

PART XX. Texas Workforce Commission

CHAPTER 821. Texas PayDay Rules

The Texas Workforce Commission proposes new §§821.1-821.6, 821.21-821.28, 821.41-821.46, 821.61-821.63 and 821.81, concerning Payment of Wages. The proposed rules interpret and clarify the provisions of Texas Labor Code, Chapter 61, Payment of Wages.

The Commission administers the investigation, determination and collection of unpaid wages for employees. This program is an administrative alternative to litigation in Texas courts.

Subchapter A of the proposed rules contains provisions of general application relating to the title and purpose of the rules, definitions of terms, jurisdiction and the relation of Texas Labor Code, Chapter 61, to other wage and hour laws. Subchapter B of the proposed rules interprets and clarifies statutory provisions relating to the form and delivery of wages, the timeliness of payment, fringe benefits and commissions, treatment of loans and advances, and withholding wages. Subchapter C of the proposed rules interprets and clarifies statutory provisions relating to various stages in the administrative wage claim process. Subchapter D of the proposed rules addresses the wage collection process. Finally, Subchapter E of the proposed rules sets out the Commission's policy on requiring bonds of certain employers.

Randy Townsend, Director of Finance, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

LaSha Barefield, Deputy Director of Labor Law Enforcement, Education & Regulation, 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 rules will be to provide a clear understanding of the rules implementing and interpreting the provisions of the Texas Labor Code, Chapter 61, Payment of Wages.

There will be no effect on small businesses.

There are no anticipated economic costs to persons who are required to comply with the proposed rules.

Comments on the proposed rules may be submitted to LaShea Barefield, Labor Law Enforcement, Education and Regulation Department, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001; telephone number (512) 837-9559; facsimile number (512) 834-3632; e-mail address

LaShea.Barefield@twc.state.tx.us.

The Commission will schedule a public hearing on the proposed rules to follow the Commission's regularly scheduled meeting on February 10, 1998 in Room 644 of the TWC Building at 101 E. 15th Street in Austin, Texas.

SUBCHAPTER A. General Provisions

40 TAC §§821.1-821.6

The new rules are proposed under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

The proposed new rules affect the Texas Labor Code, Title 2, and Texas Labor Code, Chapter 61, Payment of Wages.

§821.1. Title and Purpose.

(a) Title. These rules may be cited as the Texas Payday Rules.

(b) Purpose. The purpose of these rules is to implement and interpret the provisions of the Texas Labor Code, Chapter 61, Payment of Wages.

§821.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Act -- Texas Labor Code, Chapter 61, also known as the Texas Payday Act or the Texas Payday Law.

Claimant -- A person who has filed a wage claim under the Act.

Commission -- The Texas Workforce Commission.

Court of competent jurisdiction -- a court authorized to issue an order including, but not limited to, a legislative or statutory county court at law, district court, small claims court, or federal court that acts within the appropriate jurisdiction over the amount in controversy, the person, and other appropriate subject matter.

#### §821.3. Jurisdiction.

(a) The Commission shall exercise jurisdiction over wage claims in which:

- (1) the work is performed exclusively in Texas;
- (2) the work is performed in part in Texas and in part in other states within the United States and where the wages would be reportable to Texas for Unemployment Insurance purposes pursuant to Texas Labor Code §201.043; or
- (3) the work is performed by an individual who is a Texas resident at the time the work is performed and the work is performed outside Texas for a Texas employer or a non-resident employer over whom Texas exercises jurisdiction pursuant to subsection (b) of this section.

(b) The Commission shall exercise jurisdiction over a non-resident employer pursuant to the Texas Civil Practice & Remedies Code, Chapter 17, Subchapter C, also known as the "Texas Long-Arm Statute," when all three of the following are met:

- (1) the employer purposely does some act or consummates some transaction in Texas;
  - (2) the wage claim arises from the employer's act or the employer's contact with Texas is continuing and systematic; and
  - (3) exercising jurisdiction is consistent with:
    - (A) fair play and justice as determined by the quality, nature and extent of the employer's activities in Texas including the extent to which the employer avails itself of the benefits and protections of Texas law; and
    - (B) the relative convenience of the parties.
- (c) The Commission shall not exercise jurisdiction over wage claims to the extent the wages are for work performed outside the United States.

#### §821.4. Political Subdivision.

(a) An entity is a political subdivision of the state, and therefore not an employer under the Act, if it meets the criteria in either subsections (b) or (c) of this section.

(b) An entity is a political subdivision of this state if it is a governmental unit having:

- (1) the power to tax real and tangible personal property;
- (2) limited geographic and jurisdictional boundaries;
- (3) locally elected or locally appointed governing members; and
- (4) the authority to provide a general public service or benefit.

(c) An entity is a political subdivision of this state if the entity is so designated by Texas statute.

(d) Entities that are political subdivisions of this state include, but are not limited to:

- (1) cities;
- (2) counties;
- (3) school districts;
- (4) junior college districts;
- (5) levee improvement districts;

- (6) drainage districts;
- (7) irrigation districts;
- (8) water improvement districts;
- (9) water control and improvement districts;
- (10) water control and preservation districts;
- (11) freshwater supply districts;
- (12) navigation districts;
- (13) conservation and reclamation districts;
- (14) soil conservation districts;
- (15) municipal utility districts;
- (16) river authorities; and
- (17) other similar entities.

§821.5. Employment Status: Employee or Independent Contractor.

The Commission adopts the following form, Form C-8, as its official guideline for use in determining employment status.

Figure 1: 40 TAC §821.5

§821.6. Wage Claims Involving Minimum Wage or Overtime.

(a) The Commission shall consider any applicable minimum wage and overtime requirement in determining if wages are due and unpaid.

(b) In determining an employee's entitlement to federal minimum wage or overtime, the Commission shall look to the Fair Labor Standards Act (FLSA) of 1938 as amended, 29 U.S.C. 201 et seq., and the regulations promulgated by the United States Department of Labor thereunder. In determining an employee's entitlement to state minimum wage, the Commission shall look to the Texas Minimum Wage Act, located at Texas Labor Code, Chapter 62.

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

Filed with the Office of the Secretary of State, on January 12, 1998.

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J. Ferris Duhon

Acting Deputy Director

Texas Workforce Commission

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For further information, please call: (512) 463-8812

SUBCHAPTER B. Payment of Wages

40 TAC §§821.21-821.28

The new rules are proposed under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

The proposed new rules affect the Texas Labor Code, Title 2, and Texas Labor Code, Chapter 61, Payment of Wages.

§821.21. Complete and Unconditional Payment of Wages.

(a) An employer has paid an employee's wages for purposes of the Act if the employer has delivered the wages to the employee:

- (1) in a form authorized by Texas Labor Code § 61.016; and
- (2) by a method authorized by Texas Labor Code § 61.017.

(b) An employer has paid an employee's wages for purposes of the Act if the employer has complied with subsection (a) of this section despite the subsequent loss, misplacement or theft of the wages unless the loss, misplacement or theft is attributable to the employer.

(c) An employer has not paid an employee's wages for purposes of the Act if:

- (1) the employee returns or refuses the paycheck because the employee has good

reason to believe the paycheck will be dishonored; or

(2) the employee disagrees with the amount of the paycheck, and has good reason to believe the employee's endorsement of the paycheck will release the employer from further liability to the employee for wages already earned.

(d) An employer has not paid an employee's wages for purposes of the Act if the employee has received the wages subject to a third party claim because:

(1) the paycheck has been dishonored due to insufficient funds, a stop-payment order or any other reason attributable to the employer;

(2) the employer has caused a direct deposit of the wages to be reversed; or

(3) the employer has taken other similar action to undo the payment of wages.

#### §821.22. Payment Other Than on Payday.

(a) For purposes of § 61.013 of the Act, the Commission interprets "another regular business day" to mean any regular business day, which is designated as being such within the customary practice of the employer, following the employer's designated payday.

(b) When an employee leaves employment other than by discharge on a payday, payment of wages in full will be due the following scheduled payday. The Commission shall consider "discharge" as dismissal or release from employment initiated by the employer including, but not limited to, layoff.

#### §821.23. Delayed Wage Payments.

(a) An employer may delay beyond the regularly scheduled payday the payment to an employee of wages the employer is unable to calculate solely because of the employee's failure or refusal to submit information required for the calculation. If the employer is able to calculate part of the employee's wages, the employer may not delay the payment of that part of the employee's wages.

(b) An employer may not delay the payment of wages to an employee under subsection (a) of this section beyond the payday immediately following the time the employer is able to reasonably ascertain the amount of wages due for the pay period in question.

(c) An employer is deemed to be able to calculate the amount of an employee's wages before a payday if the employee submits all information required for the calculation no later than the deadline set by the employer for that purpose.

#### §821.24. Electronic Funds Transfer.

(a) An employer may not mandate that an employee accept payment by electronic funds transfer for wages already earned. Although the Act allows for payment of wages in the form of electronic funds transfer, it requires the employee's written agreement to electronic funds transfer as the method of delivery.

(b) An employer may deduct from an employee's wages the cost to the employer of that employee's electronic funds transfer payment of wages when authorized in writing by the employee.

#### §821.25. Fringe Benefits.

(a) For purposes of § 61.001 (7) (B) of the Act, vacation pay and sick leave pay are payable to an employee upon separation from employment only if a written agreement with the employer or a written policy of the employer specifically provides for payment.

(b) Severance pay is payment by an employer to an employee beyond the employee's wages on termination of employment, usually based on the employee's length of prior services, and is not attributable to any period of time subsequent to termination. Wages in lieu of notice is not severance pay. Wages in lieu of notice is payment by an employer to an employee beyond the employee's wages on termination of employment when no advance notice of termination has been given to the employee.

(c) For purposes of § 61.001 (7) (B) of the Act, the sale of an employer's

business is a termination of employment with all of the employer's employees. At the time of termination, the employer becomes liable for the payment of vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay if owed pursuant to a written agreement or written policy between the employer and its employees.

(d) For purposes of § 61.001 (7) of the Act, expense reimbursements paid to employees are not wages. Expense reimbursements are payments to the employee for costs expended by the employee directly related to the employer's business.

(e) Absent the inclusion of definitions of terms in a written agreement with the employer or under a written policy of the employer, a term will be given its ordinary meaning unless a party establishes that it is defined in another way.

(f) For purposes of § 61.001 (7) (B) of the Act, accrued leave time of an employee shall carry over to subsequent years only if a written agreement with the employer or a written policy of the employer specifically provides for it.

#### §821.26. Commissions.

(a) For purposes of § 61.015 of the Act:

(1) Commissions are earned when the employee has met all the required conditions set forth in the applicable agreement with the employer. To change an agreement, there must be prior notice as to the nature and effective date of the changes. Changes to written agreements shall be in writing.

(2) Commissions are due to be paid, in a timely manner, according to the terms specified in an agreement between an employer and an employee. The terms should specify the time intervals or circumstances (or combinations thereof) that would cause commissions to become payable, such as, but not limited to, weekly, monthly, quarterly, when sales transactions are recorded, upon buyer's remittance, etc.

(b) Unless the agreement states otherwise, the employer shall pay, after separation, commissions earned as of the time of separation.

(c) Commissions due after separation from employment are payable based on the routine or practice specified in the agreement when the employee was employed, or on any special agreement made between the employee and the employer upon separation.

(d) Draws against commissions may be recovered from the current or any subsequent pay period until fully reconciled.

#### §821.27. Loans and Advances.

(a) An employer must comply with Texas Labor Code § 61.018, and this chapter in order to recoup a loan the employer made to an employee.

(b) In recouping a loan made to an employee, an employer may count the loan repayment toward any applicable minimum or overtime wages the employer is obligated to pay to the employee.

(c) In recouping a loan made to an employee from any of the employee's paychecks, including the employee's final paycheck, the employer may not withhold or divert more than the agreed amount. The agreed amount is the amount:

(1) identified as the amount to be withheld from any one paycheck in the written loan agreement between the employer and employee; or

(2) otherwise authorized in writing by the employee for repayment of the loan.

(d) An employer does not need written authorization to recoup wages the employer paid in advance to an employee.

(e) An employer pays wages in advance only if both the employer and employee understand and agree that the employer is advancing to the employee wages that are unearned, or earned but not yet due for payment.

#### §821.28. Deductions.

(a) The Commission provides the following guidance in determining whether an employer is entitled to withhold or divert wages under court order, by law or

with written authorization under §61.018 of the Act:

(1) A court is presumed to be a court of competent jurisdiction with respect to issuing court orders. The burden shall be on the party opposing a court order to challenge the court's authority by appealing to the issuing court or court of appropriate review as the Commission will presume full faith and credit applies to court orders.

(2) State or federal law includes statutes and codes enacted by Congress or the Texas Legislature, rules promulgated by a Texas or federal agency, and regulations promulgated by a Texas or federal agency.

(3) A lawful purpose is one that is authorized, sanctioned, or not forbidden, by law.

(b) Deductions shall be specific as to the lawful purpose for which the employee has accepted the responsibility or liability. Written authorizations shall include:

(1) sufficient information to give the employee a reasonable expectation of the amount to be withheld from pay; and

(2) a clear indication that the deduction is to be withheld from wages.

(c) The employee's signed acknowledgment of receipt of company policies can be authorization to withhold wages if the acknowledgment meets the requirements of subsection (b) of this section. The signed acknowledgment of receipt shall also include language that states that the employee agrees to abide by or be bound to these company policies.

(d) The Commission shall consider the following factors when evaluating deductions for losses:

(1) the employer shall provide evidence to the Commission that the employee was responsible for the losses; and

(2) the employer shall provide evidence to the Commission of the dollar value or amount of the losses.

(e) The employer shall ensure that properly withheld wages are applied toward their authorized purpose. Properly withheld wages not applied toward their authorized purpose will be considered unlawful deductions.

(f) The employer shall obtain written authorization as required under the Act to deduct credit card service charges from an employee's tips.

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

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Texas Workforce Commission

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For further information, please call: (512) 463-8812

#### SUBCHAPTER C. Wage Claims

##### 40 TAC §§821.41-821.46

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##### §821.41. Validity of Claim/Filing and Investigative Procedures.

(a) A faxed wage claim does not meet the requirements of § 61.051 and will not be accepted as a valid claim.

(b) A photocopy of a wage claim is not valid without original signatures of the claimant and the witness.

(c) A wage claim must be filled out completely, legibly, and sufficiently to identify and allow the Commission to attempt contact with the employer.

#### §821.42. Timeliness.

(a) The Commission shall determine the filing date of a wage claim as the date delivered in person to the Commission or the date of a mailed wage claim based on the following:

(1) The postmark date of a wage claim properly addressed shall establish by a rebuttable presumption the date upon which the wage claim was filed unless the party opposing this presumption presents evidence to establish some other filing date.

(2) Absent a postmark or evidence establishing some other filing date, the date of receipt by the Commission shall control.

(b) The Commission shall deem a wage claim invalid if filed before the wages are due for payment.

(c) The Commission shall suspend the time limit for filing a wage claim only for those reasons required by law including, but not limited to, bankruptcy stays.

#### §821.43. Wage Claim Withdrawal.

(a) The Commission shall allow a claimant to withdraw a wage claim when:

(1) the order has not become final; or

(2) the order has become final but the parties agree on a settlement, part of which is the claimant's agreement to withdraw the wage claim.

(b) A claimant withdrawing a wage claim must submit a form as prescribed by the Commission before the Commission levies funds to satisfy the order. Regardless of any settlement agreement entered into by the parties, after the Commission has collected funds to satisfy the order, the Commission shall disburse the collected funds in accordance with the final order of the Commission to the claimant unless otherwise ordered by a court.

(c) The Commission shall apply the withdrawal of a wage claim to both administrative penalties and wages.

#### §821.44. Bad faith.

(a) An employer acts in bad faith in not paying wages as required by the Act when that employer acts:

(1) with the knowledge that the failure to pay wages is in violation of the Act or this chapter; or

(2) in reckless disregard for the requirements of the Act or this chapter.

(b) An employee brings a wage claim in bad faith when the employee does so:

(1) with the knowledge that the claim is groundless; or

(2) solely to harass the employer against whom the claim is brought.

(c) An employee brings a wage claim by filing the claim with the Texas Workforce Commission.

#### §821.45. Appeals.

(a) If either party files an appeal to a preliminary wage determination order, the Commission shall consider all issues, including the amount of wages in controversy.

(b) The Commission shall hear all timely requests for reopening and grant such requests if it appears the petitioner has shown good cause for his failure to appear at the prior hearing.

#### §821.46. Void Determination Orders and Decisions.

A preliminary wage determination order and a decision shall be void from its inception when a non-existent entity is ordered to pay wages.

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

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J. Ferris Duhon

Acting Deputy Director

Texas Workforce Commission

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For further information, please call: (512) 463-8812

#### SUBCHAPTER D.Collection Action

40 TAC §§821.61-821.63

The new rules are proposed under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

The proposed new rules affect the Texas Labor Code, Title 2, and Texas Labor Code, Chapter 61, Payment of Wages.

#### §821.61. Proof of Payment.

(a) When the employer submits proof of payment, the Commission shall afford the claimant the opportunity to contest the information submitted.

(b) A claimant who submits proof of payment shall do so in writing by a signature verifiable by the Commission.

#### §821.62.Collection Pending Judicial Review.

The Commission may initiate or continue collection on a final order unless a party complies with the payment provision of Texas Labor Code § 61.063.

#### §821.63. Assignment of Lien to Claimant.

(a) Upon written request by the claimant, the Commission shall execute an assignment of lien to the claimant. The claimant shall bear responsibility for recording the lien.

(b) Any partial assignment shall leave in full force and effect the lien regarding the remaining claimants.

(c) The Commission's assignment of lien is final and irrevocable.

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

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Texas Workforce Commission

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#### SUBCHAPTER E.Bonds

40 TAC §821.81

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#### §821.81. Bonding.

(a) When authorized by Texas Labor Code § 61.031, the Commission may require a bond of an employer if the Commission reasonably believes the employer would otherwise fail to comply with the Act.



(b) The Commission shall consider the following factors in determining the amount of the bond:

(1) the seriousness of the violation, including nature, circumstances, extent and gravity of any prohibited acts;

(2) the history of previous violations;

(3) the amount necessary to deter future violations;

(4) efforts to pay past due wages and penalties;

(5) the total amount of wages not paid in accordance with the Act; and

(6) any other matter that justice may require.

(c) The bond shall be in an amount not less than the cumulative total amount of wages finally determined to be due and unpaid by the employer in the past. The maximum bond shall be in an amount not more than five times the cumulative total amount of wages finally determined to be due and unpaid by the employer in the past.

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

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Acting Deputy Director

Texas Workforce Commission

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