

## CHAPTER 821. TEXAS PAYDAY RULES

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 **DECEMBER 12, 2006**, 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*: **December 29, 2006**  
Estimated End of Comment Period: **January 29, 2007**

The Texas Workforce Commission (Commission) proposes amendments to the following sections of Chapter 821 relating to Texas Payday Rules:

Subchapter A. General Provisions, §821.5  
Subchapter C. Wage Claims, §821.42

The Commission proposes the following new section of Chapter 821 relating to Texas Payday Rules:

Subchapter C. Wage Claims, §821.47

PART I. PURPOSE, BACKGROUND, AND AUTHORITY  
PART II. EXPLANATION OF INDIVIDUAL PROVISIONS  
PART III. IMPACT STATEMENTS  
PART IV. COORDINATION ACTIVITIES

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

The purpose of the proposed Chapter 821 rule change is:

- to reflect recent revisions to Agency Form C-8 referenced in §821.5; and
- to authorize the Commission to allow wage claims to be amended for the purposes of efficiency, expediency, and fairness to all parties.

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

(Note: Minor, nonsubstantive, 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 proposes the following amendment to Subchapter A:

##### **§821.5. Employment Status: Employee or Independent Contractor**

Section 821.5 adopts Agency Form C-8 as the Agency's official guideline for use in determining employment status. The introductory paragraphs of Form C-8 incorporate a broader explanation

of the applicability of the factors used to determine employee or independent contractor status, and specifically note that not all factors listed apply to each and every case.

## **SUBCHAPTER C. WAGE CLAIMS**

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

#### **§821.42. Timeliness**

Section 821.42(b) is removed in order to allow the Commission, at its discretion, to consider comprehensive wage claims from the investigatory phase through the wage claim hearing. Some wage claims may have to be dismissed as being premature simply because no wages have become due at the time the preliminary wage determination order or hearing decision is issued. In such cases, the claimant would still have the opportunity to refile the wage claim when the wages become due.

#### **§821.47. Amendment of Wage Claims**

New §821.47(a) and §821.47(b) provide authority for the Commission, at its discretion, to allow a wage claim to be amended for expediency or to prevent injustice. The new rule affords wage claimants the opportunity to add wages that become due subsequent to the filing of the wage claim or to amend the amount of wages at issue, subject to the discretion of the investigator or hearing officer handling the case. New §821.47 will not affect the requirement in Texas Labor Code §61.051(c) that a wage claim be filed no later than the 180th day after the date the wages claimed become due for payment.

An individual who originally files a claim for wages may realize that he or she did not request the full amount of wages allegedly owed; may have wages that continue to become due after the filing date of the wage claim; or may simply have filed the claim a few days before the wages actually became due under the Texas Payday Law. Under current rules, the claimant may not amend the original claim, but instead must file another, separate wage claim for the additional amount. The result is inefficient and burdensome multiple claims, excessive paperwork for all parties, and redundant investigations and hearings.

Under new §821.47, the Commission would have the discretion to allow a claimant to amend the amount of wages originally claimed in order to add wages that have become due. For example, a claimant files a wage claim contending commissions of \$200 are due but unpaid by the employer. Subsequent to filing the wage claim, the claimant believes more commissions in the amount of \$75 have become due. Under the current rule, the claimant would be required to file an additional, separate wage claim for \$75, which may result in another investigation and hearing, separate and apart from the hearing for the original \$200 claim. This subsequent investigation and hearing may have been avoided had the claimant been able to add the claim for the \$75 prior to the first hearing on the original \$200 claim. The new rule will result in efficiency and cost savings and reduce the necessity for more hearings which could likely result if the claimant is obliged to file a separate wage claim for the additional sums owed.

Amending wage claims may raise procedural due process issues, hence the amendments will be subject to the discretion of the Commission. Several factors will affect the Commission's decision on whether to allow the amendment of a wage claim.

One factor is the status of the wage claim. Amending a wage claim that is still in the investigation phase is relatively simple and raises few due process concerns because the Commission has yet to issue a preliminary wage determination order. However, allowing an amendment after the hearing has been held and a decision issued would raise serious due process issues, and would be unlikely to be allowed by the Commission.

Amending a wage claim after the issuance of the preliminary wage determination order, but prior to a hearing, is possible but may require additional procedures to ensure proper notice is given. The hearing officer may:

- proceed with the hearing and include the amended wages with the original claim;
- return the claim for further investigation of the issues; or
- continue the hearing to afford the employer opportunity to conduct a proper defense, gather appropriate records, etc.

Other factors affecting the Commission's disposition of an amendment include whether the amendment is:

- an extension of the same issues in the original claim—e.g., the original claim alleges \$200 in hourly wages owed but the amended claim alleges \$300 in hourly wages owed for an additional week;
- a new allegation of a different type of payment owed—e.g., the original claim alleges \$200 in hourly wages owed and the amended claim alleges \$200 in vacation/commissions/bonuses also owed; or
- a significant change in the amount of the original claim—e.g., the original claim alleges \$200 in salary owed and the amended claim alleges \$5,000 in salary owed.

Proper notice and possibly investigation for new or significantly changed issues still will be required. Although at or prior to the hearing, a claimant may amend the claim regarding the amount allegedly owed, a claimant may not discuss new issues without both parties being afforded proper notice. Should the claimant introduce a new issue at the hearing, the hearing officer retains the discretion to instruct the claimant to file a new, separate wage claim for those wages or to continue the hearing and provide both parties adequate notice of the issues to be discussed.

Example 1: A hearing is set to adjudicate a wage claim of \$200 by the claimant from the employer. At the hearing, the claimant argues that vacation pay of \$500 also is due from the employer, an issue the claimant previously failed to raise. Unless the employer is ready and willing to proceed with the vacation pay issue at that time, the hearing officer must advise the claimant to file a new wage claim for the vacation pay so it can be properly investigated.

Example 2: A hearing is set to adjudicate a wage claim involving \$800 for two weeks' salary. At the hearing, the claimant asserts that since the filing of the wage claim, an additional week is unpaid in the amount of \$400 and has become due. The hearing officer must allow the amendment of the wage claim. If the employer is not prepared to discuss the additional week now claimed, the hearing officer must schedule a continuance of the hearing to provide the employer an opportunity to prepare.

Under Texas Labor Code §61.058, hearings conducted under the Texas Payday Law are conducted under the rules and hearings procedures contained in Chapter 815 of this title, which ensure that procedural due process rights are preserved and that a fair hearing is conducted. New §821.47(b) clarifies that the same rules and hearings procedures will govern the wage claim amendment process.

### **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 apply:

There are no additional costs to the state and to local government as a result of enforcing or administering this rule.

There are estimated reductions in costs to the state but not to local government as a result of allowing amended wage claims, which will streamline the process and result in fewer claims filed. At this time, it is not possible to quantify the amount of these reductions.

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

Enforcing or administering the rule does not have foreseeable implications relating to the cost or revenues of the state or local governments.

There are no anticipated economic costs to persons required to comply with this rule, and there will be no adverse economic effect on small businesses or microbusinesses.

These conclusions are made on the basis that the proposed rules, specifically the Form C-8 changes, are to clarify that not all 20 factors included in the guidelines may apply in each case, and that such clarification does not constitute a substantive change.

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.

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

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 concerning factors for determining employee and independent contractor status, and to streamline and expedite the wage claim process.

#### **PART IV. COORDINATION ACTIVITIES**

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce and UI Policy, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to 512-475-3577; or e-mailed to [TWCPolicyComments@twc.state.tx.us](mailto: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 §§301.061 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 rules affect Texas Labor Code, Chapter 302.

## Chapter 821. TEXAS PAYDAY RULES

### SUBCHAPTER A. GENERAL PROVISIONS

#### §821.5. Employment Status: Employee or Independent Contractor.

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

#### EMPLOYMENT STATUS – A COMPARATIVE APPROACH

Under the common law test, a worker is an employee if the purchaser of that worker's service has the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done. Control need not actually be exercised; rather, if the service recipient has the right to control, employment may be shown.

~~Depending upon the type of business and the services performed, not all 20 common law factors may apply. In addition, the weight assigned to a specific factor may vary depending on the facts of the case.~~

~~The weight given to a factor is not always constant from case to case, because the importance assigned each factor may vary depending on the occupation or on the facts of that particular case.~~

~~If an employment relationship exists, it is of no consequence does not matter that the employee is happens to be called something else different, such as partner, agent, co-adventurer, contract laborer, subcontractor, or independent contractor.~~

##### 1. INSTRUCTIONS:

An Employee receives instructions about when, where and how the work is to be performed.

*An Independent Contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work.*

##### 2. TRAINING:

Employees are often trained by a more experienced employee or are required to attend meetings or take training courses.

*An Independent Contractor uses his or her own methods and thus need not receive training from the purchaser of those services.*

##### 3. INTEGRATION:

Services of an Employee are usually merged into the firm's overall operation; the firm's success depends on those Employee services.

*An Independent Contractor's services are usually separate from the client's business and are not integrated or merged into it.*

##### 4. SERVICES RENDERED PERSONALLY:

An Employee's services must be rendered personally; Employees do not hire their own substitutes or delegate work to them.

*A true Independent Contractor is able to assign another to do the job in his or her place and need not perform services personally.*

##### 5. HIRING, SUPERVISING & PAYING HELPERS:

An Employee may act as a foreman for the employer but, if so, helpers are paid with the employer's funds.

*Independent Contractors select, hire, pay and supervise any helpers used and are responsible for the results of the helpers' labor.*

##### 6. CONTINUING RELATIONSHIP:

##### 11. ORAL OR WRITTEN REPORTS:

An Employee may be required to submit regular oral or written reports about the work in progress.

*An Independent Contractor is usually not required to submit regular oral or written reports about the work in progress.*

##### 12. PAYMENT BY THE HOUR, WEEK OR MONTH:

An Employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week.

*An Independent Contractor is normally paid by the job, either a negotiated flat rate or upon submission of a bid.*

##### 13. PAYMENT OF BUSINESS & TRAVEL EXPENSE:

An Employee's business and travel expenses are either paid directly or reimbursed by the employer.

*Independent Contractors normally pay all of their own business and travel expenses without reimbursement.*

##### 14. FURNISHING TOOLS & EQUIPMENT:

Employees are furnished all necessary tools, materials and equipment by their employer.

*An Independent Contractor ordinarily provides all of the tools and equipment necessary to complete the job.*

##### 15. SIGNIFICANT INVESTMENT:

An Employee generally has little or no investment in the business. Instead, an Employee is economically dependent on the employer.

*True Independent Contractors usually have a substantial financial investment in their independent business.*

##### 16. REALIZE PROFIT OR LOSS:

An Employee often continues to work for the same employer month after month or year after year.  
*An Independent Contractor is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work.*

**7. SET HOURS OF WORK:**

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An Employee may work "on call" or during hours and days as set by the employer.  
*A true Independent Contractor is the master of his or her own time and works the days and hours he or she chooses.*

**8. FULL TIME REQUIRED:**

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An Employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the Employee's time.  
*A true Independent Contractor cannot be required to devote full-time service to one firm exclusively.*

**9. LOCATION WHERE SERVICES PERFORMED:**

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Employment is indicated if the employer has the right to mandate where services are performed  
*Independent Contractors ordinarily work where they choose. The workplace may be away from the client's premises.*

**10. ORDER OR SEQUENCE SET:**

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An Employee performs services in the order or sequence set by the employer. This shows control by the employer.  
*A true Independent Contractor is concerned only with the finished product and sets his or her own order or sequence of work.*

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An Employee does not ordinarily realize a profit or loss in the business. Rather, Employees are paid for services rendered.  
*An Independent Contractor can either realize a profit or suffer a loss depending on the management of expenses and revenues.*

**17. WORKING FOR MORE THAN ONE FIRM AT A TIME:**

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An Employee ordinarily works for one employer at a time and may be prohibited from joining a competitor.  
*An Independent Contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule.*

**18. MAKING SERVICE AVAILABLE TO THE PUBLIC:**

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An Employee does not make his or her services available to the public except through the employer's company.  
*An Independent Contractor may advertise, carry business cards, hang out a shingle or hold a separate business license.*

**19. RIGHT TO DISCHARGE WITHOUT LIABILITY:**

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An Employee can be discharged at any time without liability on the employer's part.  
*If the work meets the contract terms, an Independent Contractor cannot be fired without liability for breach of contract.*

**20. RIGHT TO QUIT WITHOUT LIABILITY:**

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An Employee may quit work at any time without liability on the Employee's part.  
*An Independent Contractor is legally responsible for job completion and, on quitting, becomes liable for breach of contract.*

**SUBCHAPTER C. WAGE CLAIMS**

**§821.42. Timeliness.**

- (a) The Commission shall determine the filing date of a wage claim as the date delivered in person to the Commission or the date of a mailed wage claim based on the following:
  - (1) The postmark date of a wage claim properly addressed shall establish by a rebuttable presumption the date upon which the wage claim was filed unless the party opposing this presumption presents evidence to establish some other filing date.
  - (2) Absent a postmark or evidence establishing some other filing date, the date of receipt by the Commission shall control.
- ~~(b) The Commission shall deem a wage claim invalid if filed before the wages are due for payment.~~
- ~~(b)(e)~~ 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.

**§821.47. Amendment of Wage Claims.**

- (a) At the discretion of the Commission, a wage claim may be amended for expediency or to prevent injustice.
- (b) Wage claim amendments are subject to the rules and hearing procedures set forth in Chapter 815 (relating to Unemployment Insurance) of this title, except to the extent that such sections are clearly inapplicable or contrary to provisions set out under this chapter or under the Act.