

1 **CHAPTER 844. PROHIBITED CORONAVIRUS VACCINE MANDATES BY**
2 **PRIVATE EMPLOYER**

3
4 **PROPOSED RULES TO BE PUBLISHED IN THE *TEXAS REGISTER*. THIS**
5 **DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS SUBJECT**
6 **TO FORMATTING CHANGES AS REQUIRED BY THE OFFICE OF THE**
7 **SECRETARY OF STATE.**

8
9 The Texas Workforce Commission (TWC) proposes new Chapter 844, relating to
10 Prohibited Coronavirus Vaccine Mandates by Private Employer, comprising the
11 following subchapters:

12
13 Subchapter A. General Provisions, §§844.01 and §844.02

14 Subchapter B. Complaints, §§844.25 - 844.30

15 Subchapter C. Determinations, §§844.50 - 844.55

16 Subchapter D. Administrative Hearings and Judicial Review, §§844.75 - 844.87

17
18 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

19 The purpose of Chapter 844 is to establish rules as required by Senate Bill (SB) 7, 88th
20 Texas Legislature, Third Special Session (2023), which added Texas Health and Safety
21 Code, Chapter 81D, Prohibited Coronavirus Virus Vaccine Mandates by Private
22 Employer.

23
24 SB 7 prohibits employers from taking adverse actions against applicants, employees, or
25 contractors based on a refusal to be vaccinated against COVID-19. If an adverse action
26 was taken by an employer against an applicant, employee, or contractor, the applicant,
27 employee, or contractor can file a complaint and TWC will investigate. An employer who
28 is determined to have taken a prohibited adverse action is subject to an administrative
29 penalty unless the employer takes reasonable efforts to make the complainant whole. SB
30 7 also allows TWC to recover the reasonable cost of investigation when it is determined
31 that the employer took a prohibited adverse action.

32
33 Chapter 844 rules address the requirements for and methods of submitting a complaint.
34 The chapter also establishes an appeal procedure to provide employers notice and an
35 opportunity to be heard at a meaningful time and in a meaningful manner.

36
37 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

38
39 **SUBCHAPTER A. GENERAL PROVISIONS**

40 **TWC proposes new Subchapter A, General Provisions, as follows:**

41
42 **§844.01. Purpose**

43 New §844.01 defines the purpose of the Chapter 844 rules.

44
45 **§844.02. Definitions**

1 New §844.02 defines "Adverse Action," "Agency," "Complainant," "Complaint Form,"
2 "Contractor," "COVID-19," "Day," "Department," "Employee," "Employer,"
3 "Governmental Entity," and "Person." The definition of Employee would include an
4 individual who seeks admission to or is employed under a medical residency program in
5 Texas.

6 7 **SUBCHAPTER B. COMPLAINTS**

8 **TWC proposes new Subchapter B, Complaints, as follows:**

9 10 **§844.25. Complaint Requirements**

11 New §844.25 establishes the requirements and method to file a complaint. Complaints
12 must be filed online within 90 days of the adverse action and must provide the name of
13 the complainant, name of the employer, and the nature and description of the adverse
14 action. The complainant must also declare that the information provided in the complaint
15 is true and correct.

16 17 **§844.26. Valid Complaints**

18 New §844.26 addresses issues concerning the validity of a complaint. These issues
19 include that the adverse action must have occurred after the effective date of SB 7, that
20 the employer is not a governmental entity, and that the complaint is not duplicative of a
21 prior complaint. All references to days in this chapter mean calendar days.

22 23 **§844.27. Jurisdiction**

24 New §844.27 defines when employers are subject to TWC's jurisdiction under this
25 Chapter as it relates the connection of the work, complainant, and employer to Texas.

26 27 **§844.28. Dismissal**

28 New §844.28 allows TWC to dismiss complaints that are incomplete or do not meet the
29 requirements of §844.26. Dismissed complaints can be refiled by the complainant within
30 30 days of the dismissal.

31 32 **§844.29. Adverse Action**

33 New §844.29 provides context to the definition of adverse action by further addressing
34 the reasonable person standard. Examples of an adverse action include, but are not
35 limited to, terminating an employee, terminating a contractual relationship, demoting an
36 employee, reducing pay or compensation, not hiring an employee, not offering a contract
37 for a contract position, or a reduction in hours not related to a business need. When
38 determining whether an employer's action was an adverse action, the Agency will
39 consider the employer's good faith attempt to comply with a legal obligation as evidence
40 that the employer's action would not be considered by a reasonable person to be for the
41 purpose of punishing, alienating, or otherwise adversely affecting a complainant.

42 43 **§844.30. Investigation of Complaints in Health Care**

44 New §844.30 requires TWC to consult with the Texas Department of State Health
45 Services (DSHS) when a complaint against a health care facility, health care provider, or
46 physician concerns a policy that requires the use of protective medical equipment to

1 determine if the policy is reasonable. Section 844.30 also requires TWC and DSHS to
2 enter an MOU to facilitate coordination.

3
4 **SUBCHAPTER C. DETERMINATIONS**

5 **TWC proposes new Subchapter C, Determinations, as follows:**

6
7 **§844.50. Preliminary Determination Order, Determination on Remedial Action, and**
8 **Penalty and Cost Order**

9 New §844.50 defines the procedures for issuing a determination after the investigation is
10 complete. A preliminary determination order will be mailed to the employer informing
11 the employer whether TWC found a violation, which would require the imposition of an
12 administrative penalty, and whether TWC will seek to recover investigative costs from
13 the employer. SB 7 prescribes the administrative penalty amount of \$50,000 for each
14 violation and did not provide TWC with discretionary authority to adjust the penalty
15 amount. The preliminary determination order would inform the employer of appeal rights
16 and the ability to take remedial action to avoid the administrative penalty. If an employer
17 completes remedial action and submits proof of remedial action within 30 days of a
18 preliminary determination order or decision, TWC will issue a determination on remedial
19 action, which is an appealable document. Once the determination or decision is final, a
20 penalty and cost order will be issued instructing the employer to make payment to TWC.
21 If an employer fails to make payment in accordance with the penalty and cost order,
22 TWC will refer the amount to the Office of the Attorney General in accordance with
23 Texas Government Code §2107.003 as well as reporting the indebtedness to the Texas
24 Comptroller of Public Accounts under the warrant hold provisions in Texas Government
25 Code §403.055(f).

26
27 **§844.51. Remedial Action**

28 New §844.51 establishes how an employer may take remedial action, in accordance with
29 Texas Health and Safety Code §81D.006, to avoid the imposition of an administrative
30 penalty. The section also defines acceptable proof of a remedial action and the method
31 for submitting proof of remedial action, which must be submitted within 30 days of a
32 preliminary determination order.

33
34 **§844.52. Investigative Costs**

35 New §844.52 addresses when TWC may seek to recover the reasonable costs of an
36 investigation.

37
38 **§844.53. Corrected Determinations**

39 New §844.53 allows TWC to issue corrected determinations or decisions to correct an
40 error including an incorrect employer address.

41
42 **§844.54. Withdrawal of Complaint**

43 New §844.54 allows a complainant to withdraw a complaint before the preliminary
44 determination order becomes final.

45
46 **§844.55. Appeal and Determination Finality**

1 New §844.55 establishes that an employer can file an appeal to a determination within 30
2 days of the mailing date of the determination by submitting a written appeal by mail, fax,
3 or other method approved by TWC on the preliminary determination order.

4
5 **SUBCHAPTER D. ADMINISTRATIVE HEARINGS AND JUDICIAL REVIEW**

6 **TWC proposes new Subchapter D, Administrative Hearings and Judicial Review, as**
7 **follows:**

8
9 **§844.75. Administrative Hearings**

10 New §844.75 states that an administrative hearing will be conducted by the Agency's
11 Special Program Appeals department by electronic means.

12
13 **§844.76. Parties**

14 Under New §844.76, the parties to the hearing are the employer and TWC. While the
15 complainant is not a party to the appeal, a complainant would be invited to the hearing as
16 a witness because his or her testimony may be needed to decide whether a violation
17 occurred.

18
19 **§844.77. Hearing Scheduling and Notice**

20 New §844.77 prescribes the procedures for scheduling and issuing a hearing notice upon
21 the receipt of an appeal. The section states what information must be included in the
22 hearing notice.

23
24 **§844.78. Representation**

25 New §844.78 allows parties to be represented by an attorney or other individual of their
26 choice.

27
28 **§844.79. Ex Parte Communications**

29 New §844.79 prohibits ex parte communications without notice and an opportunity for all
30 parties to participate.

31
32 **§844.80. Hearing Procedures**

33 New §844.80 establishes hearing procedures for the administrative hearing including
34 general procedures and procedures for evidence, witnesses, exchange of exhibits, and
35 maintaining the hearing record.

36
37 **§844.81. Postponement and Continuance**

38 New §844.81 addresses situations when the hearing can be postponed or continued.

39
40 **§844.82. Default**

41 New §844.82 describes the procedures when a party fails to appear for the hearing and
42 for a non-appearing party to file a motion to set aside the default.

43
44 **§844.83. Timeliness**

1 New §844.83 establishes the timeliness guidelines for this chapter including address
2 changes, dating of appeal documents, and the evidence required to overcome the
3 presumption of receipt.

4
5 **§844.84. Withdrawal of an Appeal**

6 New §844.84 allows an employer to withdrawal an appeal before the hearing officer's
7 decision is final.

8
9 **§844.85. Decision**

10 New §844.85 states that the hearing officer's decision must be issued in writing as soon
11 as possible after the hearing closes; states the information that must be included in the
12 decision; and states that the decision must be mailed to the parties or their
13 representatives. A decision can be reopened if the employer submits a notice to the
14 hearing officer within 14 days of the mailing date of the decision that the employer
15 intends to take remedial action. The employer would then have 30 days to submit proof
16 of remedial action.

17
18 **§844.86. Finality of Decision**

19 New §844.86 states that the hearing officer's decision becomes final 14 days after the
20 date the decision is mailed unless the hearing officer reopens the decision before that
21 date.

22
23 **§844.87. Judicial Review**

24 New §844.87 sets forth the method of seeking judicial review of the hearing officer's
25 decision.

26
27 **PART III. IMPACT STATEMENTS**

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

30
31 There are additional estimated costs to the state and to local governments expected as a
32 result of enforcing or administering the rules.

33
34 There are no estimated cost reductions to the state and to local governments as a result of
35 enforcing or administering the rules.

36
37 There are estimated losses or increases in revenue to the state or to local governments as
38 a result of enforcing or administering the rules.

39
40 There are no foreseeable implications relating to costs or revenue of the state or local
41 governments as a result of enforcing or administering the rules.

42
43 There are no anticipated economic costs to individuals required to comply with the rules.

44
45 There are no anticipated adverse economic impact on small businesses, microbusinesses,
46 or rural communities as a result of enforcing or administering the rules.

1
2 Based on the analyses required by Texas Government Code, §2001.024, TWC has
3 determined that the requirement to repeal or amend a rule, as required by Texas
4 Government Code, §2001.0045, does not apply to this rulemaking.

5
6 Takings Impact Assessment

7 Under Texas Government Code, §2007.002(5), "taking" means a governmental action
8 that affects private real property, in whole or in part or temporarily or permanently, in a
9 manner that requires the governmental entity to compensate the private real property
10 owner as provided by the Fifth and Fourteenth Amendments to the US Constitution or the
11 Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the
12 property that would otherwise exist in the absence of the governmental action, and is the
13 producing cause of a reduction of at least 25 percent in the market value of the affected
14 private real property, determined by comparing the market value of the property as if the
15 governmental action is not in effect and the market value of the property determined as if
16 the governmental action is in effect. TWC completed a Takings Impact Assessment for
17 the proposed rulemaking action under Texas Government Code, §2007.043. The primary
18 purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to
19 implement and interpret the provisions of Texas Health and Safety Code, Chapter 81D,
20 Prohibited Coronavirus Virus Vaccine Mandates by Private Employer.

21
22 The proposed rulemaking action will not create any additional burden on private real
23 property or affect private real property in a manner that would require compensation to
24 private real property owners under the US Constitution or the Texas Constitution. The
25 proposal also will not affect private real property in a manner that restricts or limits an
26 owner's right to the property that would otherwise exist in the absence of the
27 governmental action. Therefore, the proposed rulemaking will not cause a taking under
28 Texas Government Code, Chapter 2007.

29
30 Government Growth Impact Statement

31 TWC has determined that during the first five years the rules will be in effect, they:

- 32 --will create or eliminate a government program;
- 33 --will require the creation or elimination of employee positions;
- 34 --will require an increase or decrease in future legislative appropriations to TWC;
- 35 --will require an increase or decrease in fees paid to TWC;
- 36 --will create a new regulation;
- 37 -- will not expand, limit, or eliminate an existing regulation;
- 38 -- will change the number of individuals subject to the rules; and
- 39 -- will not positively or adversely affect the state's economy.

40
41 Economic Impact Statement and Regulatory Flexibility Analysis

42 TWC has determined that the rules will not have an adverse economic impact on small
43 businesses or rural communities, as the proposed rules place no requirements on small
44 businesses or rural communities.

45
46 Mariana Vega, Director, Labor Market Information, has determined that there is not a

1 significant negative impact upon employment conditions in the state as a result of the
2 rules.

3
4 Chuck Ross, Director, Fraud Deterrence and Compliance Monitoring, has determined
5 that for each year of the first five years the rules are in effect, the public benefit
6 anticipated as a result of enforcing the proposed rules will be to ensure compliance with
7 new state law.

8
9 TWC hereby certifies that the proposal has been reviewed by legal counsel and found to
10 be within TWC's legal authority to adopt.

11 **PART IV. COORDINATION ACTIVITIES**

12 SB 7 requires consultation with the Department of State Health Services.

13
14 TWC will provide notice to employers and other stakeholders to increase awareness
15 during the public comment period.

16 **PART V. PUBLIC COMMENTS**

17 Comments on the proposed new rules may be submitted to
18 TWCPolicyComments@twc.texas.gov and must be received no later than August 26,
19 2024.

20 **PART VI. STATUTORY AUTHORITY**

21 The rules are proposed to implement Senate Bill 7, 88th Texas Legislature, Third Special
22 Session (2023), which added Texas Health and Safety Code, Chapter 81D, Prohibited
23 Coronavirus Virus Vaccine Mandates by Private Employer.

24 The rules are proposed under:

25 --Texas Health and Safety Code §81D.007, which provides TWC with the specific
26 authority to adopt rules as necessary to implement and enforce Texas Health and Safety
27 Code, Chapter 81D; and

28 --Texas Labor Code §301.0015(a)(6), which provides TWC with the general authority to
29 adopt, amend, or repeal such rules as it deems necessary for the effective administration
30 of TWC services and activities.

31
32 The proposed rules relate to Texas Health and Safety Code, Chapter 81D.
33
34
35
36
37

1 **CHAPTER 844. PROHIBITED CORONAVIRUS VACCINE MANDATES BY**
2 **PRIVATE EMPLOYER**

3
4 **SUBCHAPTER A. GENERAL PROVISIONS**

5
6 **§844.01. Purpose.**

7
8 The purpose of this chapter is to implement and interpret the provisions of Texas
9 Health and Safety Code, Chapter 81D, Prohibited Coronavirus Virus Vaccine
10 Mandates by Private Employer.
11

12 **§844.02. Definitions.**

13
14 The following words and terms, when used in this chapter, shall have the
15 following meanings, unless the statute or context in which the word or phrase is
16 used clearly indicates otherwise.
17

- 18 (1) "Adverse Action" means an action taken by an employer that a
19 reasonable person would consider was for the purpose of punishing,
20 alienating, or otherwise adversely affecting an employee, contractor,
21 applicant for employment, or applicant for a contract position.
22
23 (2) "Agency" shall have the meaning established under §800.2 of this title.
24
25 (3) "Applicant for employment" means a person who has submitted a
26 formal application for an employment position for which the person
27 meets the minimum qualifications and who has a genuine interest in
28 the position.
29
30 (4) "Applicant for a contract position" means a person who has submitted
31 a formal application or proposal for a contract position for which the
32 person meets the minimum qualifications and who has a genuine
33 interest in the contract position.
34
35 (5) "Complainant" means an employee, contractor, applicant for
36 employment, or applicant for a contract position who files a complaint
37 against an employer alleging an Adverse Action by the employer
38 against the person in violation of Texas Health and Safety Code,
39 Chapter 81D.
40
41 (6) "Complaint Form" means the COVID-19 Vaccine Complaint Form
42 approved by the Agency.
43
44 (7) "Contractor" means a person who undertakes specific work for an
45 employer in exchange for a benefit without submitting to the control of
46 the employer over the manner, methods, or details of the work.

- 1
2 (8) "COVID-19" means the 2019 novel coronavirus disease and any
3 variants of the disease.
4
5 (9) "Day" means calendar day.
6
7 (10) "Department" means the Department of State Health Services.
8
9 (11) "Employee" means an individual who is employed by an employer,
10 whether or not for compensation. The term does not include:
11
12 (A) a person related to the employer or the employer's spouse
13 within the first or second degree by consanguinity or affinity,
14 as determined under Texas Government Code, Chapter 573; or
15
16 (B) a contractor.
17
18 (12) "Employer" means a person, other than a governmental entity, who
19 employs one or more employees.
20
21 (13) "Governmental Entity" means this state, an agency of this state, a local
22 government entity, or a political subdivision of this state as defined in
23 §821.4 of this title. This definition includes the definition of
24 governmental entity as provided by Texas Health and Safety Code
25 §81B.001(2).
26
27 (14) "Person" includes corporation, organization, government or
28 governmental subdivision or agency, business trust, estate, trust,
29 partnership, association, and any other legal entity.
30

31 **SUBCHAPTER B. COMPLAINTS**

32 **§844.25. Complaint Requirements.**

- 33
34
35 (a) A complaint must be filed in writing by the complainant completing the
36 Complaint Form.
37
38 (b) A Complaint Form may only be submitted by online submission as identified
39 through the Agency's website page related to COVID-19 mandate
40 complaints or by other means authorized in writing by the Agency.
41
42 (c) The complainant must provide the following information on the Complaint
43 Form:
44
45 (1) the name of the complainant;
46

- 1 (2) the name of the employer;
2
3 (3) the nature and description of any alleged Adverse Action the employer
4 took against the complainant; and
5
6 (4) any other information specifically requested by the Agency on the
7 Complaint Form that is necessary to resolve the complaint.
8
9 (d) The complainant must declare that the information provided in the
10 completed Complaint Form is true and correct.
11

12 **§844.26. Valid Complaints.**
13

- 14 (a) A complaint may only be filed for an Adverse Action that occurred after the
15 effective date of Senate Bill (SB) 7, 88th Texas Legislature, Third Special
16 Session (2023), which was February 6, 2024.
17
18 (b) The complaint must be received by the Agency within 90 days of the date of
19 the Adverse Action. For adverse actions that occurred after the effective
20 date of SB 7, and before the effective date of this chapter, a complaint must
21 be received by the Agency within 90 days of the date this chapter becomes
22 effective.
23
24 (c) A contractor or applicant for a contract position may only file a complaint if
25 the contractor or applicant for a contract position was or would have been a
26 party to the contract with the employer.
27
28 (d) A complaint must name an employer that is a non-governmental entity that
29 satisfies the definition of employer in §844.02(12) of this chapter.
30
31 (e) A complaint may only be filed by a complainant for an Adverse Action that
32 was taken against the complainant for a refusal to be vaccinated against
33 COVID-19.
34
35 (f) A Complaint Form must be filled out completely and sufficiently to allow
36 the Agency to attempt contact with the employer to investigate the Adverse
37 Action.
38
39 (g) A complainant may not file an additional complaint for an Adverse Action
40 that has already been the basis of another complaint that is still pending or
41 resulted in the issuance of a preliminary determination order, other than a
42 dismissal under §844.28 of this subchapter, or for a complaint that was
43 withdrawn under §844.54 of this chapter.
44
45 (h) During the course of an investigation, a complainant or an employer may
46 provide additional information to the Agency prior to the issuance of a

1 preliminary determination order which the Agency will consider in addition
2 to evidence offered in the original complaint.
3

4 **§844.27. Jurisdiction.**

5
6 The Agency may exercise jurisdiction over complaints under this chapter in which:

- 7
8 (a) the work was performed or would have been performed in Texas; and:
9
10 (b) the employer:
11
12 (1) is a resident employer; or
13
14 (2) is a non-resident employer pursuant to the Texas Civil Practice &
15 Remedies Code, Chapter 17, Subchapter C, also known as the
16 "Texas Long-Arm Statute," when the following are met:
17
18 (A) the employer employs the complainant in Texas at the time
19 of the Adverse Action or the employer's contact with Texas
20 is continuing and systematic; and
21
22 (B) exercising jurisdiction is consistent with:
23
24 (i) fair play and justice as determined by the quality,
25 nature, and extent of the employer's activities in
26 Texas including the extent to which the employer
27 avails itself of the benefits and protections of
28 Texas law; and
29
30 (ii) the relative convenience of the parties.
31
32 (c) The Agency shall not exercise jurisdiction over complaints based on work
33 performed or intended to be performed outside the United States.
34

35 **§844.28. Dismissal.**

- 36
37 (a) The Agency may dismiss a complaint that is incomplete or does not meet
38 the requirements of §844.26 of this subchapter.
39
40 (b) A dismissal under subsection (a) of this section becomes final unless a
41 complainant refiles the complaint within the period to file a complaint or
42 within 30 days of the mailing of the dismissal, whichever is later.
43

1 **§844.29. Adverse Action.**

- 2 (a) To support a finding of a violation under this chapter, the Adverse Action must
3 cause a result that a reasonable person would regard as an objective and
4 demonstrated harm to the complainant.
- 5
- 6 (b) If an Adverse Action was taken, the Agency will consider the reason(s)
7 provided by an employer when determining whether the Adverse Action was
8 taken due to a refusal to be vaccinated against COVID-19 in violation of
9 Texas Health and Safety Code, Chapter 81D.

10

11 **§844.30. Investigation of Complaints in Health Care.**

12

13 If a complaint against a health care facility, health care provider, or physician
14 alleges an Adverse Action that involved an employer policy that includes
15 requiring the use of protective medical equipment, as described in Texas Health
16 and Safety Code §81D.0035(b), the Agency will consult with the Department to
17 determine whether the policy was reasonable.

18

19 **SUBCHAPTER C. Determinations**

20

21 **§844.50. Preliminary Determination Order, Determination on Remedial Action,
22 and Penalty and Cost Order.**

- 23
- 24 (a) After an investigation, the Agency will mail a preliminary determination
25 order to the employer stating whether the Agency determined the employer
26 took an Adverse Action against the complainant for a refusal to be
27 vaccinated against COVID-19 in violation of Texas Health and Safety Code,
28 Chapter 81D.
- 29
- 30 (b) If the Agency determines that a violation exists, but no remedial action has
31 occurred prior to the preliminary determination order being issued, the
32 preliminary determination will notify the employer:
- 33
- 34 (1) that a violation has occurred;
- 35
- 36 (2) an administrative penalty will be imposed;
- 37
- 38 (3) that the employer may remediate the violation;
- 39
- 40 (4) the amount of reasonable investigative costs, if any, the Agency will
41 seek to recover from the employer; and
- 42
- 43 (5) the employer has the right to file an appeal.
- 44

- 1 (c) If the Agency determines that a violation exists, and the employer has taken
2 remedial action prior to the preliminary determination order being issued,
3 the preliminary determination will notify the employer:
4
 - 5 (1) that a violation has occurred;
 - 6
 - 7 (2) whether the remediation was sufficient to remove the administrative
8 penalty;
 - 9
 - 10 (3) whether an administrative penalty will be imposed;
 - 11
 - 12 (4) the amount of reasonable investigative costs, if any, the Agency will
13 seek to recover from the employer; and
 - 14
 - 15 (5) the employer has the right to file an appeal.
 - 16
- 17 (d) If an employer submits proof of remedial action after the preliminary
18 determination order is issued, the Agency will issue a separate determination
19 on remedial action with separate appeal rights. An employer has 30 days to
20 submit proof of remedial action from the mailing date of the preliminary
21 determination order. If the employer does not submit proof of remediation
22 within 30 days, and/or does not appeal, the Agency will not consider any
23 proof of remediation.
24
- 25 (e) If the employer files a timely appeal to the preliminary determination order,
26 the employer may remediate at any time up until the hearing officer issues
27 his or her decision, after which the employer must comply with the
28 requirements of §844.85(e) of this chapter.
29
- 30 (f) After a preliminary determination order, a determination on remedial action,
31 or decision becomes final, the Agency will issue a penalty and cost order to
32 the employer detailing the final amount owed to the Agency by the
33 employer with instructions for submitting payment.
34
- 35 (g) Determinations and penalty and cost orders shall be mailed to the employer
36 at the best address available as required by §815.3 of this title, or at a
37 location the employer usually receives mail.
38
- 39 (h) A copy of the preliminary determination order will also be mailed to the
40 complainant.
41
- 42 (i) An administrative penalty under this chapter is not an award of damages to
43 the complainant and no funds will be issued to the complainant by the
44 Agency.
45

1 **§844.51. Remedial Action.**

2
3 (a) Under Texas Health and Safety Code §81D.006(a)(1) and (2), an
4 administrative penalty will not be assessed if prescribed remedial action is
5 taken in response to a complaint. The remedial action required to avoid a
6 penalty depends upon the specific facts which resulted in a violation.
7 Depending upon the circumstances of the violation, remedial action may
8 require:

9
10 (1) if the complainant applied for an employment or contract position with
11 the employer, and was not offered such position based upon his or her
12 refusal to be vaccinated against COVID-19, the employer must offer
13 the complainant the position applied for;

14
15 (2) if the complainant is currently, or was recently, an employee or
16 contractor of the employer, the employer shall take the following
17 remedial steps as applicable to the violation. Not all steps may be
18 applicable to remedy the Adverse Action which resulted in a violation:

19
20 (A) reinstatement of the employee or contractor;

21
22 (B) providing the employee or contractor with back pay from the
23 date the employer took the Adverse Action; and/or

24
25 (C) the employer must take every reasonable effort to reverse the
26 effects of the Adverse Action. Reasonable efforts include, but
27 are not limited to, reestablishing employee benefits for which
28 the employee or contractor otherwise would have been
29 eligible if the Adverse Action had not been taken.

30
31 (b) Acceptable proof of a remedial action may include an offer or hiring letter
32 on company letterhead, a signed new hire paperwork, a signed settlement
33 letter, or completion of an Agency form by the complainant attesting to the
34 remedial action.

35
36 (c) Proof of remedial action shall be submitted online as identified through the
37 Agency's website page related to COVID-19 mandate complaints, by other
38 means authorized in writing by the Agency, or to the assigned hearing
39 officer in accordance with §844.85(e) of this chapter.

40
41 **§844.52. Investigative Costs.**

42
43 (a) If the Agency determines that the employer violated this chapter, the
44 Agency may recover from the employer reasonable investigative costs
45 incurred in conducting the investigation into whether the employer violated

1 Texas Health and Safety Code, Chapter 81D, regardless of whether the
2 employer took remedial action.

- 3
- 4 (b) The Agency may not recover from the employer investigative costs incurred
5 in conducting an investigation into whether the employer took remedial
6 action.
- 7
- 8 (c) The preliminary determination order will inform the employer of the
9 investigative costs calculated by the Agency.
- 10
- 11 (d) The investigative costs may, at the discretion of the Agency, be included in
12 the amount owed in the penalty and cost order even if the employer took
13 remedial action.
- 14

15 **§844.53. Corrected Determinations and Decisions.**

16

- 17 (a) If Agency staff discover a clerical error of a non-substantive nature in
18 connection with a determination or decision issued under this chapter,
19 within the applicable appeal period, the Agency may reconsider and reissue
20 the determination unless an appeal has already been filed.
- 21
- 22 (b) A reissued determination voids and replaces the determination or decision
23 issued under this chapter requiring correction and becomes final unless an
24 appeal is filed from the determination within 30 days of the date the reissued
25 determination is mailed.
- 26
- 27 (c) Notwithstanding subsection (a) of this section, if a determination or decision
28 issued under this chapter is mailed to an employer's incorrect address, the
29 Agency may reissue the determination to the employer's correct address at
30 any time.
- 31

32 **§844.54. Withdrawal of Complaint.**

33

- 34 (a) A complainant may withdraw a complaint at any time before the date the
35 preliminary determination order becomes final.
- 36
- 37 (b) A complainant withdrawing a complaint shall submit a form as prescribed
38 by the Agency.
- 39
- 40 (c) A complaint that is withdrawn may not be refiled and a new complaint
41 cannot be filed for the same Adverse Action as the withdrawn complaint.
- 42

43 **§844.55. Appeal and Determination Finality.**

44

- 45 (a) Appealable Determinations:
- 46

1 (1) An employer determined to have violated this chapter may appeal the
2 preliminary determination order, within 30 days of the mailing date of
3 the determination, to dispute whether a violation of Texas Health and
4 Safety Code, Chapter 81D occurred, or the amount of the assessed
5 investigative costs.

6
7 (2) An employer determined to have not met the remedial action
8 requirements under §844.51 of this subchapter may appeal the
9 determination on remedial action within 30 days of the mailing date of
10 the determination.

11
12 (3) An employer may appeal a combined determination under §844.50(c)
13 of this subchapter to dispute any of the issues contained therein within
14 30 days of the mailing date of the determination.

15
16 (b) A determination becomes final unless the employer files an appeal before
17 the appeal deadline.

18
19 (c) An appeal must be filed in writing by mail, common carrier, facsimile (fax),
20 or other method approved by the Agency on the preliminary determination
21 order or on the determination on remedial action.

22
23 (d) A penalty and cost order is not an appealable document.

24
25 (e) Complainants are not a party of interest and may not file an appeal to the
26 preliminary determination order or a determination on remedial action.

27
28 **SUBCHAPTER D. ADMINISTRATIVE HEARINGS AND JUDICIAL REVIEW**

29
30 **§844.75. Administrative Hearings.**

31
32 (a) Administrative hearings shall be conducted subject to the rules and hearing
33 procedures set out in Chapter 815 of this title, except to the extent that such
34 sections are clearly inapplicable or contrary to provisions set out under this
35 chapter.

36
37 (b) The hearing is not subject to Texas Government Code, Chapter 2001.

38
39 (c) Hearings may be conducted by electronic means, including but not limited to
40 telephonic hearings, unless the hearing officer determines that an in-person
41 hearing is necessary.

42
43 (d) Accommodations may be requested, including the need for an in-person
44 hearing or interpreters, through the hearing officer or Agency staff.

45

1 **§844.76. Parties.**

2
3 (a) The parties to proceedings under this chapter are the Agency and the employer
4 named in the preliminary determination order or determination on remedial
5 action.

6
7 (b) While the complainant is not a party, the complainant may be invited to
8 participate in the hearing as a witness.

9
10 **§844.77. Hearing Scheduling and Notice.**

11
12 (a) Upon receipt of an appeal, the Agency shall assign an impartial hearing
13 officer and mail a notice of hearing to the employer and complainant and/or
14 their designated representatives.

15
16 (b) The notice of hearing shall be in writing and include a:

17 (1) statement of the date, time, place, and nature of the hearing;

18 (2) a statement of the legal authority and jurisdiction under which the
19 hearing is to be held;

20 (3) a reference to the sections of the statutes and rules involved;

21 (4) statement of the issues to be considered during the hearing; and

22 (5) either:

23 (A) a short, plain statement of the factual matters asserted; or

24 (B) an attachment that incorporates by reference the factual
25 matters asserted in the complaint.

26
27 (c) The notice of hearing shall be issued at least 10 days before the date of the
28 hearing unless all parties agree to waive this requirement.

29
30 **§844.78. Representation.**

31 Parties have the right to be represented by an attorney or other individual of their
32 choice in accordance with §815.18(3) of this title.

33
34 **§844.79. Ex Parte Communications.**

35 (a) Except as provided in this chapter, and unless required for the disposition
36 of ex parte matters authorized by law, the hearing officer may not
37 communicate, directly or indirectly, in connection with any issue of fact or
38

1 law with a party, representative of a party, witness, or individual providing
2 testimony except on notice and opportunity for each party to participate.

- 3
4 (b) The hearing officer may communicate concerning the case with an Agency
5 employee who has not participated in the hearing but may do so only for
6 the purpose of using the special skills or knowledge of the Agency and its
7 staff in evaluating the evidence.
8

9 **§844.80. Hearing Procedures.**

- 10
11 (a) General Procedure. The hearing shall be conducted informally and, in such
12 manner, as to ascertain the substantive rights of the parties. The hearing
13 officer shall develop the evidence. All issues relevant to the appeal shall be
14 considered and addressed.
15

16 (1) Presentation of Evidence. The parties may present evidence that is
17 material and relevant, as determined by the hearing officer. In conducting
18 a hearing, the hearing officer shall actively develop the record on the
19 relevant circumstances and facts to resolve all issues. To be considered as
20 evidence in a decision, any document or physical evidence must be
21 entered as an exhibit at the hearing. A party has the right to object to
22 evidence offered at the hearing by the hearing officer or other parties.
23

24 (2) Evidence Generally. Evidence, including hearsay evidence, shall be
25 admitted if it is relevant and if in the judgment of the hearing officer it is
26 the kind of evidence on which reasonably prudent persons are accustomed
27 to rely in conducting their affairs. However, the hearing officer may
28 exclude evidence if its probative value is outweighed by the danger of
29 unfair prejudice, by confusion of the issues, or by reasonable concern for
30 undue delay, waste of time, or needless presentation of cumulative
31 evidence.
32

33 (3) Examination of Witnesses and Parties. The hearing officer shall examine
34 parties and any witnesses under oath and shall allow cross-examination to
35 the extent the hearing officer deems necessary to afford the parties due
36 process.
37

38 (4) Additional Evidence. The hearing officer, with or without notice to any of
39 the parties, may take additional evidence deemed necessary, provided that
40 a party shall be given an opportunity to rebut the evidence if it is to be used
41 against the party's interest.
42

43 (5) Appropriate Hearing Behavior. All parties shall conduct themselves in an
44 appropriate manner. The hearing officer may expel any individual,
45 including a party, who fails to correct behavior the hearing officer

1 identifies as disruptive. After an expulsion, the hearing officer may
2 proceed with the hearing and render a decision.

3
4 (b) Records.

5
6 (1) The hearing record shall include the audio recording of the proceeding and
7 any other relevant evidence relied on by the hearing officer, including
8 documents and other physical evidence entered as exhibits.

9
10 (2) The hearing record shall be maintained in accordance with federal or state
11 law.

12
13 (3) Confidentiality of information contained in the hearing record shall be
14 maintained in accordance with federal and state law.

15
16 (4) Upon request, a party has the right to obtain one copy of the hearing
17 record, including recordings of the hearing and file documents at no
18 charge.

19
20 **§844.81. Postponement and Continuance.**

21
22 (a) On the hearing officer's own motion, or for good cause, at a party's request,
23 the hearing officer may postpone or continue a hearing.

24
25 (b) Requests for a continuance or postponement may be made informally by a
26 party, either orally or in writing, to the hearing officer.

27
28 (c) The hearing officer shall use his or her best judgement to determine when to
29 grant a continuance or postponement of a hearing to secure all necessary
30 evidence and to be fair to the parties.

31
32 (d) The notice of the hearing must indicate the times and places at which the
33 hearing may be continued unless waived by the parties.

34
35 **§844.82. Default.**

36
37 If a party to whom a notice of hearing provided under this chapter fails to appear
38 for a hearing, the hearing officer may proceed in that party's absence on a default
39 basis. If a final decision is issued, the factual allegations listed in the notice of
40 hearing may be deemed admitted. If a party fails to appear at a hearing, the
41 hearing officer will issue a notice of default to that party. A party may file a
42 motion no later than 14 days after the notice of default is mailed to set aside a
43 default announced at the hearing and to reopen the record. If a timely motion to
44 set aside a default is filed, the hearing officer may grant the motion, set aside the
45 default, and reopen the hearing for good cause shown, or in the interests of
46 justice. The hearing officer may issue a decision denying the motion to set aside

1 a default without a hearing if the motion fails to allege a reason for the party's
2 failure to appear or if a party has failed to appear at three or more scheduled
3 hearings.

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§844.83. Timeliness.

(a) Parties shall promptly notify, in writing or during the recorded hearing, the Agency of any change of mailing address. Determinations and decisions shall be mailed to the new address.

- (1) If a party properly designates a party representative, a determination or decision must be mailed to the designated party representative for it to become final.
- (2) The Agency is responsible for making an address change only if the Agency is specifically directed by the party to mail subsequent correspondence to the new address.
- (3) If the Agency addresses a document incorrectly, but the party receives the document, the time frame for filing an appeal shall begin as of the actual date of receipt by the party, whether or not the party receives the document within the appeal time frame. However, this does not apply if the party fails to provide a current address or provides an incorrect address.

(b) A determination or decision mailed to a party shall be presumed to have been delivered if the document was mailed as specified in subsection (a) of this section.

- (1) A determination or decision shall not be presumed to have been delivered:
 - (A) if there is tangible evidence of nondelivery, such as being returned to the sender by the US Postal Service; or
 - (B) if credible and persuasive evidence is submitted to establish nondelivery or delayed delivery to the proper address.
- (2) If a party provides the Agency with an incorrect mailing address, a mailing to that address shall be considered a proper mailing, even if there is proof that the party never received the document.

(c) The filing date for a complaint or an appeal shall be:

- (1) the postmark date or the postal meter date (where there is only one or the other);

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- (2) the postmark date if there is both a postmark date and a postal meter date;
 - (3) the date the document was delivered to a common carrier, which is equivalent to the postmark date;
 - (4) three business days before receipt by the Agency, if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;
 - (5) the date of the document itself, if the document date is fewer than three days earlier than the date of receipt and if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;
 - (6) the date of the document itself, if the mailing envelope containing the complaint or appeal is lost after delivery to the Board or Agency. If the document is undated, the filing date shall be deemed to be three business days before receipt by the Board or Agency; or
 - (7) the date of receipt by the Agency if the document was filed online or by fax.
- (d) Credible and persuasive testimony under oath, subject to cross-examination, may establish a filing date that is earlier than the dates established under subsection (c) of this section. A party shall be allowed to establish a filing date earlier than a postal meter date or the date of the document itself only upon a showing of extremely credible and persuasive evidence. Likewise, when a party alleges that a complaint or appeal has been filed that the Agency has never received, the party must present credible and persuasive evidence to support the allegation.
- (e) A decision or preliminary determination order shall not be deemed final if a party shows that a representative of the Agency has given misleading information on appeal rights to the party. The party shall specifically establish:
- (1) how the party was misled; or
 - (2) what misleading information the party was given, and, if possible, by whom the party was misled.
- (f) Appeal and complaint deadlines are extended one working day following a deadline which falls on a weekend, an official state holiday, a state holiday for which minimal staffing is required or a federal

1 holiday.

2
3 (g) There is no good cause exception to the timeliness rules.

4
5 **§844.84. Withdrawal of an Appeal.**

6
7 An employer may request a withdrawal of its appeal at any time before the
8 hearing officer's decision is issued. The hearing officer may grant the request for
9 withdrawal in writing and issue an order of dismissal.

10
11 **§844.85. Decision.**

12
13 (a) The hearing officer shall issue a written decision as soon as possible after the
14 hearing is finally closed.

15
16 (b) The Agency shall notify each party to a contested case of any decision of the
17 hearing officer by mailing the decision to the parties or the parties designated
18 representative if requested.

19
20 (c) The decision shall include findings of fact and conclusions of law separately
21 stated and a list of the individuals who appeared at the hearing. Findings of fact, if
22 set forth in statutory language, shall be accompanied by a concise and explicit
23 statement of the underlying facts supporting the findings. Findings of fact shall be
24 based exclusively on the evidence and on matters officially noticed and any issues
25 the parties waived notice of. The hearing officer shall rule on any contested
26 determinations issued as a result of the complaint.

27
28 (d) If the decision rules that the employer violated Texas Health and Safety Code,
29 Chapter 81D or this chapter and if no remediation determination has been issued
30 prior to the hearing, the hearing officer's decision shall indicate the amount of the
31 administrative penalty, any applicable investigative costs, and inform the
32 employer of the ability to avoid the administrative penalty by taking remedial
33 action and submitting proof thereof.

34
35 (e) If no decision has ruled on remedial action and the employer intends to take
36 remedial action in response to a decision issued under subsection (d) of this
37 section, the employer must notify the hearing officer of their intent to remedy
38 within 14 days of the decision being issued. Notice of intent to remedy must be
39 filed in accordance with the instructions provided in the decision. Upon
40 notification, the hearing officer's decision will be reopened for 30 days for the
41 employer to provide proof of remedial action to the hearing officer.

42
43 (f) The hearing officer may hold an additional hearing to consider additional
44 evidence of remediation. After consideration of any evidence of proof of

1 remediation, the hearing officer shall issue a combined decision addressing all
2 issues in front of the hearing officer resulting from the complaint.

3

4

§844.86. Finality of Decision.

5

6

The decision of the hearing officer becomes final 14 days after the date the
7 decision is mailed unless before that date the hearing officer reopens the decision.

8

9

§844.87. Judicial Review.

10

11

(a) If a final decision imposes an administrative penalty or the recovery of
12 investigative costs, an employer may obtain judicial review of the decision
13 by filing a petition in a Travis County district court against the Agency on
14 or after the date on which the decision is final, and not later than the 14th
15 day after that date.

16

17

(b) Judicial review under this subchapter is by trial de novo based on the
18 substantial evidence rule.

19

20

(c) An employer may not obtain judicial review of the decision unless the
21 employer has exhausted the party's remedies as provided by this subtitle.