



**WORK SESSION OF THE  
TEXAS WORKFORCE COMMISSION**

**DATE**

**SEPTEMBER 11, 2024**

1 Wednesday, September 11, 2024

2 CHAIRMAN DANIEL: Good afternoon, everyone.  
3 This work session is called to order. We need to check on public  
4 comments.

5 MR. TROBMAN: No, sir.

6 CHAIRMAN DANIEL: No public commenters.  
7 Let's jump right in then. We're here today to talk specifically  
8 about 40 TAC Chapter 815.134 which is the marketplace contractor  
9 platform. We met in June on this. We took a good look at the  
10 issue. I thought we had a good conversation. Everybody went on  
11 the record with what was some exceptional information. It asked  
12 staff to go back and take a look at this to parse our  
13 statements, try to find some commonalities of policy in there  
14 and look to see if any type of communication needed to go out to  
15 the offices here at TWC at large. It is my understanding staff  
16 has a document to present. I've actually seen it. It's good. Mr.  
17 Trobman, I'll just hand it over to you and present the document,  
18 any context you want to give. Obviously, there will be some  
19 discussion.

20 MR. TROBMAN: Yes, sir. Well, you know, over  
21 the summer we have developed a draft tax department's guidance  
22 documents. It's in the form a UI tax letter. It's primarily  
23 designed to guide our tax staff and other staff who touch the  
24 evaluation process when evaluating business models and applying  
25 our agency marketplace platform rules. This document will be

1 disseminated across that audience. They will also be trained  
2 specifically on the application of this guidance to ensure both  
3 uniformity and consistency in all of the decision making that's  
4 going on with these types of applications. We're confident that  
5 the issuance of this document and the associated training will  
6 yield the positive results you all are looking for to help align  
7 our rules with this critical segment of our state's economy. So  
8 with that I'll turn it over to Sergio who can walk through some  
9 of the nuts and bolts here.

10 SERGIO LOPEZ: Thank you, sir. Appreciate  
11 it. For the record, Sergio Lopez, director of unemployment  
12 insurance tax department. Presented for your consideration and  
13 approval is Unemployment Insurance Tax Letter 3-24. The letter  
14 will provide revised guidance to staff who are evaluating and  
15 determining on a business entity meets the conditions of the  
16 marketplace platform. Texas Administrative Code 815.134 was  
17 amended in 2019 to create an exception to employment for  
18 marketplace platform and contractors. At the time we issued a UI  
19 Tax Letter 3-19, which provided guidance to staff on  
20 [inaudible]. As the marketplace platform and contractor  
21 landscape evolved it became necessary, basically, to provide  
22 revised guidance to staff. The letter expands on a few areas  
23 especially three of the nine marketplace platform divisions,  
24 specifically A, G, and H. A reads that all or substantially all  
25 of the payments made to the contractor shall be on a per-job or

1 transaction basis. Revised guidance is that hourly wage may  
2 translate to a per-job or transaction basis. G reads the  
3 marketplace contractor is responsible for providing the  
4 necessary tools, materials, and equipment. The tax letter  
5 clarifies that tools and equipment may be provided by the client  
6 who engaged the marketplace contractor. H reads the marketplace  
7 platform does not control the details or methods for the  
8 services performed by a marketplace contractor. Like G, the  
9 revised guidance makes it clear that it is acceptable for the  
10 client who engaged the marketplace contractor to provide  
11 instructions and direction. The UI letter, UI tax letter, also  
12 provides a high-level decision flow for the staff and emphasizes  
13 that the initial investigation and draft determination must be  
14 submitted to our UI tax operations team for a quick review,  
15 sorry, for a quality review and approval for that final  
16 determination. The Tax Letter 3-24, if approved, will proceed  
17 with training UI tax accounts examiners on the revised guidance.  
18 So that concludes my presentation. I'm available for questions.  
19 Thank you.

20 CHAIRMAN DANIEL: All right. Any comments or  
21 questions?

22 COMMISSIONER TREVIÑO: My comment would be  
23 that I'd like to thank staff first of all for the work in  
24 developing guidance and applying Texas Workforce Commission rule  
25 815.314 to unemployment insurance tax investigations. It's

1 crucial that staff continue to ensure that online marketplace  
2 contracting conditions are fully met to determine the existence  
3 of an independent contractor relationship. I believe that the  
4 proposed UI tax letter will provide valuable assistance in  
5 evaluating these cases and help the commission to adapt to the  
6 evolving digital marketplace. However, I'm concerned that some  
7 of the businesses might misrepresent themselves as marketplace  
8 platform to avoid full employment, which could impact the  
9 state's economy. Therefore, it's essential for the commission to  
10 provide clear internal guidance on applying marketplace platform  
11 rules. Additionally, these matters should be assessed on a case-  
12 by-case basis and I support the guidance outlined in the tax  
13 letter to aid staff in evaluating marketplace exemptions  
14 effectively.

15 COMMISSIONER ESPARZA: I've got some  
16 information I want to add to the record. Obviously, thank you  
17 very much staff, Eric, you guys, for catching me up especially  
18 the first work session was on the marketplace issue here and  
19 along with that and our team here led by Tommy Simmons on the  
20 tax cases that we go through [inaudible]. So, thank you all very  
21 much for that. Also, I'd like to thank Michael Britt for showing  
22 up in the meeting here too. I appreciate, always appreciate his  
23 support and his presence. So we got that. Ideally, and one more  
24 thing. The remarks and the items we have a lot of work has been  
25 done to get to where we're at. I think where I'm going to end

1 here is one minor concern that we want to address. Maybe we can  
2 have that conversation. Definitely, I thank Tommy for his  
3 experience, his guidance, but it's also his birthday. If I could  
4 take a moment of personal privilege thanking Tommy and happy  
5 birthday, Tommy. I'd love to nominate him for the nicest, most  
6 helpful person in the state. I get to answer a phone call, it's  
7 an employer with an issue, transfer over to him and I'll sit in  
8 with that conversation and listen to him. At the end of the  
9 conversation the employer or the person having the problem  
10 always says great things about Texas because of the information  
11 they get from Tommy, so thank you for that. My remarks are as  
12 follows. Would like to thank TWC staff, obviously, especially  
13 our General Counsel's office. Definitely appreciate the work  
14 that we're going into that. Specifically, after the analysis of  
15 the marketplace contractor case and the work that they did  
16 preparing the tax letter, we would like to identify the  
17 attention that was following clarifications. Point one, the  
18 analysis that we're talking about in this letter will start out  
19 with whether an entity with a digital platform meets three  
20 conditions before—for being a marketplace contractor. I think I  
21 would love to work with Commissioner Treviño ensuring that the  
22 right businesses are using this for that concern. In the next  
23 step, point two, analysis of whether the worker satisfied the  
24 nine-point test in the rule for being a marketplace contractor,  
25 the first point in the tax letter properly distinguishes between

1 employees who apply for an hourly position of indefinite  
2 duration on an ongoing basis and the marketplace contractors who  
3 are looking for individual gigs, i.e., discrete shifts or blocks  
4 of time that result in specific and limited amount of  
5 compensation. Item three, the tax letter's explanation for the  
6 tools, materials, and equipment factor is very useful in that it  
7 sets the unique expensive fixed and often regulated equipment at  
8 client locations apart from the kind of tools that workers use  
9 to work on equipment or perform ordinary tasks so we want to  
10 make sure that we're looking at the big equipment that just  
11 can't be moved and plugged in at any of the other fashion,  
12 medical equipment that needs to be certified. Point four, the  
13 explanation for instructions from the client is reasonable and  
14 in line with our discussion during the last work session on the  
15 rule. The only reservation to, and we'll conclude with this, is  
16 the letter—in the letter is that the explanation for the ninth  
17 factor, i.e., a requirement to attend mandatory meetings of  
18 training could use some clarification. Specifically during a  
19 particular client engagement, a need could arise for clients to  
20 call a special meeting for safety or other critical purpose. In  
21 such a situation it would not be unreasonable for the client to  
22 expect all workers physically located at the workplace to attend  
23 the meeting in order to receive instructions related to a  
24 particular safety or emergency need. Other than that, I believe  
25 that the draft tax letter is a good starting point for that

1 discussion but again, I think we want to make room for the  
2 ability to call people in again to adjust to the environment, to  
3 adjust to safety issues in and around workplace, and I think  
4 that's something that maybe we can get language to allow for  
5 something like that to take place.

6                   CHAIRMAN DANIEL: So I'm hearing a lot of  
7 agreement that the tax letter that's been prepared and that you  
8 would issue does go a long way toward clarifying I think just  
9 some changes that have happened in the marketplace since that  
10 original rule was passed in 2019. I think these types of  
11 evolution on the marketplace are just something that we're going  
12 to have to contend with. Technology makes everything move faster  
13 and I think we probably, as a commission, the three of us need  
14 to probably convene work sessions more often to discuss changing  
15 marketplace conditions. I don't think you put something in place  
16 and just anticipate that that will be the rule that we want to  
17 operate under for the rest of time. I just don't think that's  
18 reality. I don't think it works like that. You know, I think  
19 that what I saw in the draft letter and the one that likely  
20 would be the bulk of what goes out, I think that's very helpful  
21 in getting some clarification for some things that we've  
22 targeted right now. I would ask Mr. Serna to help make sure that  
23 the concepts that we see in that paper are fully operationalized  
24 across the whole agency. It's not really just the tax  
25 department. There are other people that are working on issues



1 like this and I think we need to do that. I think about in June  
2 some of the legal rationale that was laid out by Commissioner  
3 Esparza at our first work session, and then I've seen  
4 incorporated into this tax letter, I think again the equal  
5 application of that to any type of employment status question  
6 that comes under TWC's jurisdiction, I think this information  
7 goes a long way to answering those types of questions. I don't  
8 think we should just probably blindly apply any kind of  
9 technical interpretation of regulation without considering the  
10 realities of business operations and relationships. Just in the  
11 time I've been here, just in the few tax cases that make it to  
12 the commission that we see, I saw a case where the state  
13 required training, not the employer, not the marketplace  
14 platform. It was the state of Texas that required the training.  
15 Our staff, in my opinion, was confused as to this fact. I think  
16 this letter goes a long way toward clarifying that. I think the  
17 way people get paid has changed. We say payment on a  
18 transactional basis in the original rule. That is going to be  
19 hourly. Think about all the lawyers, Mr. Trobman, that are  
20 running around making hourly wages. My daughter's a lawyer. I  
21 know what her hourly wage is. It's pretty high at some firms and  
22 so it's one of those things that if transactional is kind of  
23 like the basis of what business you're doing, what kind of shift  
24 it is or what kind of job it is or what kind of total conclusion  
25 there is, and I think that just because it's an hourly wage,

1 it's really not necessarily [inaudible] employment and I think  
2 that the clarification given in the proposed tax letter I think  
3 goes a long way toward us admitting the realities of the  
4 marketplace which is people get paid a lot of different ways,  
5 and when it's a set job for a set time but the wage is  
6 calculated hourly, that might not be in employment or it might  
7 be, and our professionals have to make that decision. They need  
8 the tools that they need to make that decision. It's already  
9 been mentioned but I've seen a couple cases over the years of  
10 tools, materials, equipment on site, and sometimes the law  
11 requires that only a certain person can own that. Sometimes the  
12 cost of that equipment dictates that somebody else is going to  
13 own it. There's a lot of leased equipment in this world. This is  
14 not a simple question anymore. I think you guys probably nailed  
15 it on giving some flexibility on what it is to own that  
16 equipment, and then supervisory relationships was actually a big  
17 sticking point for me. When the state of Texas requires a  
18 supervision, that's not the same as occupational supervision.  
19 It's just not, and I'm not sure five years ago when this rule  
20 went into effect, I'm not sure that was as pertinent a point as  
21 it is today. A lot of things have changed about the workplace,  
22 and I think we probably are wise to acknowledge that. And then  
23 we've already talked about the training issue. I don't think I  
24 need to bring that up. I will also say that I'm pretty open to  
25 bringing the full rule back up for discussion and revision,

1 probably not right now, probably not until next summer would be  
2 the earliest we would want to do that. I still think it's  
3 prudent we give the legislature time to work on this. There are  
4 still dissatisfied marketplace contractors. There are still  
5 dissatisfied contractors who work via those platforms. There are  
6 still dissatisfied businesses who use the services of those, and  
7 consumers that use the services of those, and I think they do  
8 deserve an opportunity to talk to their legislative member,  
9 House member, Senate member, and give the legislature an  
10 opportunity to weigh in on that but by next summer we may want  
11 to bring up this section again. We may even want to think about  
12 our 20-factor test. That poster was put in there a long, long  
13 time ago. Perhaps it's still germane in its current form.  
14 Perhaps it deserves some discussion. Perhaps we should take a  
15 look at it so I think our look at this might even move past  
16 marketplace contractors and just move into what is the  
17 commission's view of employment since the statute vests us with  
18 deciding that but we also have to really get that policy laid  
19 out so staff can execute on that policy in a way that's fair to  
20 the people of Texas but also to the employers, also to the  
21 employees and the folks that will be using that. So maybe by  
22 next summer we'll certainly know what the legislature will have  
23 done relative to this. We may want to bring all this back up for  
24 discussion. The only other thing I'd say is the Open Meetings  
25 Act places some restrictions on the time I spend with Tommy but

1 the time I have spent with him, he is a quite personable  
2 individual and I do wish him a happy birthday as well. Anything  
3 else anybody want to add at this time? I would just say I would  
4 have had Michael Britt bring a presentation but his tie is way  
5 too subdued today and I don't feel like that—I think it  
6 signifies some lack of preparation for this meeting. Eric will  
7 be declared the tie winner of the day. Any other order of  
8 business? Oh, one other thing. Sergio, I do want to address  
9 this. The commission does not need to approve this letter.  
10 That's up to the executive director. We made our policy position  
11 known. This is a purely operational matter. This is the  
12 executive director's opportunity to inform his staff as to how  
13 he wants the commission's policies carried out. I would say that  
14 based on what I saw in the letter that the executive director I  
15 think intends for the division director and the UI division to  
16 approve this letter, and so at this point I've heard no  
17 objections from the commissioners, only points for future  
18 discussion. I would say to you, Mr. Serna, please proceed with  
19 due haste. I think this is a good clarification. It's a good way  
20 for our staff to have all the facts at hand, and we'll move  
21 forward into the spring, and then the potential to pick this  
22 back up next summer I think is pretty high but I think this is a  
23 real good intermediary step to make sure we stay on the right  
24 road. If there's nothing else, I'd entertain a motion to  
25 adjourn.

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COMMISSIONER TREVIÑO: I move to adjourn.

COMMISSIONER ESPARZA: I second.

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