part correctly?

5 MR. TROBMAN: Absolutely, and I think that
6 when we do bring this to you all in an open meeting, there will
7 be the opportunity as there always is to provide comment at that
8 time. The commissioners are bringing forward for you all to
9 discuss variations on what staff puts together, obviously
10 there's the opportunity to have comments before you before we
11 take any sort of action there.

12 CHAIRMAN DANIEL: OK, great, so there will
13 be an opportunity for direct public input. That's good. That's
14 what I wanted to hear. All right, any other comments, concerns.

15 COMMISSIONER ESPARZA: Not from me.

16 COMMISSIONER TREVIÑO: Nothing I can think
17 of right now.

18 CHAIRMAN DANIEL: All right. Everybody's
19 good? All right. Let's entertain a motion to adjourn this work
20 session.

21 COMMISSIONER TREVIÑO: Chairman, I move we
22 adjourn this work session.

23 COMMISSIONER ESPARZA: Second.

24 CHAIRMAN DANIEL: It's been moved and
25 seconded to adjourn and we're adjourned. Thank you all.

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