

Policy Concept
Chapter 815, Unemployment Insurance
Rule Project #2021-19-815 – SB 695-TUCA Collection-Notice of Assessment

Introduction and Background

When an employer does not timely pay its required unemployment taxes after being notified of the debt, the Texas Unemployment Compensation Act (TUCA) provides regulations for collecting the past due contributions. TUCA, Chapter 213, Subchapter C provides methods for collections of unpaid unemployment contributions, penalties, and interest by civil suit or Notice of Assessment (NOA). The Texas Workforce Commission (TWC) is required to take this action. An NOA is only attempted after TWC has exhausted other avenues of tax collections including the tax statement, default notices, pre-assessment notifications, tax liens, and tax levies.

An NOA is a written decision of a tax authority where the amount of taxable income is determined and the amount of tax due is calculated. In 1989, House Bill 1941, 71st Texas Legislature, Regular Session, provided for collection of delinquent unemployment benefit taxes, penalties, or interest by serving a NOA on an employer that owes unemployment taxes. The Legislature granted TWC this authority after an audit by the Office of the State Auditor contained findings regarding the significant amount of time taken before a judgment can be obtained by civil suit.

The NOA correspondence totals the amount of taxes, penalties, or interest owed by the employer. Once the NOA is served upon the employer, TWC loses jurisdiction over the NOA and may not change it. After being served, the employer's sole avenue of redress of an grievance is through judicial review. If the employer does not seek judicial review, or if the assessment is upheld after judicial review, the assessment is final and is recorded as a judgment against the employer. The final NOA has the same effect as a final judgment of a district court.

In the 87th Texas Legislature, Regular Session, the Legislature passed Senate Bill (SB) 695, a TWC initiative, which amended Texas Labor Code, §213.032(a). SB 695 was signed by the Governor on June 4, 2021, and became effective on September 1, 2021.

Prior to the passage of SB 695, Texas Labor Code, §213.032(a) required TWC to serve an NOA in the same manner as provided in Texas Rules of Civil Procedure Rule 106.

Texas Rules of Civil Procedure Rule 106 allows for service by personal service or by certified mail by any person authorized by Texas Rules of Civil Procedure Rule 103. However, per Texas Rules of Civil Procedure Rule 103, an interested party, such as TWC, may not serve any process. This meant that TWC's Collections and Civil Actions department (Collections) was required to use a process server to mail its NOAs to liable employers. This method incurs unnecessary costs and leads to significant delays. Collections was without a process server for a substantial part of 2018 and 2020, leaving it without the ability to serve any NOAs at all.

Additionally, SB 695 addressed substituted service. In certain situations, an employer that owes unpaid contributions, interest, or penalties may try to escape liability by avoiding service of the NOA by personal service or mail. An example would be an employer residing in a gated community that will not allow access to a process server and the employer will not accept the mail. In these situations, Texas Rules of Civil Procedure Rule 106 states that a court may grant a substituted method of service. This

1 created substantial difficulties for Collections as TWC could not seek substituted service because it did
2 not have a cause number to petition for substituted service as no suit has been filed. Filing suit would
3 defeat the Legislature's intended purpose of granting TWC the authority to issue NOAs as it is not
4 uncommon for service to be unsuccessful in person or by mail.

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6 These issues have been addressed by SB 695. As a result of SB 695, Texas Labor Code, §213.032(a)
7 now reads as follows:

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9 (a) A notice of assessment shall be served on a defaulting employer:
10 (1) by personal delivery;
11 (2) by registered or certified mail, return receipt requested, or similar common carrier
12 method to the employer's address as shown by commission records; or
13 (3) if an attempt to serve a notice of the assessment in a manner described by Subdivision
14 (1) or (2) has been unsuccessful, in another manner that is reasonably calculated to give
15 the employer notice of the assessment.

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17 In addition to the state statute, effective December 31, 2021, the Texas Supreme Court updated Texas
18 Rules of Civil Procedure Rule 106 to allow substituted service "in any other manner, including
19 electronically by social media, email, or other technology, that the statement or other evidence shows
20 will be reasonably effective to give the defendant notice of the suit."

21 22 **Purpose for the Proposed Rule**

23 The purpose for this proposed rule is to establish administrative rules to implement and interpret SB
24 695.

25 26 **Rule Revisions Required by Federal Regulation or State Statute**

27 28 **Issue #1: Implement and Interpret SB 695**

29 The passage of SB 695 provides additional authority for TWC to not only serve NOAs in person or by
30 mail itself, but to effectuate substituted service itself as well. However, before Collections undertakes
31 these actions, Collections believes it would be prudent to have administrative rules in place to
32 implement and interpret this new legislation. These rules would provide Collections with guidance for
33 issuing NOAs as well as inform employers on the ways in which they may be served NOAs.

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35 Furthermore, an employer aggrieved by a NOA must contest the assessment by seeking judicial review
36 in Travis County district court. Administrative rules implementing and interpreting Texas Labor Code,
37 §213.032(a) would provide additional support for instances where judicial review occurs.

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39 The current language of Texas Labor Code, §213.032(a) allows for TWC to continue using a process
40 server if it so chooses. Without administrative rules being in place, Collections has continued using a
41 process server under the previous procedures during this time.

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43 Staff recommends that the administrative rules clarify each paragraph of Texas Labor Code, §213.032:
44 personal delivery, service by mail, or substituted service.

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46 That being said, some rules will be generally applicable to all three paragraphs of Texas Labor Code,
47 §213.032(a). For those generally applicable areas, staff recommends clarifying that Texas Labor Code,

1 §213.032(a)(3) be referred to as substituted service and that contesting service must be done in Travis
2 County district court as required by Texas Labor Code, §213.032(c). Staff also believes that it is
3 important to include that Texas Labor Code, §213.032(a) provides TWC with the flexibility to serve
4 parties itself or by designated third party.

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6 When serving certain corporations, TWC or its designee will also take into consideration Texas
7 Business Organizations Code, Chapter 5. (*See Texas Business Organizations Code, Chapter 5,*
8 *Subchapter F*). This would be applicable when attempting personal or substituted service upon the
9 corporation's registered agent or the Secretary of State if no valid agent exists. Only Texas Labor Code,
10 §213.032(a)(2) contains a requirement that the NOA be mailed to an address in TWC records, so
11 personal or substituted service can be attempted to registered agents. Staff recommends this area be
12 clarified as well.

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14 Finally, Texas Labor Code, §212.006(b) and §214.002(a)(3) allow for NOAs to be served upon
15 claimants as well as employers. Staff recommends interpreting certain language in Texas Labor Code,
16 Chapter 213 to more clearly apply to claimant assessments in those situations. To that end, staff
17 recommends stating the language in Texas Labor Code, §213.033(a) prescribing a three-year limitation
18 on employer assessments for employer contributions, penalties, and interest, be limited to the third
19 anniversary after the benefit overpayment becomes final when it relates to claimant assessments. It is not
20 recommended that the three-year limitation begin running prior to finality as overpayment amounts may
21 change during the dispute resolution process.

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23 As it relates to service by personal delivery and mail, staff is recommending clarifying what constitutes
24 "address as shown by commission records" for Texas Labor Code, §213.032(a)(2) and that TWC or its
25 designee may make multiple service attempts under Texas Labor Code, §213.032(a)(1) and (2) prior to
26 attempting substituted service.

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28 In terms of substituted service, staff recommends clarifying that TWC or its designee may make
29 multiple attempts at substituted service. Staff also recommends providing permissible methods of what
30 constitutes "Another manner reasonably calculated to give the employer notice of the assessment" per
31 Texas Labor Code, §213.032(a)(3). Such reasonably calculated means may include those methods
32 specifically mentioned by Texas Rules of Civil Procedure Rule 106(b) including by social media, email,
33 or other technology, TWC-established contact methods, including the Unemployment Tax Services and
34 the Unemployment Benefits Services portals, or other mailing addresses that are not maintained in TWC
35 records as required by Texas Labor Code, §213.032(a)(2). Other mailing addresses may include those
36 obtained from third-party background and reporting agencies, online searches, and other government
37 records. Additionally, certain corporations will need to be served as prescribed by Texas Business
38 Organizations Code, Chapter 5, and Civil Practice and Remedies Code, Chapter 17.

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40 **Other Rule Revisions**

41 None

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43 **PC Decision Point**

44 Staff recommends amending 40 TAC Chapter 815 to add a new Subchapter H, Collection Action, as
45 presented, to provide rules implementing and interpreting SB 695.