

CHAPTER 821. TEXAS PAYDAY RULES

ADOPTED 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 AUGUST 31, 2010, THE TEXAS WORKFORCE COMMISSION ADOPTED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

Estimated date of publication in the *Texas Register*: **September 17, 2010**

The rules will take effect: **September 20, 2010**

The Texas Workforce Commission (Commission) adopts the following new sections, *without* changes, to Chapter 821, relating to Texas Payday Rules, as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5511):

Subchapter A. General Provisions, §821.7

Subchapter B. Payment of Wages, §821.29

The Commission adopts amendments to the following sections, *without* changes, of Chapter 821, relating to Texas Payday Rules, as published in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5511):

Subchapter A. General Provisions, §821.4

Subchapter B. Payment of Wages, §§821.25 - 821.27

Subchapter C. Wage Claims, §§821.41 - 821.43 and 821.46

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

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

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

--Clarification of definitions involving political subdivisions of the state, notice of paydays, severance pay, and fringe benefits;

--Clarification regarding commissions and bonuses, wage deductions, and voiding of determination orders and decisions; and

--Requirements for claimant withdrawal of a wage claim.

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

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

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

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(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 A. GENERAL PROVISIONS

The Commission adopts the following amendments to Subchapter A:

§821.4. Political Subdivision

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

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

§821.7. Notice of Paydays

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

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

SUBCHAPTER B. PAYMENT OF WAGES

The Commission adopts the following amendments to Subchapter B:

§821.25. Fringe Benefits

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

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

The Commission believes that current §821.25(b) is vague and difficult to interpret. The existing rule describes severance pay as "payment by an employer to an employee beyond the employee's wages on termination of employment, usually based on the employee's length of prior service,

and is not attributable to any period of time subsequent to termination." Payments made pursuant to agreements made at separation, such as contractual liquidated damages claims

or releases of liability claims¹ must not be construed as severance pay under Texas Labor Code, Chapter 61. Also, amounts paid to an employee because of a lack of notice of separation must not be construed as severance pay.

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

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

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

§821.26. Commissions or Bonuses

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

§821.27. Loans

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

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.

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 agreement stating that he or she will not sue the company for anything that happened during the employee's term of employment.

§821.29. Wage Advances

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

Wage advances are normally an advance on wages yet to be earned during a particular pay period. As such, the employer's recovery (crediting) of the wage advance from an employee's next scheduled paycheck is a reimbursement to the employer and not a deduction or a withholding of the employee's wages--i.e., the employee received full payment of wages on or before the scheduled payday for that pay period. The Commission believes that Chapter 821 requires clarification to:

- assist employers that seek to recover wage advances from an employee's next paycheck issued after the wage advance; and
- provide guidance to employers and workers regarding an employer's ability to recover wage advances.

SUBCHAPTER C. WAGE CLAIMS

The Commission adopts the following amendments to Subchapter C:

§821.41. Validity of Claim/Filing and Investigative Procedures

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

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

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

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

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

§821.42. Timeliness

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

§821.43. Wage Claim Withdrawal

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

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

§821.46. Void Determination Orders and Decisions

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

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

No comments were received.

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.

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

The adopted rules affect Texas Labor Code, Chapter 61.

CHAPTER 821. TEXAS PAYDAY RULES

SUBCHAPTER A. GENERAL PROVISIONS

§821.4. Political Subdivision.

- (a) An entity is a political subdivision of the state, and therefore not an employer under the Act, if it meets the criteria in either subsections (b) or (c) of this section.
- (b) An entity is a political subdivision of this state if it is a governmental unit having:
 - (1) the power to tax real and tangible personal property;
 - (2) limited geographic and jurisdictional boundaries;
 - (3) locally elected or locally appointed governing members; and
 - (4) the authority to provide a general public service or benefit.
- (c) An entity is a political subdivision of this state if the entity is so designated by Texas statute.
- (d) Entities that are political subdivisions of this state include, but are not limited to:
 - (1) cities;
 - (2) counties;
 - (3) school districts;
 - (4) junior college districts;
 - (5) levee improvement districts;
 - (6) drainage districts;
 - (7) irrigation districts;
 - (8) water improvement districts;
 - (9) water control and improvement districts;
 - (10) water control and preservation districts;
 - (11) freshwater supply districts;

- (12) navigation districts;
- (13) conservation and reclamation districts;
- (14) soil conservation districts;
- (15) municipal utility districts;
- (16) river authorities;
- (17) housing authorities;
- (18) hospital authorities; and
- (19) other similar entities.

§821.7. Notice of Paydays.

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

SUBCHAPTER B. PAYMENT OF WAGES

§821.25. Fringe Benefits.

- (a) For purposes of §61.001(7)(B) of the Act, vacation pay and sick leave pay are payable to an employee upon separation from employment only if a written agreement with the employer or a written policy of the employer specifically provides for payment.
- (b) For purposes of §61.001(7)(B) of the Act, severance pay is payment by an employer to an employee beyond the employee's wages on termination of employment, based on the employee's prior service. Severance pay does not include payments for liquidated damages, payments in exchange for a release of claims, or payments made because of a lack of notice of separation.
- (c) For purposes of §61.001(7)(B) of the Act, the sale of an employer's business is a termination of employment with all of the employer's employees. At the time of termination, the employer becomes liable for the payment of vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay if owed pursuant to a written agreement or written policy between the employer and its employees.
- (d) For purposes of §61.001(7)(B) of the Act, expense reimbursements paid to employees are not wages. Expense reimbursements are payments to the employee for costs expended by the employee directly related to the employer's business.

- (e) Absent the inclusion of definitions of terms in a written agreement with the employer or under a written policy of the employer, a term will be given its ordinary meaning unless a party establishes that it is defined in another way.
- (f) For purposes of §61.001(7)(B) of the Act, accrued leave time of an employee shall carry over to subsequent years only if a written agreement with the employer or a written policy of the employer specifically provides for it.
- (g) For purposes of §61.001(7)(B) of the Act, paid time off (PTO) or paid days off (PDO) are wages unless the employer's written policy defines PTO or PDO as something other than a combination of vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay. PTO or PDO is payable to an employee upon separation from employment only if a written agreement with the employer or a written policy of the employer specifically provides for payment.

§821.26. Commissions or Bonuses.

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

§821.27. Loans.

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

§821.29. Wage Advances.

- (a) A wage advance occurs when an employer advances to an employee a monetary sum that represents wages not yet earned, or wages that have been earned but are not yet due for payment.
- (b) An employer may recoup the wage advance from the employee's next regularly scheduled paycheck directly following the advance if:
 - (1) the employer provides the employee with notice that the amount is an advance that will be recovered from the next paycheck; and
 - (2) the employee agrees to the amount to be recouped.
- (c) If the wage advance is not recouped in the next regularly scheduled paycheck following the advance, the employer shall comply with §61.018 of the Act.

SUBCHAPTER C. WAGE CLAIMS

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

- (a) A wage claim may be filed in person at an office of the Commission, by mailing the claim to an address designated by the Commission, or by faxing the claim to a fax number designated by the Commission.
- (b) A wage claim must be filled out completely, legibly, and sufficiently to identify and allow the Commission to attempt contact with the employer.

§821.42. Timeliness.

- (a) The Commission shall determine the filing date of a wage claim as the date delivered in person to the Commission, the date faxed to and received by the Commission at a fax number designated by the Commission, or the date of a mailed wage claim based on the following:
 - (1) The postmark date of a wage claim properly addressed shall establish by a rebuttable presumption the date upon which the wage claim was filed unless the party opposing this presumption presents evidence to establish some other filing date.
 - (2) Absent a postmark or evidence establishing some other filing date, the date of receipt by the Commission shall control.
- (b) The Commission shall suspend the time limit for filing a wage claim only for those reasons required by law including, but not limited to, bankruptcy stays.

§821.43. Wage Claim Withdrawal.

- (a) The Commission shall allow a claimant to withdraw a wage claim only under the following circumstances:
 - (1) Before the Commission's written decision is final; or
 - (2) After the Commission's written decision is final, if the claimant certifies to the Agency that the wage claim is fully satisfied.
- (b) A claimant withdrawing a wage claim shall submit a form as prescribed by the Commission.
- (c) The Commission shall apply the withdrawal of a wage claim to both administrative penalties and wages.

§821.46. Void Determination Orders and Decisions.

A preliminary wage determination order and a decision shall be void from its inception when it orders a nonexistent entity to pay wages or orders a nonliable entity to pay wages.