

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 **APRIL 29, 2008**, THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

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

Subchapter B. Benefits, Claims and Appeals, §815.18

The Commission proposes the following new subchapter to Chapter 815 relating to Unemployment Insurance:

Subchapter E. Confidentiality and Disclosure of State Unemployment Compensation Information, §§815.161–815.168

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

The purpose of the proposed Chapter 815 rules change is to:

- comply with final rules setting forth the statutory confidentiality and disclosure requirements of Title III of the Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) concerning unemployment compensation (UC) information issued by the U.S. Department of Labor (DOL) on September 27, 2006, in 20 Code of Federal Regulations (C.F.R.) Part 603; and
- implement House Bill (HB) 2120 and Senate Bill (SB) 1619, enacted by the 80th Texas Legislature, Regular Session (2007), which address certain federal requirements, as enumerated in 20 C.F.R. Part 603.

The federal rules relating to confidentiality of UC information require state law to:

- contain provisions that are interpreted and applied consistent with federal definitions of "identifying information";

- provide penalties for disclosure of confidential UC information; and
- define "public domain information" to clarify how such information is held in Texas.

By amending Texas Labor Code §301.081 and adding new §301.085, HB 2120 and SB 1619:

- mirror the federal interpretation of identifying information under 20 C.F.R. §603.4;
- make unauthorized disclosure of such information a Class A misdemeanor; and
- establish that UC information is not public information for purposes of Chapter 552, Texas Government Code, thereby making UC information not subject to the Texas Public Information Act.

Federal regulations authorize states to implement specific details and to adopt state law with more stringent confidentiality provisions than those imposed by the final regulations. HB 2120 and SB 1619 direct the Commission to adopt rules regarding confidentiality of UC information.

The federal regulations generally provide that all employment and/or wage information is confidential and must not be disclosed. However, because sharing UC information is necessary for the proper administration of the UC program, disclosure to certain entities has been deemed mandatory. These entities include claimants and employers, the Internal Revenue Service (for purposes of UC tax administration), and U.S. Citizenship and Immigration Services (for purposes of identifying a claimant's immigration status). In addition, federal UC law also requires disclosure of state UC information to certain federal UC and benefits programs. SSA also requires disclosure of specific information to various specified state and federal agencies in administration of the agencies' programs. The confidentiality and disclosure requirements in SSA Title III relating to UC information are conditions for receipt of grants by the states for UC administration. The disclosure requirements in FUTA are conditions required of a state in order for employers in that state to receive credit against the federal unemployment tax under 26 United States Code §3302.

There are certain circumstances under which otherwise confidential UC information can be disclosed, but only if such disclosure is authorized by state law and does not interfere with the efficient administration of the state's UC program. Federal regulations specifically provide that the confidentiality requirement of 20 C.F.R. §603.4 does not apply to public domain information as that term is defined at §603.2(c). The federal regulations allow for disclosure of UC information only if state law provides sufficient protections regarding the payment of costs, safeguards, and data-sharing agreements. For example, provided sufficient protections are in place, states are permitted to disclose UC information:

- to public officials in the performance of their duties;
- to agents or contractors of public officials; or
- on the basis of informed consent.

Notwithstanding the general rule that all UC information is confidential and barred from disclosure, federal regulations make disclosure mandatory to a number of entities—primarily governmental—beyond the obvious claimants and employers, because it is either necessary for the proper administration of the UC program or SSA mandates that certain specified information be disclosed to these other entities. Beyond these mandatory disclosures, states have significant

latitude above the federal floor and may have more stringent confidentiality provisions than imposed by federal regulations.

Several factors are key in weighing options related to disclosure of this information. As DOL notes in the regulations' preamble, "Confidentiality is necessary to avoid deterring individuals from claiming benefits or exercising their rights, to encourage employers to provide information necessary for program operations, to avoid interference with the administration of the UC program, and to avoid notoriety for the program if program information were misused."

Historically, the Agency's practices have provided the greatest level of confidentiality to UC information in order to ensure a fair system in which all parties are willing and able to participate. Retaining policies that reflect this conservative approach ensures consistency with federal regulations. Without reasonable and effective confidentiality of this information, a chilling effect may result at all stages of UC proceedings if participants believe the Agency cannot effectively maintain as confidential the often highly personal information divulged. Accordingly, maintaining the status quo retains the guiding principles of federal law, including treating all appeals records as confidential.

Another increasingly important factor in deciding how to treat confidential UC information is the potential for identity theft and the considerable harm (financial and otherwise) the release of such information could cause UC program participants. In deciding what type of UC information to release, the Commission has weighed these benefits and risks, including:

- public access to open administrative hearings and related information;
- chilling effect on individuals and employers exercising appeal rights under UC law;
- staff time and costs necessary to redact the requested records given the broad definition of "identifying information";
- significant risk of inadvertent errors in redaction; and
- potential for identity theft if UC records are released.

In recognition of these factors, and consistent with current practices, the Commission has determined that only UC information considered public domain or otherwise expressly exempted may be released.

Public domain information is generally considered exempt from the UC confidentiality requirements. The final federal rules offer states some flexibility in defining the term public domain information. According to the federal regulations, public domain information includes:

- information about the organization of the state, the state UC Agency, and appellate authorities, including the names and positions of officials and employees;
- information about the state UC law (and applicable federal law), provisions, rules, regulations, and interpretations thereof, including statements of general policy and interpretations of general applicability; and
- any agreement, including interstate arrangements and reciprocal agreements and any agreements with DOL related to the administration of the state UC law.

In the proposed federal rules, the possibility existed that appellate records and decisions could qualify as "statements of general policy" within the definition of public domain information set out in 20 C.F.R. §603.2. The Commission commented on these proposed federal rules, concerned that DOL would interpret these regulations to require a state to treat entire appeals records and decisions as public domain information. Such a practice would be at odds with current policy. The Commission determines certain cases to be of precedential value and includes a digest of each selected case in the Commission Appeals Policy and Precedent Manual. Thereafter, only the de-identified digests of Commission-approved precedents are treated as public domain information, while appeals records and fact-specific decisions are withheld. These digests have traditionally been available to the public and may be accessed on the Agency's Web site at www.texasworkforce.org.

In 20 C.F.R. §603.2, DOL removed appeals records and decisions from the definition of public domain information, establishing that the public does not necessarily have a right of access to appeals records and decisions, and ensuring that some appeals information such as Social Security numbers remains confidential. In fact, DOL noted in its preamble to the final rules that, "States may keep appellate records confidential even though the rule does not require it." As a result, the Commission has opted to deem entire appellate records as confidential and will continue to release de-identified digests of Commission-approved precedents.

This practice is supported by provisions of the Texas Government Code and rulings by the Texas Office of the Attorney General (OAG). Under §552.107(1), Texas Government Code, certain legal matters are considered privileged and thus are not subject to disclosure. The case analyses rendered by Commission appeals attorneys in furtherance of professional legal services to the Commission have been protected from disclosure under §552.107(1). Once OAG makes a decision for a governmental body concerning the disclosure of a specific, clearly delineated category of information, that governmental body need not seek future OAG decisions regarding its ability to withhold such information, provided the elements of law, fact, and circumstances on which the decision was based have not changed in subsequent information requests. Such rulings that a governmental body may rely on are known as "previous determinations." Before Texas enacted the law making UC information privileged—not public—for purposes of the Public Information Act, OAG granted the Agency two previous determinations. Both ruled that a confidential case analysis rendered by Commission appeals attorneys in furtherance of professional legal services to the Commission is an exception to disclosure, pursuant to Texas Government Code §552.107(1).

In these proposed rules, the Commission has chosen to maintain the status quo in Commission operations by:

- using the definition of public domain information set forth in 20 C.F.R. §603.2(c), as interpreted by the Commission and allowing appropriate Agency organization information, Texas UC law, and any Texas UC administration agreements to be released;
- continuing the practice of holding entire appeals records and decisions as confidential and not releasable; and
- continuing the current practice of releasing de-identified Commission-designated precedent case digests as statements of general applicability under the definition of public domain information.

Disclosure of confidential UC information is permissible under certain exceptions if authorized by state law and if such disclosure does not interfere with the efficient administration of the state UC law. Disclosure to individuals and employers of their own confidential UC information—provided it is for UC purposes—is required under 20 C.F.R. §603.6(a). For example, a claimant's UC information can be released to that particular individual; likewise, employer information can be disclosed to that specific employer. The federal regulations also permit disclosure of such information for non-UC purposes under certain specified circumstances. However, DOL makes clear that these disclosures for non-UC purposes must be subject to cost reimbursement, as grant funds may not be used to pay for such disclosure costs. These proposed rules allow claimants or employers access to their own UC information, even if the request is for non-UC purposes, subject to cost reimbursement, unless such access could conflict with the administration of UC such as releasing a confidential informant's name or attorney-client privileged information. The federal regulations also permit states to disclose confidential UC information, including identifying information, to an employer or claimant's agent, upon presentation of a written release from the particular individual or employer. Or, when a written release is impossible or impracticable to obtain, the agent can present such other form of consent as is permitted under state law.

Federal rules treat an elected official performing services for a constituent regarding UC matters as the individual's or employer's agent. DOL reasons that when an elected official is acting in response to a constituent's inquiry about a UC matter, such as that individual's UC claim, the elected official is acting on the individual's behalf and thus is effectively the individual's agent in resolving claim-related issues. But because elected officials may receive requests for assistance that do not specifically authorize the disclosure of confidential UC information—even though such disclosure is necessary for the official to adequately respond to the constituent—DOL revised its final rule to permit the elected official to present reasonable evidence of a request for assistance rather than the "written release." Reasonable evidence of a request for assistance might be a letter from the individual or employer requesting assistance or a written record of a telephone request from the individual or employer. DOL explained that in most cases a request for assistance from a U.S. congressman in reviewing a particular claim includes such reasonable evidence and it is unnecessary to request further evidence.

Attorneys retained in a UC matter to represent an individual or employer are also treated as agents of that individual or employer. Because DOL recognized an attorney has legal and ethical obligations, DOL agreed that an attorney's assertion that he or she has been retained to represent an individual or employer on a UC matter is sufficient to authorize the disclosure of the client's confidential UC information to the attorney.

As proposed herein, the Commission has chosen to treat confidential UC information as releasable to an agent when informed consent is obtained, including the allowable disclosures to:

- elected officials performing constituent services, upon presentation of a written release or reasonable evidence that the individual or employer has authorized such disclosure;
- attorneys retained for purposes related to state UC law, if the attorney asserts that he or she is representing the individual or employer; and

—other, non-attorney agents, such as an individual's representative or an employer service agent, provided the required consent is obtained.

Because of the greater potential threat to employer or individual privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential UC information, DOL believes that additional protections, such as a conditional written release, are necessary for these types of third-party disclosures. The federal rules impose certain requirements upon this category of disclosure, including:

- cost reimbursement;
- safeguard and security requirements;
- written, enforceable agreements;
- imposition of penalties for the misuse of data; and
- maintenance of systems sufficient to allow an audit.

The provisions of HB 2120 and SB 1619 impose criminal penalties for the unauthorized use of a claimant's or employer's identifying information, thus meeting a key element of the federal regulations. The Agency obtains written agreements to ensure the information will be kept confidential. These written agreements include provisions for:

- monitoring contractor usage of UC information (including site visits); and
- obtaining reimbursement of costs.

The Agency exchanges information with numerous contractors. Accordingly, certain threshold standards must be met by all third parties to ensure compliance with federal law. At a minimum, the third party must acknowledge that unauthorized release of the UC information could result in the imposition of criminal penalties. But, given the range of potential risks posed by different contractors, safeguarding the release of confidential information will require additional measures above the basic minimum federal standards. However, the Commission also recognizes the important role the Local Workforce Development Boards (Boards) play in administration of workforce programs. Accordingly, to facilitate Boards' oversight and administration of service delivery and eligibility determinations for workforce services, the Commission proposes to permit the release of otherwise confidential employer and claimant information to Texas workforce system contractors and Board contractors for the administration of workforce programs, as appropriate, pursuant to a written agreement containing the safeguards identified in 20 C.F.R. §603.9 and §603.10.

One effective approach—used in the Agency's current monitoring and safeguard agreements—is to perform an individualized risk assessment. Accordingly, these rules establish general categories and parameters to govern the authorized use of UC information, based upon a risk assessment of disclosure by a particular contractor. Likewise, the Agency will continue to draft individual agreements tailored to address such issues as the specific methods of release, the use of the information, and auditing requirements. Such contracting details are developed on an operational level, but will reflect the guiding principles reflected in these proposed rules.

Contractors of other local, state, or federal public officials may seek access to identifying information. The federal regulations define a public official as "an official, agency, or public entity within the executive branch of federal, state, or local government that has

responsibility for administering or enforcing a law, or an elected official in the federal, state, or local government." As long as the use of this information is related to the administration of governmental or legal functions, the Commission will permit access to any contractor of any other local, state, or federal public official. These activities may include research related to the law administered by the public official. However, prior to releasing identifying information to any contractor of any public official, the Agency must:

- (1) enter into a written agreement with the public official on whose behalf the agent or contractor will obtain information that holds the public official responsible for ensuring that the agent or contractor complies with the safeguards in 20 C.F.R. §603.9, and provides for termination if the state or state UC agency determines that the entity does not follow the safeguards in the agreement;
- (2) ensure that appropriate monitoring, based on a risk assessment analysis that includes performing on-site inspections of the agency, entity, or contractor, is in place to ensure that the requirements of the state's law and the agreement to maintain confidentiality in contract required by 20 C.F.R. §603.10 are met;
- (3) recoup the costs required to set up the agreement, provide the information, monitor the use, and investigate breaches of the agreement; and
- (4) devote staff time to the above activities within the current full-time equivalent cap of the Agency.

The Commission proposes to permit release of otherwise confidential employer and claimant information to nonpublic contractors of federal, state, and local entities, but only on an individualized basis. Under the federal regulations, the Commission must ensure that all costs are recovered up front. Accordingly, these rules propose to allow a risk assessment analysis of each contractor's business practices and uses of confidential UC information, to ensure that where release is appropriate, contracts are tailored to each contractor.

Pursuant to the newly adopted federal regulations, an employer's or individual's agent may access the client's UC information to the same extent as the client, provided the agent first secures written authorization from the employer or individual the agent represents. However, the standards for release are quite different if the requesting entity is a non-agent third party. A non-agent third party lacks written authorization from the employer or individual and typically seeks access to confidential information for business or research purposes.

DOL's final rules recognize that additional protections are needed for releases to non-agent third parties because of the greater potential threat to employer or individual privacy posed by the entity's collection, storage, maintenance, use, and possible misuse of confidential UC information. In particular, DOL stressed that the purpose specified in the release must be limited to providing a service or benefit to the individual signing the

release or to carrying out the administration or evaluation of a public program to which the release pertains; if the release does not meet these requirements, the state may not disclose confidential UC information under this exception to disclosure.

As noted above, HB 2120 and SB 1619 satisfy the federal criminal penalty requirements for misuse of UC data—under Texas law, unauthorized release of this information is a Class A misdemeanor. However, the Agency must ensure that requestors maintain sufficient systems to allow for audit of disclosed information and to allow the Agency to monitor the use, storage, and destruction of the information. Historically, the Agency has not provided such access because previously state law did not impose any criminal penalties for unauthorized use or release of UC information, and the cost and staff time necessary to ensure the non-agent complied with federal requirements was prohibitive. Although releases to non-agent third parties are subject to the same four safeguards applicable to government contractors, such releases are not statutorily mandated. Accordingly, the Commission has chosen to continue its current practice of allowing non-agent third parties access to confidential UC records only on a strict case-by-case basis, rather than on an ongoing or, in particular, electronic online basis. In each instance, as a comprehensive written agreement is developed, the costs of monitoring compliance and the risks of improper use must be fully evaluated and built into the agreement, as well as recovered in full up front.

As previously noted, 20 C.F.R. §603.6(a) requires disclosure to individuals and employers of their own confidential UC information, provided such is for UC purposes. Currently, disclosure of confidential UC information to parties is separately required under the terms of the Narciso Gutierrez, et al. vs. TWC (Gutierrez) settlement. On August 13, 1998, a full and final settlement was implemented between the parties. In part, the settlement requires the Commission to provide "relevant separation and timeliness information in the Commission's custody, as a matter of routine, to both parties (the claimant and the employer) with the Notice of Hearing it currently sends out." Thus, prior to the hearing, the Agency must mail to both parties all fact-finding statements relating to the work separation and the appeal. Moreover, the Gutierrez agreement requires the mutual exchange of otherwise confidential information in hearings. The terms of the agreement are contractual, binding upon the Commission, and do not expire.

Proposing rules to explicitly allow the sharing of confidential identifying UC information addresses a unique challenge concerning release of certain information where the claimant has been a victim of family violence or stalking. Section 207.046(a)(2), Texas Labor Code, provides that a claimant is not disqualified from receiving UC if that individual left the workplace to avoid family violence or stalking, provided certain evidentiary standards are satisfied. Section 207.046(b), Texas Labor Code, provides, "except as provided by law," such evidence may not be disclosed to any person without the affected claimant's consent.

Arguably, §207.046(b), Texas Labor Code, could be read to prohibit the Agency from meeting Gutierrez requirements because the Agency likely lacks the claimant's consent to provide relevant separation information to both parties in some hearings. Conversely,

failure to provide pertinent information to both parties prior to the hearing could hamper administrative process rights if both parties were not fully apprised of the issues prehearing, possibly resulting in inadequately prepared participants. Specifically allowing the sharing of this information with all hearing parties by rule satisfies Gutierrez without violating §207.046(b). Establishing this practice in rule will ensure the disclosure of UC records to a hearing party, meet the terms of the Gutierrez settlement agreement, and avoid any legal challenges related to the release of this information in such circumstances.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

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

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

The Commission proposes the following amendments to Subchapter B:

§815.18. General Rules for Both Appeal Stages

Section 815.18(2) is reorganized as §815.18(2)(A).

New §815.18(2)(B) states that the Agency shall provide copies of the relevant separation and timeliness information in its custody to both parties with the Notice of Hearing, including:

- (i) all information received from the parties in response to, or in protest of, a claim for unemployment insurance;
- (ii) all fact-finding statements relating to the work separation; and
- (iii) the appeal from the determination of the work separation.

SUBCHAPTER E. CONFIDENTIALITY AND DISCLOSURE OF STATE UNEMPLOYMENT COMPENSATION INFORMATION

The Commission proposes new Subchapter E, as follows:

§815.161. Scope and Purpose

Section 815.161(a) states that the purpose of the subchapter is to implement the federal regulations, 20 C.F.R. Part 603, and state law, Texas Labor Code, Chapter 301, Subchapter F, regarding the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information.

Section 815.161(b) explains that this subchapter is limited to the confidentiality requirements in federal and state laws and regulations specifically regarding unemployment information. The section further states that additional limitations on the release, custody, use, preservation, and disclosure of information maintained in unemployment insurance records may be imposed by other laws and regulations.

Section 815.161(c) sets out that no right or obligation of the Agency, party to a claim, employer, or third party to invoke limitations or confidentiality requirements based on such separate laws or

regulations is waived or limited by this subchapter. Additionally, this subchapter does not address any right or obligation a party to an unemployment compensation claim may have to redisclose unemployment insurance information regarding his or her own claim or unemployment insurance tax records obtained lawfully from the Agency.

§815.162. Definitions

Section 815.162 sets forth the definitions for terms used throughout Subchapter E of Chapter 815.

Section 815.162(1) defines "confidential unemployment compensation information" as unemployment compensation information in the records of the Agency, which includes identifying information regarding any individual or past or present employer or employing unit—including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit.

Section 815.162(2) defines "informed consent release" as a written grant of authorization that meets the requirements of §815.166 of this subchapter made by an individual or employer to a third party to allow access to confidential unemployment compensation information. When a written release is impossible or impracticable to obtain, the third party may present such other form of consent as is permitted by the Agency.

Section 815.162(3) defines "party" as the employer or claimant to whom the confidential unemployment compensation information relates, including a base period employer that has appealed a notice of chargeback regarding a specific claim. This term does not include any past or present employer or claimant who is not the subject of the particular claim, except an employer that appealed a notice of chargeback relating to an employee in the chargeback period.

Section 815.162(4) defines "public official" as:

- (A) an official, agency, or public entity within the executive branch of federal, state, or local government that has responsibility for administering or enforcing a law; or
- (B) an elected official in the federal, state, or local government.

Section 815.162(5) defines "unemployment compensation information" as information in the records of the Agency that pertains to the administration of the Texas Unemployment Compensation Act, including any information collected, received, developed, or maintained in the administration of unemployment compensation benefits, the unemployment compensation tax system or the unemployment compensation benefit and tax appeal system.

§815.163. Disclosure of Confidential Unemployment Compensation Information

Section 815.163(a) states that the Agency shall not disclose confidential unemployment compensation information except in compliance with federal law, state law, and this subchapter—but notwithstanding any other provision of this chapter.

Section 815.163(b) explains that the Agency shall not disclose confidential unemployment compensation information if such disclosure interferes with the efficient administration of the state unemployment compensation law. In evaluating interference with efficient administration, the Agency may consider factors including, but not limited to, the burdensomeness of the request and whether the request places an employer's or individual's privacy at unacceptable risk.

§815.164. Mandatory and Permissive Disclosures

Section 815.164(a) clarifies that the Agency shall disclose confidential unemployment compensation information if disclosure is necessary for the proper administration of the unemployment compensation program.

Section 815.164(b) explains that disclosure necessary for the proper administration of the unemployment compensation program includes, but is not limited to, disclosure required under 20 C.F.R. §603.6, as well as disclosure to claimants, employers, and third parties, as necessary, for purposes of unemployment administration and adjudication processes under this chapter.

§815.165. Exceptions to Confidentiality Requirements

Section 815.165(a) allows the Agency to disclose public domain information. For purposes of this section, public domain information is defined to include directory information about the organization of the state, the Commission, and appellate authorities, as well as the names and positions of officials and employees; information about the state unemployment compensation law (and applicable federal law), provisions, rules, regulations, and interpretations, including statements of general policy and interpretations of general applicability; and any agreement relating to the administration of the state unemployment compensation law. Commission-designated precedent case digests from which all individually identifiable information has been removed also constitute public domain information. But public domain information does not include information historically excepted from disclosure under the Public Information Act, Chapter 552, Texas Government Code, including, but not limited to, attorney/client privileged information; interagency memoranda containing advice, opinion, or recommendation to policy makers or decision makers; or other items historically excepted from disclosure under the Public Information Act.

Section 815.165(b) states that the Agency may disclose confidential unemployment compensation information about an individual or employer to that individual or employer, respectively, but in no event does this restrict the Agency from withholding information historically excepted from disclosure including, but not limited to, confidential informant or attorney-client privileged information, or tax audit techniques.

Section 815.165(c) provides that the Agency may disclose confidential unemployment compensation information, so long as the requestor provides a written release demonstrating informed consent signed by the individual or the employer whose records are requested, and if the written release demonstrated informed consent.

Section 815.165(d)(1)–(5) states that the Agency may disclose confidential unemployment compensation information, based on informed consent, to the following:

- (1) An agent who acts for or in the place of an individual or an employer by the authority of that individual or employer if the agent presents a written release signed by the party to be represented. If a written release is impossible or impracticable to obtain, the Agency may accept other documentation sufficient to establish informed consent.
- (2) An elected official performing constituent services, so long as the official presents reasonable evidence of authorization to obtain the information, such as a letter from the individual or employer requesting the elected official's assistance or a written record of a telephone request from the individual or employer that the individual or employer has authorized such disclosure.
- (3) A licensed attorney retained for purposes unrelated to the state's unemployment compensation law; if the attorney provides a written statement declaring that he or she has been retained to represent the individual or employer, the requirements of a written release are met. An attorney retained for purposes related to the state's unemployment compensation law may assert that he or she is representing the individual or employer, and such assertion need not be in writing.
- (4) A third party that is not acting as an agent, but only if that entity provides the Agency with a copy of an informed consent release consistent with the requirements of §815.166 of this subchapter.
- (5) A third party seeking confidential information on an ongoing basis, only if that entity submits an informed consent release consistent with the requirements of §815.166. This requirement applies even if the third party is an agent seeking information on an ongoing basis.

Section 815.165(e) provides that the Agency may disclose confidential unemployment compensation information to a public official for use in the performance of his or her official duties, including the administration or enforcement of law or execution of the official responsibilities of a federal, state, or local elected official. Administration of law includes research related to the law administered by the public official. Execution of official responsibilities does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

Section 815.165(f) states that the Agency may disclose confidential unemployment compensation information to a public official's agent or contractor if such disclosure is permissible under 20 C.F.R. §603.5(e) and only after evaluating the following factors:

- (1) the potential threat to the employer's or individual's privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential unemployment compensation information;
- (2) the costs associated with such disclosure;
- (3) the agent or contractor's ability to comply with the requirements in 20 C.F.R. §603.9 regarding safeguards and security of confidential unemployment compensation information;

- (4) the costs of enforcement, including investigation and assessment of penalties for misuse of data;
- (5) the costs to develop, monitor, and maintain systems sufficient to allow audit of the information;
- (6) the personnel, travel, and equipment expenses associated with periodic monitoring and on-site audits required by 20 C.F.R. §603.10; and
- (7) whether the disclosure is for purposes of solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

Section 815.165(g) explains that the Agency may disclose confidential unemployment compensation information to parties for purposes of claims adjudications, hearings and appeals, consistent with this chapter.

Section 815.165(h) provides that the Agency may disclose confidential unemployment compensation information to a federal official for purposes of UC program oversight and audits, including disclosures under 20 C.F.R. Parts 29 and 601, as well as under 20 C.F.R. Parts 96 and 97.

Section 815.165(i) clarifies that the confidentiality requirements of this chapter do not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS). Further, this chapter's requirements do not restrict or impose any condition on the transfer of any other information to BLS under an agreement, or the disclosure or use of such information by BLS.

§815.166. Informed Consent Release

Section 815.166(1)–(5) allows the Agency to disclose confidential unemployment compensation information upon submission of an informed consent release as set forth in this section. An informed consent release is a written release that must be signed by the individual or employer, and must specify the following:

- (1) The information to be disclosed;
- (2) That the information will be obtained through access of state government files;
- (3) The purpose or purposes for which the information is sought;
- (4) That the information obtained under the release will be used only for that purpose or purposes;
- (5) The individuals or entities that may receive the information; and
- (6) A purpose limited to assisting the individual with obtaining a service or benefit, or meeting a federal or state law requirement for the administration or evaluation of a public program to which the release pertains.

§815.167. Subpoenas and Court Orders

Section 815.167(1)–(2) states that the Agency may disclose confidential unemployment compensation information in compliance with:

- (1) a court order specifically requiring such disclosure; or

- (2) a subpoena issued by a local, state, or federal official, other than a court clerk, provided the official possesses legal authority to obtain such information by subpoena under state or federal law.

§815.168. Charges for Disclosure of Unemployment Compensation Information

Section 815.168(a) requires the Agency to recoup the cost of providing unemployment compensation information consistent with 20 C.F.R. §603.8. It allows the Agency to charge actual charges and to set standardized charges for items routinely requested.

Section 815.168(b) states that the Agency may only release unemployment compensation information for non-unemployment compensation purposes to the following individuals if the unemployment compensation program is reimbursed and there is a written, enforceable confidentiality agreement:

- (1) third-party requestors;
- (2) public officials; and
- (3) contractors of public officials, provided the public officials remain liable for the actions of the contractor.

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:

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

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

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

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

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

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no new requirements on small businesses.

Our reasoning is strongly influenced by the requirements of 20 C.F.R. Part 603 (*Federal Register*, September 27, 2006), which provides in §603.8 that federal unemployment compensation grant funds may not be used to pay any of the costs of making any disclosure of unemployment compensation information, that the costs to a state unemployment compensation agency of processing and handling a request for disclosure of information must be calculated in accordance with the cost principles and administrative requirements of 29 C.F.R. Part 97 and OMB Circular No. A-87, and that the costs to a state unemployment compensation agency of making a disclosure of unemployment compensation information must be paid by the recipient of the information or another source paying on behalf of the recipient. We do not consider the requirement to recover the costs of making the disclosure of unemployment compensation information covered by these rules either a new requirement or a requirement of these rules, themselves, nor do we consider the requirement that the disclosure of this unemployment compensation information must be paid by the recipient of the information (or another source paying on behalf of the recipient) to be either a new requirement or one created by these 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 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

In the development of these rules for publication and public comment, the Commission sought the involvement of each of Texas' 28 Boards. The Commission provided the policy concept to each of the Boards for consideration and review. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

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 with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities. Further, these rules are proposed under Texas Labor Code §301.085(b), which requires that, consistent with federal law, the Commission shall adopt and enforce reasonable rules governing the confidentiality, custody, use,

preservation, and disclosure of unemployment compensation information. The rules must include safeguards to protect the confidentiality of identifying information regarding any individual or any past or present employer or employing unit contained in unemployment compensation information, including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit, as applicable.

The proposed rules affect Texas Labor Code, Title IV.

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

§815.18. General Rules for Both Appeal Stages

This section shall be applicable to appeals both to the appeal tribunal and to the Commission.

- (1) Issuance of subpoenas.
 - (A) Subpoenas to compel the attendance of witnesses and the production of records for any hearing of an appeal may be issued at the direction of the Commission or its designee or an appeal tribunal. A subpoena may be issued either at the request of a party or on the motion of the Commission or its designee or the appeal tribunal. The party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case. The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.
 - (B) A witness subpoenaed to appear before an appeal tribunal, the Commission or its designee, or a court may be paid a fee and mileage for the appearance. The fee shall be \$20 per day, and for miles necessarily traveled to and returning from a hearing, the rate per mile shall be at the rate provided for state employees in the State Appropriations ~~Appropriation~~ Act, or as otherwise required by law. The fee as provided in this section and the mileage shall be paid from the unemployment compensation administration fund upon proper certification of the appeal tribunal, the Commission or its designee, or the court, and upon certification of the witness that the fees and mileage are just, true, and unpaid.
- (2) Provision of Request for Agency records by a party.
 - (A) Upon the request of a party to a proceeding, the Agency shall provide copies of all records pertaining to that proceeding, except for records subject to privileges under state or federal law or regulation. Other Agency records shall be produced only if the party specifies the exact information desired, and the necessity of the records to allow the party to properly present its claim; the production of records shall be subject to confidentiality limitations and privileges under state or federal law or regulation.

(B) The Agency shall provide copies of the relevant separation and timeliness information in the Agency's custody to both parties with the Notice of Hearing, including:

- (i) all information received from the parties in response to, or in protest of, a claim for unemployment insurance;
- (ii) all fact-finding statements relating to the work separation; and
- (iii) the appeal from the determination of the work separation.

(3) Representation before appeal tribunal and the Commission.

(A) An individual who is a party to a proceeding may appear before an appeal tribunal or the Commission or its designee.

(B) A partnership may be represented by any of its members or a duly authorized representative. Any corporation or association may be represented by an officer or a duly authorized representative.

(C) Any party may appear by an attorney at law or by any other individual who is qualified to represent others.

(D) The Commission or its designee or an appeal tribunal may refuse to allow any individual to represent others in any proceeding before it if the individual acts or speaks in an unethical manner or if the individual intentionally and repeatedly fails to observe the provisions of the Act or the rules of the Agency.

(4) Removing a party from a proceeding. The Commission or its designee or an appeal tribunal may, after an appropriate warning, expel from any proceeding any individuals, whether or not a party, who ~~fail~~ fails to comport themselves in a manner befitting the proceeding. The Commission or its designee or an appeal tribunal may then continue with the proceeding, hear evidence, and render a decision on the appeal.

(5) Appeal Information. An appeal tribunal decision sent to a party of interest, or the Commission's decision sent to a party, will include or be accompanied by a notice specifying the appeal rights of the parties, the procedure for filing further appeal, and the time period within which an appeal shall be filed.

(6) Retention of Decisions. Copies of decisions of the Commission and of appeal tribunals shall be kept in accordance with the approved records retention schedule.

SUBCHAPTER E. CONFIDENTIALITY AND DISCLOSURE OF STATE UNEMPLOYMENT COMPENSATION INFORMATION

§815.161. Scope and Purpose

- (a) The purpose of this subchapter is to implement the federal regulations, 20 C.F.R. Part 603, and state law, Texas Labor Code, Chapter 301, Subchapter F, regarding the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information.
- (b) This subchapter is limited to the confidentiality requirements in federal and state laws and regulations specifically regarding unemployment information. Other laws and regulations may impose additional limitations on the release, custody, use, preservation, and disclosure of information maintained in unemployment insurance records.
- (c) This subchapter does not:
 - (1) limit or waive any right or obligation of the Agency, party to a claim, employer, or third party to invoke limitations or confidentiality requirements based on such separate laws or regulations; or
 - (2) address any right or obligation a party to an unemployment compensation claim may have to redisclose unemployment insurance information regarding his or her own claim or unemployment insurance tax records obtained lawfully from the Agency.

§815.162. Definitions

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

- (1) Confidential unemployment compensation information -- Unemployment compensation information in Agency records, including identifying information regarding any individual or past or present employer or employing unit, or any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit.
- (2) Informed consent release -- A written grant of authorization that meets the requirements of §815.166 of this subchapter made by an individual or employer to a third party to allow access to confidential unemployment compensation information. When a written release is impossible or impracticable to obtain, the third party may present such other form of consent as is permitted by the Agency.

- (3) Party -- The employer or claimant to whom the confidential unemployment compensation information relates. A party includes a base period employer that has appealed a notice of chargeback regarding a specific claim. A party does not include any past or present employer or claimant who is not the subject of the particular claim, except an employer that appealed a notice of chargeback relating to an employee in the chargeback period.
- (4) Public official --
 - (A) An official, agency, or public entity within the executive branch of federal, state, or local government with responsibility for administering or enforcing a law; or
 - (B) An elected official in the federal, state, or local government.
- (5) Unemployment compensation information -- Information in the Agency's records that pertains to the administration of the Texas Unemployment Compensation Act, including any information collected, received, developed, or maintained in the administration of unemployment compensation benefits, the unemployment compensation tax system, or the unemployment compensation benefit and tax appeal system.

§815.163. Disclosure of Confidential Unemployment Compensation Information

- (a) The Agency shall not disclose confidential unemployment compensation information except in compliance with federal law, state law, and this subchapter.
- (b) Notwithstanding any other provision of this chapter, confidential unemployment compensation information shall not be disclosed if such disclosure interferes with the efficient administration of the state unemployment compensation law. In evaluating interference with efficient administration, the Agency may consider factors including, but not limited to, the burdensomeness of the request and whether the request places an employer's or individual's privacy at unacceptable risk.

§815.164. Mandatory and Permissive Disclosures

- (a) The Agency shall disclose confidential unemployment compensation information if disclosure is necessary for the proper administration of the unemployment compensation program.
- (b) Disclosure necessary for the proper administration of the unemployment compensation program includes, but is not limited to, disclosure required under 20 C.F.R. §603.6 and disclosure to claimants, employers, and third parties, as necessary, for purposes of unemployment administration and adjudication processes under this chapter.

§815.165. Exceptions to Confidentiality Requirements

- (a) The Agency may disclose public domain information. For purposes of this section, public domain information includes directory information about the organization of the state, the Commission, and appellate authorities, as well as the names and positions of officials and employees; information about the state unemployment compensation law (and applicable federal law), provisions, rules, regulations, and interpretations, including statements of general policy and interpretations of general applicability; and any agreement relating to the administration of the state unemployment compensation law. Commission-designated precedent case digests from which all individually identifiable information has been removed constitute public domain information. Public domain information does not include information historically excepted from disclosure under the Public Information Act, Chapter 552, Texas Government Code, including, but not limited to, attorney/client privileged information; interagency memoranda containing advice, opinion, or recommendation to policy makers or decision makers; or other items historically excepted from disclosure under the Public Information Act.
- (b) The Agency may disclose confidential unemployment compensation information about an individual or employer to that individual or employer, respectively, but in no event does this restrict the Agency from withholding information historically excepted from disclosure, including, but not limited to, confidential informant or attorney-client privileged information, or tax audit techniques.
- (c) The Agency may disclose confidential unemployment compensation information if the requestor provides a written release signed by the individual or the employer whose records are requested, and if the written release demonstrates informed consent.
- (d) The Agency may disclose confidential unemployment compensation information, based on informed consent, to the following:
 - (1) An agent acting for or in the place of an individual or an employer by the authority of that individual or employer if the agent presents a written release signed by the party to be represented. If a written release is impossible or impracticable to obtain, the Agency may accept other documentation sufficient to establish informed consent.
 - (2) An elected official performing constituent services provided the official presents reasonable evidence of authorization to obtain the information, such as a letter from the individual or employer requesting the elected official's assistance or a written record of a telephone request from the individual or employer that the individual or employer has authorized such disclosure.

- (3) A licensed attorney retained for purposes unrelated to the state's unemployment compensation law; if the attorney provides a written statement declaring that he or she has been retained to represent the individual or employer, the requirements of a written release will have been met. An attorney retained for purposes related to the state's unemployment compensation law may assert that he or she is representing the individual or employer, and such assertion need not be in writing.
 - (4) A third party that is not acting as an agent, only if that entity provides the Commission with a copy of an informed consent release consistent with the requirements of §815.166 of this subchapter.
 - (5) A third party seeking confidential information on an ongoing basis, only if that entity submits an informed consent release consistent with the requirements of §815.166. This requirement applies even if the third party is an agent seeking information on an ongoing basis.
- (e) The Agency may disclose confidential unemployment compensation information to a public official for use in the performance of his or her official duties, including the administration or enforcement of law or execution of the official responsibilities of a federal, state, or local elected official. Administration of law includes research related to the law administered by the public official. Execution of official responsibilities does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.
- (f) The Agency may disclose confidential unemployment compensation information to a public official's agent or contractor if such disclosure is permissible under 20 C.F.R. §603.5(e) and only after evaluating the following factors:
- (1) The potential threat to the employer's or individual's privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential unemployment compensation information;
 - (2) The costs associated with such disclosure;
 - (3) The agent or contractor's ability to comply with the requirements in 20 C.F.R. §603.9 regarding safeguards and security of confidential unemployment compensation information;
 - (4) The costs of enforcement, including investigation and assessment of penalties for misuse of data;
 - (5) The costs to develop, monitor, and maintain systems sufficient to allow audit of the information;

- (6) The personnel, travel, and equipment expenses associated with periodic monitoring and on-site audits required by 20 C.F.R. §603.10; and
 - (7) Whether the disclosure is for purposes of solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.
- (g) The Agency may disclose confidential unemployment compensation information to parties for purposes of claims adjudications, hearings, and appeals, consistent with this chapter.
- (h) The Agency may disclose confidential unemployment compensation information to a federal official for purposes of UC program oversight and audits, including disclosures under 20 C.F.R. Parts 29 and 601, as well as under C.F.R. Parts 96 and 97.
- (i) The confidentiality requirements of this chapter do not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS). Further, this chapter's requirements do not restrict or impose any condition on the transfer of any other information to BLS under an agreement, or the disclosure or use of such information by BLS.

§815.166. Informed Consent Release

The Agency may disclose confidential unemployment compensation information upon submission of an informed consent release as set forth in this section. An informed consent release is a written release that must be signed by the individual or employer, and must specify the following:

- (1) The information to be disclosed;
- (2) That the information will be obtained through access of state government files;
- (3) The purpose or purposes for which the information is sought;
- (4) That the information obtained under the release will be used only for that purpose;
- (5) The individuals or entities that may receive the information; and
- (6) A purpose limited to assisting the individual with obtaining a service or benefit, or meeting a federal or state law requirement for the administration or evaluation of a public program to which the release pertains.

§815.167. Subpoenas and Court Orders

The Agency may disclose confidential unemployment compensation information in compliance with:

- (1) a court order specifically requiring such disclosure; or

- (2) a subpoena issued by a local, state, or federal official, other than a court clerk, provided the official possesses legal authority to obtain such information by subpoena under state or federal law.

§815.168. Charges for Disclosure of Unemployment Compensation Information

- (a) The Agency shall recoup the cost of providing unemployment compensation information consistent with 20 C.F.R. §603.8. The Agency may charge actual charges and may set standardized charges for items routinely requested.
- (b) The Agency may only release unemployment compensation information for non-unemployment compensation purposes to the following individuals if the unemployment compensation program is reimbursed and there is a written, enforceable confidentiality agreement:
 - (1) Third-party requestors;
 - (2) Public officials; and
 - (3) Contractors of a public official provided the public official remains liable for the actions of the contractor.