

1 **CHAPTER 821. TEXAS PAYDAY RULES**

2
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.**
6

7 The Texas Workforce Commission (Commission) proposes the following new sections to
8 Chapter 821, relating to Texas Payday Rules:

- 9
10 Subchapter A. General Provisions, §821.7
11 Subchapter B. Payment of Wages, §821.29
12

13 The Commission proposes amendments to the following sections of Chapter 821, relating to
14 Texas Payday Rules:

- 15
16 Subchapter A. General Provisions, §821.4
17 Subchapter B. Payment of Wages, §§821.25 - 821.27
18 Subchapter C. Wage Claims, §§821.41 - 821.43 and 821.46
19

- 20 PART I. PURPOSE, BACKGROUND, AND AUTHORITY
21 PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
22 PART III. IMPACT STATEMENTS
23 PART IV. COORDINATION ACTIVITIES
24
25

26 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

27 Texas Government Code §2001.039 requires that every four years each state agency review and
28 consider for reoption, revision, or repeal each rule adopted by that agency.
29

30 The Commission has conducted a rule review of Chapter 821, Texas Payday Rules, and proposes
31 the following amendments:

- 32 --Clarification of definitions involving political subdivisions of the state, notice of paydays,
33 severance pay, and fringe benefits;
34 --Clarification regarding commissions and bonuses, wage deductions, and voiding of
35 determination orders and decisions; and
36 --Requirements for claimant withdrawal of a wage claim.
37

38 House Bill (HB) 762, enacted by the 81st Texas Legislature, Regular Session (2009) amends
39 Texas Labor Code, Chapter 61 (Texas Payday Law):

- 40 --to allow a wage claim to be filed by fax to a number designated by the Commission or by any
41 other means adopted in Commission rule; and
42 --to remove the requirement that a wage claim must be filed in writing.
43

44 Therefore, the Commission also proposes to amend Chapter 821 by clarifying that a wage claim
45 may be filed in a manner prescribed by the Commission, including by fax, to a number
46 designated by the Commission and associated timeliness-of-receipt provisions.

1 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

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

4
5 **SUBCHAPTER A. GENERAL PROVISIONS**

6 **The Commission proposes the following amendments to Subchapter A:**

7
8 **§821.4. Political Subdivision**

9 Section 821.4 provides the criteria by which entities are considered to be political subdivisions of
10 the state and, thus, are not considered to be employers under the Texas Payday Law.

11
12 New §821.4(d)(17) - (19) provides a list of some of the entities statutorily defined as political
13 subdivisions. For example, pursuant to Texas Local Government Code §392.006, a housing
14 authority is a governmental entity for all purposes, and is thus exempt from Texas Labor Code,
15 Chapter 61.

16
17 **§821.7. Notice of Paydays**

18 New §821.7 specifically allows employers to post notices of designated paydays electronically .

19
20 Texas Labor Code §61.012(c) requires employers to post, in conspicuous places in the
21 workplace, notices indicating the paydays. The proposed rule allows employers to post such
22 notices on a company Web site or otherwise make the notice available electronically to
23 employees.

24
25
26 **SUBCHAPTER B. PAYMENT OF WAGES**

27 **The Commission proposes the following amendments to Subchapter B:**

28
29 **§821.25. Fringe Benefits**

30 Section 821.25(a) specifies that vacation and sick leave are accrued pay payable to an employee
31 upon separation from employment only if a written agreement with the employer or a written
32 policy of the employer specifically provides for the payment.

33 Section 821.25(b) removes references to length of prior service and to specify that neither
34 amounts paid to an employee because of a lack of notice of termination nor payments made in
35 accordance with post-employment agreements are considered severance pay.

36 The Commission believes that current §821.25(b) is vague and difficult to interpret. The existing
37 rule describes severance pay as "payment by an employer to an employee beyond the employee's
38 wages on termination of employment, usually based on the employee's length of prior service,
39 and is not attributable to any period of time subsequent to termination." Payments made
40 pursuant to agreements made at separation, such as contractual liquidated damages claims

41
42 or releases of liability claims¹ must not be construed as severance pay under Texas Labor Code,

¹ *Contractual liquidated damages*—a situation in which an employee has a written contract of employment that provides some penalty if the employer terminates the contract early.

1 Chapter 61. Also, amounts paid to an employee because of a lack of notice of separation must
2 not be construed as severance pay.

3
4 In addition, the current rule may overemphasize "length of service" as a prerequisite to severance
5 pay. The key issue is that severance pay is based on the employee's prior service. In fact,
6 written agreements of employers' policies may vary regarding how length of service is treated.
7 Rather than limiting employers' options, the Commission believes the definition of severance pay
8 must be modified to focus only on prior service.

9
10 New §821.25(g) is added to allow "paid time off" (PTO) and "paid days off" (PDO) to be
11 considered fringe benefits under Texas Labor Code §61.001(7)(B) unless the employer's written
12 policy or written agreement with an employee defines PTO or PDO as something other than a
13 combination of sick leave, vacation leave, holiday leave, and other fringe benefits specified in
14 statute. The proposed subsection further clarifies that PTO or PDO would not be due at
15 separation from employment unless specifically called for in the employer's policy.

16
17 The definition of "wages" in Texas Labor Code §61.001(7)(B) includes compensation owed by
18 an employer for fringe benefits such as vacation pay, holiday pay, sick leave pay, parental leave
19 pay, or severance pay owed to an employee under a written agreement with the employer or
20 under a written policy of the employer. Employer policies have evolved to include other names
21 for fringe benefits such as PTO and PDO. It is common for employers to combine their leave
22 types under PTO or PDO, which usually includes, but is not limited to, a combination of sick
23 leave, vacation leave, and holiday leave.

24
25 **§821.26. Commissions or Bonuses**

26 Section 821.26 includes bonuses, thereby ensuring conformity with Texas Labor Code §61.015,
27 which addresses the payment of both commissions and bonuses and does not distinguish between
28 them. However, current §821.26 addresses only commissions.

29
30 **§821.27. Loans**

31 Section 821.27 includes a reference to new §821.29 to clarify that an employer may only recoup
32 loans made to an employee subject to the requirement of a written authorization under Texas
33 Labor Code §61.018, unless the loan falls under the wage advances criteria in proposed new
34 §821.29.

35
36 **§821.29. Wage Advances**

37 New §821.29 clarifies that wage advances recovered from the next regularly scheduled paycheck
38 are not considered deductions or withholdings under Texas Labor Code §61.018 and better
39 aligns the current rules with practice that the Agency's Labor Law department has historically
40 followed.

41

Payment in exchange for a release of liability claims—a situation in which an employer, at the time of the
employee's separation, offers the employee a payment of a certain sum of money in exchange for the employee
signing an a greement stating that he or she will not sue the company for anything that happened during the
employee's term of employment.

1 Wage advances are normally an advance on wages yet to be earned during a particular pay
2 period. As such, the employer's recovery (crediting) of the wage advance from an employee's
3 next scheduled paycheck is a reimbursement to the employer and not a deduction or a
4 withholding of the employee's wages—i.e., the employee received full payment of wages on or
5 before the scheduled payday for that pay period. The Commission believes that Chapter 821
6 requires clarification to:
7 --assist employers that seek to recover wage advances from an employee's next paycheck issued
8 after the wage advance; and
9 --provide guidance to employers and workers regarding an employer's ability to recover wage
10 advances.

11 12 13 **SUBCHAPTER C. WAGE CLAIMS**

14 **The Commission proposes the following amendments to Subchapter C:**

15 16 **§821.41. Validity of Claim/Filing and Investigative Procedures**

17 Section 821.41(a) is removed to comply with Texas Labor Code §61.051(d), effective September
18 1, 2009. The statute addresses contemporary means of document transmission by allowing faxed
19 wage claims.

20
21 New §821.41(a) describes the current permitted methods of filing a wage claim under Texas
22 Labor Code §61.051(d): in person, by mail, or by fax.

23
24 Section 821.41(b) is removed to allow the Agency to streamline the wage claim process while
25 still ensuring safeguards are in place.

26
27 Current §821.41(b) expressly disallows the submission of photocopied wage claims. Although
28 Texas Labor Code §61.051(d) describes the way in which a wage claim can be submitted to the
29 Agency, it does not require the submitted wage claim to be an original. In fact, the recent
30 amendment allowing wage claims to be faxed indicates that the Texas legislature does not intend
31 to require original signatures on wage claims. Accordingly, there is no statutory bar to accepting
32 properly submitted photocopied wage claims. As long as the identity of the claimant can be
33 established and validated, and the document is sufficiently legible and complete in order to allow
34 the Agency to contact the employer, there is no programmatic or operational difference between
35 a document with an original signature and a photocopied document. Moreover, Agency records
36 retention practices have been modernized from hard-copy document storage to scanning
37 technology.

1
2 Section 821.41(c) is relettered as new §821.41(b) to accommodate the changes.
3

4 **§821.42. Timeliness**

5 Section 821.42 specifies the filing date of a wage claim that is faxed to the Commission as
6 permitted by Texas Labor Code §61.051(d). The filing date must be the date faxed and received
7 by the Commission.
8

9 **§821.43. Wage Claim Withdrawal**

10 Section 821.43(a) allows a claimant to withdraw a wage claim at any time up until the Agency's
11 written decision becomes final. After that point, a claimant may withdraw a wage claim by
12 submitting a form to the Agency with the claimant's signature certifying that the wage claim is
13 satisfied.
14

15 Currently this subsection allows a claimant to withdraw a wage claim only at certain points in the
16 process, which the Commission believes creates a bureaucratic burden. Thus, the Commission
17 believes this change aligns Commission rule with recent case law and removes procedural
18 obstacles for claimants and employers.
19

20 **§821.46. Void Determination Orders and Decisions**

21 Section 821.46 broadens staff authority to void determination orders and decisions in which
22 Agency staff has determined that an entity, with no discernible relationship to the wage claimant,
23 is improperly named as the liable employer. This change improves the Agency's efficiency in
24 collecting from liable employers.
25

26 Currently, §821.46 limits the Agency's authority to void preliminary wage determination orders
27 and decisions only to those instances in which a nonexistent entity is ordered to pay wages. This
28 overly narrow interpretation prevents the Agency from correcting wage determination orders in
29 which the Agency determines that an existing--but entirely wrong--employer has been named.
30 Thus, an erroneously named employer may be liable for wages it never owed, particularly if this
31 employer does not respond to an erroneous payday wage claim notice or fails to file a timely
32 appeal.
33
34

35 **PART III. IMPACT STATEMENTS**

36 Randy Townsend, Chief Financial Officer, has determined that for each year of the first five
37 years the rules will be in effect, the following statements will apply:
38

39 There are no additional estimated costs to the state and local governments expected as a result of
40 enforcing or administering the rules.
41

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

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

1
2 There are no foreseeable implications relating to costs or revenue of the state or local
3 governments as a result of enforcing or administering the rules.

4
5 We anticipate no economic cost to persons required to comply with this rule or to small or
6 microbusinesses.

7
8 Mark Hughes, Director of Labor Market Information, has determined that there is no significant
9 negative impact upon employment conditions in the state as a result of the rules.

10
11 John Moore, Director of the Regulatory Enforcement Division, and LaSha Lenzy, Director of the
12 Unemployment Insurance Division have determined that for each year of the first five years the
13 rules are in effect, the public benefit anticipated as a result of enforcing the proposed
14 amendments will be to comply with legislative intent with regard to filing wage claims more
15 efficiently and timely. These amendments recognize the evolution in fringe benefits and
16 employment separation payments from the time these rules were originally promulgated.

17
18 The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to
19 be within the Agency's legal authority to adopt.

20
21
22 **PART IV. COORDINATION ACTIVITIES**

23 Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce
24 Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin,
25 Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us.
26 The Commission must receive comments postmarked no later than 30 days from the date this
27 proposal is published in the *Texas Register*.

28
29 The rules are proposed under Texas Labor Code §301.0015(6) and §302.002(d), which provide
30 the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it
31 deems necessary for the effective administration of Agency services and activities.

32
33 The proposed rules affect Texas Labor Code, Chapter 61.
34

1
2 **CHAPTER 821. TEXAS PAYDAY RULES**
3

4 **SUBCHAPTER A. GENERAL PROVISIONS**
5

6 **§821.4. Political Subdivision.**
7

- 8 (a) An entity is a political subdivision of the state, and therefore not an employer under
9 the Act, if it meets the criteria in either subsections (b) or (c) of this section.
10
11 (b) An entity is a political subdivision of this state if it is a governmental unit having:
12
13 (1) the power to tax real and tangible personal property;
14
15 (2) limited geographic and jurisdictional boundaries;
16
17 (3) locally elected or locally appointed governing members; and
18
19 (4) the authority to provide a general public service or benefit.
20
21 (c) An entity is a political subdivision of this state if the entity is so designated by Texas
22 statute.
23
24 (d) Entities that are political subdivisions of this state include, but are not limited to:
25
26 (1) cities;
27
28 (2) counties;
29
30 (3) school districts;
31
32 (4) junior college districts;
33
34 (5) levee improvement districts;
35
36 (6) drainage districts;
37
38 (7) irrigation districts;
39
40 (8) water improvement districts;
41
42 (9) water control and improvement districts;
43
44 (10) water control and preservation districts;
45
46 (11) freshwater supply districts;

- 1
2 (12) navigation districts;
3
4 (13) conservation and reclamation districts;
5
6 (14) soil conservation districts;
7
8 (15) municipal utility districts;
9
10 (16) river authorities; ~~and~~
11
12 (17) housing authorities;
13
14 (18) hospital authorities; and
15
16 (19) other similar entities.

17
18 **§821.7. Notice of Paydays.**

19
20 For purposes of posting notices indicating an employer's paydays, electronic posting is
21 sufficient to meet the requirements of §61.012(c) of the Act as long as the electronic
22 posting otherwise meets the requirements of the Act.

23
24 **SUBCHAPTER B. PAYMENT OF WAGES**

25
26 **§821.25. Fringe Benefits.**

- 27
28 (a) For purposes of §61.001(7)(B) of the Act, vacation pay and sick leave pay are payable to
29 an employee upon separation from employment only if a written agreement with the
30 employer or a written policy of the employer specifically provides for payment.
31
32 (b) For purposes of §61.001(7)(B) of the Act, severance ~~Severance~~ pay is payment by an
33 employer to an employee beyond the employee's wages on termination of
34 employment, based on the employee's prior service ~~usually based on the employee's~~
35 ~~length of prior service, and is not attributable to any period of time subsequent to~~
36 ~~termination.~~ Severance pay does not include payments for liquidated damages,
37 payments in exchange for a release of claims, or payments made because of a lack of
38 notice of separation.
39
40 (c) For purposes of §61.001(7)(B) of the Act, the sale of an employer's business is a
41 termination of employment with all of the employer's employees. At the time of
42 termination, the employer becomes liable for the payment of vacation pay, holiday
43 pay, sick leave pay, parental leave pay, or severance pay if owed pursuant to a
44 written agreement or written policy between the employer and its employees.
45

- 1 (d) For purposes of §~~61.001(7)(B)~~61.001(7) of the Act, expense reimbursements paid to
2 employees are not wages. Expense reimbursements are payments to the employee
3 for costs expended by the employee directly related to the employer's business.
4
5 (e) Absent the inclusion of definitions of terms in a written agreement with the employer
6 or under a written policy of the employer, a term will be given its ordinary meaning
7 unless a party establishes that it is defined in another way.
8
9 (f) For purposes of §61.001(7)(B) of the Act, accrued leave time of an employee shall
10 carry over to subsequent years only if a written agreement with the employer or a
11 written policy of the employer specifically provides for it.
12

13 (g) For purposes of §61.001(7)(B) of the Act, paid time off (PTO) or paid days off
14 (PDO) are wages unless the employer's written policy defines PTO or PDO as
15 something other than a combination of vacation pay, holiday pay, sick leave pay,
16 parental leave pay, or severance pay. PTO or PDO is payable to an employee upon
17 separation from employment only if a written agreement with the employer or a
18 written policy of the employer specifically provides for payment.
19

20 **§821.26. Commissions or Bonuses.**
21

- 22 (a) For purposes of §61.015 of the Act:
23
24 (1) Commissions or bonuses are earned when the employee has met all the
25 required conditions set forth in the applicable agreement with the employer.
26 To change an agreement, there must be prior notice as to the nature and
27 effective date of the changes. Changes to written agreements shall be in
28 writing.
29
30 (2) Commissions or bonuses are due to be paid, in a timely manner, according to
31 the terms specified in an agreement between an employer and an employee.
32 The terms should specify the time intervals or circumstances (or combinations
33 thereof) that would cause commissions or bonuses to become payable, such as,
34 but not limited to, weekly, monthly, quarterly, when sales transactions are
35 recorded, upon buyer's remittance, etc.
36
37 (b) Unless otherwise agreed, the employer shall pay, after separation, commissions or
38 bonuses earned as of the time of separation.
39
40 (c) Commissions or bonuses due after separation from employment are payable based on
41 the routine or practice specified in the agreement when the employee was employed,
42 or on any special agreement made between the employee and the employer upon
43 separation.
44
45 (d) Draws against commissions or bonuses may be recovered from the current or any
46 subsequent pay period until fully reconciled.

1
2 **§821.27. Loans.**
3

- 4 (a) An employer must comply with §61.018 of the Act, and this chapter ~~in order~~ to
5 recoup a loan the employer made to an employee, unless the loan is an advance
6 under §821.29.
7
- 8 (b) In recouping a loan made to an employee, an employer may count the loan
9 repayment toward any applicable minimum or overtime wages the employer is
10 obligated to pay to the employee.
11
- 12 (c) In recouping a loan made to an employee from any of the employee's paychecks,
13 including the employee's final paycheck, the employer may not withhold or divert
14 more than the agreed amount. The agreed amount is the amount:
15
- 16 (1) identified as the amount to be withheld from any one paycheck in the written
17 loan agreement between the employer and employee; or
18
- 19 (2) otherwise authorized in writing by the employee for repayment of the loan.
20

21 **§821.29. Wage Advances.**
22

- 23 (a) A wage advance occurs when an employer advances to an employee a monetary sum
24 that represents wages not yet earned, or wages that have been earned but are not yet
25 due for payment.
26
- 27 (b) An employer may recoup the wage advance from the employee's next regularly
28 scheduled paycheck directly following the advance if:
29
- 30 (1) the employer provides the employee with notice that the amount is an advance
31 that will be recovered from the next paycheck; and
32
- 33 (2) the employee agrees to the amount to be recouped.
34
- 35 (c) If the wage advance is not recouped in the next regularly scheduled paycheck
36 following the advance, the employer shall comply with §61.018 of the Act.**Error!**
37 **Bookmark not defined.**
38

39 **SUBCHAPTER C. WAGE CLAIMS**
40

41 **§821.41. Validity of Claim/Filing and Investigative Procedures.**
42

- 43 ~~(a) A faxed wage claim does not meet the requirements of §61.051 of the Act and will~~
44 ~~not be accepted as a valid claim.~~
45

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

3
4 (a) A wage claim may be filed in person at an office of the Commission, by mailing the
5 claim to an address designated by the Commission, or by faxing the claim to a fax
6 number designated by the Commission.

7
8
9 (b) ~~(e)~~ A wage claim must be filled out completely, legibly, and sufficiently to identify
10 and allow the Commission to attempt contact with the employer.

11
12 **§821.42. Timeliness.**

13
14 (a) The Commission shall determine the filing date of a wage claim as the date delivered
15 in person to the Commission, the date faxed to and received by the Commission at a
16 fax number designated by the Commission, or the date of a mailed wage claim based
17 on the following:

18
19 (1) The postmark date of a wage claim properly addressed shall establish by a
20 rebuttable presumption the date upon which the wage claim was filed unless
21 the party opposing this presumption presents evidence to establish some other
22 filing date.

23
24 (2) Absent a postmark or evidence establishing some other filing date, the date of
25 receipt by the Commission shall control.

26
27 (b) The Commission shall suspend the time limit for filing a wage claim only for those
28 reasons required by law including, but not limited to, bankruptcy stays.

29
30 **§821.43. Wage Claim Withdrawal.**

31
32 (a) The Commission shall allow a claimant to withdraw a wage claim only under the
33 following circumstances ~~when:~~

34
35 (1) Before the Commission's written decision is ~~order has not become~~ final; or

36
37 (2) After the Commission's written decision is final, if the claimant certifies to the
38 Agency that the wage claim is fully satisfied ~~the order has become final but the~~
39 ~~parties agree on a settlement, part of which is the claimant's agreement to~~
40 ~~withdraw the wage claim.~~

41
42 (b) A claimant withdrawing a wage claim shall ~~must~~ submit a form as prescribed by the
43 Commission. ~~before the Commission levies funds to satisfy the order. Regardless of~~
44 ~~any settlement agreement entered into by the parties, after the Commission has~~
45 ~~collected funds to satisfy the order, the Commission shall disburse the collected~~

1 ~~funds in accordance with the final order of the Commission to the claimant unless~~
2 ~~otherwise ordered by a court.~~
3

- 4 (c) The Commission shall apply the withdrawal of a wage claim to both administrative
5 penalties and wages.
6

7 **§821.46. Void Determination Orders and Decisions.**
8

9 A preliminary wage determination order and a decision shall be void from its inception
10 when it orders a nonexistent ~~non-existent~~ entity to pay wages or orders a nonliable entity
11 to pay wages.
12
13