

Chapter 815. UNEMPLOYMENT INSURANCE

PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.

ON **MAY 25, 2010**, THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

Estimated Publication Date of the Proposal in the *Texas Register*: **June 11, 2010**

Estimated End of Comment Period: **July 12, 2010**

The Texas Workforce Commission (Commission) proposes the following new sections to Chapter 815, relating to Unemployment Insurance:

Subchapter B. Benefits, Claims and Appeals, §815.25

Subchapter C. Tax Provisions, §815.136

The Commission proposes amendments to the following section of Chapter 815, relating to Unemployment Insurance:

Subchapter A. General Provisions, §815.1

The Commission proposes the repeal of the following section of Chapter 815, relating to Unemployment Insurance:

Subchapter B. Benefits, Claims and Appeals, §815.25

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

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PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the Chapter 815 rule changes is to:

--implement the provisions of House Bill (HB) 2120, enacted by the 80th Texas Legislature, Regular Session (2007), which amended, in part, Texas Labor Code §207.002 and §207.004, regarding benefit wage credits;

--clarify under what circumstances training is considered *approved* for the purposes of Texas Labor Code §207.022; and

--implement the provisions of HB 2360 enacted by the 81st Texas Legislature, Regular Session (2009), which added Chapter 104 to the Texas Labor Code, regarding the Earned Income Tax Credit (EITC).

Benefit Wage Credits

Texas Labor Code §207.002 and §207.004 relate to the operation of the unemployment compensation (UC) system and computation of an individual's UC benefits. Prior to enactment of HB 2120, Texas Labor Code, Title 4, Subtitle A (Texas Unemployment Compensation Act) provided that an individual was entitled to UC benefits based upon wages actually received during that individual's base period of employment. Benefit wage credits determine whether an individual qualifies monetarily for UC benefits, but the Commission had no authority to credit wages that were owed but not actually paid to an individual.

Texas Labor Code §207.002(a) enables the Commission to count as benefit wage credits those wages determined by a final order of the Commission to be paid (pursuant to Texas Labor Code, Chapter 61)—even if those wages have not been paid to the claimant by the employer—provided the wages were due to be paid to the claimant during the claimant's base period. The statute stipulates that, by rule, the Commission must determine the method for crediting such wages to the claimant's base period. To address this mandate, new §815.1(7) of this chapter adds a definition of "benefit wage credits."

Commission-Approved Training

The Federal Unemployment Tax Act (FUTA) §3304(a)(8) and (9) requires all states to include provisions in their laws that prevent denial of unemployment insurance (UI) benefits if a UI claimant is enrolled in training with the approval of the state agency. Such prohibition of benefit denial must be related to availability for work, active work search, and refusal to accept suitable work.

New §815.25 clarifies under what circumstances training must be considered *approved* for the purposes of Texas Labor Code §207.022. The Commission's intent is that approval of training takes the following into account:

- Whether the individual's skills make it unlikely that he or she will return to work within a reasonable time to an industry or occupation that requires those skills;
- Whether the training will facilitate the individual's reemployment in an occupation for which there is substantial and recurring demand; and
- Whether the individual is attending and making satisfactory progress in the training.

The Commission also intends that the training's funding source not be a factor in whether the training is approved except in limited circumstances.

Finally, the Commission reaffirms that approval of training must not be denied Texas claimants solely because they reside outside the state, as required by FUTA §3304(a)(9).

Earned Income Tax Credit

Texas Labor Code, Chapter 104, requires that employers provide their employees with information on the federal EITC no later than March 1 of each year. Section 104.002 requires that employers provide their employees with information on the general eligibility requirements for EITC through one of the following methods:

- In person
- E-mail

- A flyer with the employee's paycheck
- U.S. first-class mail

However, Texas Labor Code, Chapter 104, does not reference the specific information to be provided. Section 104.003 indicates that the notice is something other than:

- Internal Revenue Service (IRS) publications on EITC;
- information prepared by the Texas Comptroller of Public Accounts under Texas Government Code §403.025 relating to EITC; or
- federal income tax forms necessary to claim federal EITC.

While Texas Labor Code §104.003 excludes IRS publications and forms from the required information, it does not exclude notices. IRS Notice 797, "Possible Federal Tax Refund Due to the Earned Income Credit (EIC)" supplies information regarding general eligibility requirements for EITC.

Texas Labor Code §104.004 sets forth the Commission's duties, which include:

- periodically notifying employers regarding the requirements of Chapter 104 as part of any other periodic notice sent to employers; and
- posting a notice on its Web site.

Texas Labor Code, §104.004 provides the authority to the Commission to establish rules.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS

The Commission proposes the following amendments to Subchapter A:

§815.1. Definitions

New §815.1(7) defines "benefit wage credits" as wages received by an individual for employment from an employer during the individual's base period and wages ordered to be paid to an individual by a final Commission order, provided the wages ordered were due to be paid during the claimant's base period; such wages will be credited to the quarter in which the wages were originally due to be paid.

Certain subparagraphs have been renumbered to accommodate the addition of new §815.1(7).

SUBCHAPTER B. BENEFITS, CLAIMS, AND APPEALS

The Commission proposes the following amendments to Subchapter B:

§815.25. Approval of Training

Section 815.25 is repealed and replaced by new §815.25.

New §815.25(a) provides that the Agency must approve training:

- (1) if the individual's existing skills make reemployment in his or her customary industry or occupation unlikely within a reasonable period or his or her earning potential or ability to maintain secure employment will be enhanced by the training; and
- (2) if the training will help the individual obtain employment in an occupation with substantial and recurring demand.

New §815.25(b) provides that an individual will be in approved training, pursuant to Texas Labor Code §207.022, if the Agency approves the training and the individual is attending the training as shown by the following:

- (1) If, at the request of the Agency, the individual and/or the training facility provides the Agency with satisfactory evidence of the individual's attendance and progress; and
- (2) If, at claim certification, the individual affirms his or her attendance at the training during the benefit period or whether he or she had good cause for failure to attend the training.

New §815.25(c) prohibits the Agency from considering the source of funding of the training as approval criteria, except when the training occurs under the auspices of the Texas Department of Assistive and Rehabilitative Services; the Texas Department of Aging and Disability Services; or federal or state veterans' services. These entities conduct their own assessment of an individual's likelihood for reemployment and the necessity for the training. Training provided by these entities, by its very nature, is designed to enhance the individual's employability.

New §815.25(d) reiterates that the Agency must not deny approval of training solely because the individual does not live in Texas. It affirms that the Agency can rely on the recommendation of the agent state when determining whether the training should be approved.

New §815.25(e) requires the Commission to develop and issue procedural guidelines to be used by Agency staff and the Boards when evaluating an individual's request to have his or her training designated as *approved*. These guidelines will be consistent with the elements of new §815.25.

SUBCHAPTER C. TAX PROVISIONS

The Commission proposes the following amendment to Subchapter C:

§815.136 Earned Income Tax Credit

New §815.136 provides guidance to employers on what constitutes acceptable EITC information to be provided to employees as required by Texas Labor Code, Chapter 104.

The section specifies that the information regarding general eligibility requirements for the federal EITC in Texas Labor Code §104.002 means IRS Notice 797 or a written statement that provides the same wording as IRS Notice 797.

PART III. IMPACT STATEMENTS

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

We estimate no additional costs to the state and to local governments as a result of enforcing or administering the rules.

We estimate no reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

We estimate no loss in revenue to the state and to local governments as a result of enforcing or administering the rules.

Enforcing or administering the rules does not have foreseeable implications relating to the cost or revenues of the state or local governments. While the Agency's UI Division estimates that the effect of the proposed rules dealing with benefit wage credits may result in \$50,000 per year in additional benefits to unemployment compensation claimants, we cannot estimate any corresponding increase in revenue of the state or pertinent local governments.

The Agency anticipates no economic cost to persons or small or microbusinesses required to comply with these rules.

These rules will not have adverse economic effects on small businesses or microbusinesses because small businesses or microbusinesses are not regulated or otherwise affected by the rules.

Our reasoning for these conclusions is as follows:

--The Commission was provided the benefit wage credits authority reflected in these proposed rules in Texas Labor Code amendments enacted by the 80th Texas Legislature, Regular Session (2007), and as such, this requirement is not created by these rules.

--The Agency's UI Division, relying on approval by the Commission and concurrence by the General Counsel, instituted the training definitions and clarification of circumstances included in these proposed rules on a provisional basis in November 2009, and has been monitoring outcomes since that time. The result since implementation has not been an increase of claimants in approved training.

--The EITC provisions included in these proposed rules are intended to provide guidance and clarity to employers, and represent an improvement from the status quo. EITC provisions have long been contained in the Texas Labor Code, and as such, this is neither a new requirement nor one created by the rules.

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

LaSha Lenzy, Director of the Unemployment Insurance Division, 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 proposed amendments will be to ensure compliance with federal and state unemployment insurance requirements.

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

PART IV. COORDINATION ACTIVITIES

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

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

The proposed rules will affect Texas Labor Code, Title 4, the Texas Unemployment Compensation Act.

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER A. GENERAL PROVISIONS

§815.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the statute or context in which the word or phrase is used clearly indicates otherwise.

- (1) Act--The Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended.
- (2) Additional claim--A notice of new unemployment filed at the beginning of a second or subsequent series of claims within a benefit year or within a period of eligibility when a break of one week or more has occurred in the claim series with intervening employment. The employer named on an additional claim will have 14 days from the date notice of the claim is mailed to reply to the notice. The additional claim reopens a claim series and is not a payable claim since it is not a claim for seven days of compensable unemployment.
- (3) Agency--The unit of state government that is presided over by the Commission and under the direction of the executive director, which operates the integrated workforce development system and administers the unemployment compensation insurance program in this state as established under Texas Labor Code, Chapter 301. It may also be referred to as the Texas Workforce Commission.
- (4) Appeal--A submission by a party requesting the Agency or the Commission to review a determination or decision that is adverse to that party. The determination or decision must be appealable and pertain to entitlement to unemployment benefits; chargeback as provided in the Act, Chapter 204; fraud as provided in the Act, Chapter 214; tax coverage or contributions or reimbursements. This definition does not grant rights to a party.
- (5) Base period with respect to an individual--The first four consecutive completed calendar quarters within the last five completed calendar quarters immediately preceding the first day of the individual's benefit year, or any other alternate base period as allowed by the Act.
- (6) Benefit period--The period of seven consecutive calendar days, ending at midnight on Saturday, with respect to which entitlement to benefits is claimed, measured, computed, or determined.
- (7) Benefit wage credits--Wages used to determine an individual's monetary eligibility for benefits. Benefit wage credits consist of those wages an individual received for employment from an employer during the individual's

base period as well as any wages ordered to be paid to an individual by a final Commission order, pursuant to its authority under Texas Labor Code, Chapter 61. Benefit wage credits awarded by a final Commission order that were due to be paid to the individual by an employer during the individual's base period shall be credited to the quarter in which the wages were originally due to be paid.

(8)(7)Board--Local Workforce Development Board created pursuant to Texas Government Code §2308.253 and certified by the Governor pursuant to Texas Government Code §2308.261. This includes a Board when functioning as the Local Workforce Investment Board as described in the Workforce Investment Act §117 (29 U.S.C.A. §2832), including those functions required of a Youth Council, as provided for under the Workforce Investment Act §117(i) (also referred to as an LWDB).

(9)(8)Commission--The three-member body of governance composed of Governor-appointed members in which there is one representative of labor, one representative of employers, and one representative of the public as established in Texas Labor Code §301.002, which includes the three-member governing body acting under the Act, Chapter 212, Subchapter D, and in Agency hearings involving unemployment insurance issues regarding tax coverage, contributions or reimbursements.

(10)(9)Day--A calendar day.

(11)(10)Landman--An individual who is qualified to do field work in the purchasing of right-of-way and leases of mineral interests, record searches, and related real property title determinations, and who is primarily engaged in performing the field work.

(12)(11)Person--May include a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

(13)(12)Reopened claim--The first claim filed following a break in claim series during a benefit year which was caused by other than intervening employment, i.e., illness, disqualification, unavailability, or failure to report for any reason other than job attachment. The reopened claim reopens a claim series and is not a payable claim since it is not a claim for seven days of compensable unemployment.

(14)(13)Week--A period of seven consecutive calendar days ending at midnight on Saturday.

SUBCHAPTER B. BENEFITS, CLAIMS, AND APPEALS

~~§815.25. Approval of Training.~~

~~An individual shall be in training with the approval of the Agency if the Agency has authorized the training for the individual and the individual is attending the training course on a full-time basis and the Agency finds that:~~

- ~~(1) the individual can reasonably be expected to complete the training course successfully, and to find and accept work;~~
- ~~(2) the individual has attended the training course full time during the given training week or had good cause for the individual's failure to do so, and is making satisfactory progress in the course; and~~
- ~~(3) the training facility and/or the individual agrees to, and does, furnish evidence satisfactory to the Agency that the individual is regularly attending the training course and is satisfactorily performing assignments as a trainee.~~

§815.25. Approval of Training.

(a) The Agency shall approve training, if:

- (1) there is no longer substantial and recurring demand for the individual's skills, and the lack of employment opportunities in occupations requiring those skills is expected to continue for an extended period of time, and the individual has no other skill for which there is an expectation of reemployment in a reasonable period; and
- (2) the training will enhance the individual's ability to secure stable employment and earning potential in an occupation for which there is substantial and recurring demand.

(b) An individual shall be in approved training if the Agency approves the training for the individual and the individual is attending the training as shown by the following:

- (1) The individual and/or the training facility agrees to furnish evidence upon request of the Agency that the individual is regularly attending the training course and is satisfactorily performing assignments as a trainee; and
- (2) The individual affirms at the time of the claim certification that the individual has attended the training course during the given training week or had good cause for the individual's failure to do so.

(c) The funding source of the training shall not affect the approval of the training except that training under the auspices of the Workforce Investment Act; the Texas Department of Assistive and Rehabilitative Services; the Texas Department of Aging

and Disability Services; federal or state veterans' services, or any other program specifically designated by the Agency shall be considered approved for the purposes of the Act §207.022.

(d) The Agency shall not deny approval of training solely because the individual resides outside of the state. Agency staff may rely upon the recommendation of the agent state regarding whether the training is approved.

(e) The Commission shall develop procedural guidelines for use by Agency staff and the Boards that are consistent with the requirements of this section. Procedures may include, but are not limited to:

(1) using a statewide or Board-level demand or targeted occupations list to determine whether there is substantial and recurring demand for an occupation or industry; and

(2) using the Agency's job-matching system to assess the individual's existing skills when determining the individual's likelihood to return to an occupation or industry requiring those skills.

SUBCHAPTER C. TAX PROVISIONS

§815.136. Earned Income Tax Credit.

This section provides information to employers on the acceptable information to be provided to employees on the federal Earned Income Tax Credit (EITC) as required by Texas Labor Code, Chapter 104. The information regarding general eligibility requirements for the federal EITC in Texas Labor Code §104.002 means IRS Notice 797 or a written statement that provides the same wording as IRS Notice 797.