

Amendments to 40 TAC §815.16 Appeals to Appeal Tribunals from Determinations.

PROPOSED RULE WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL NOT HAVE ANY SUBSTANTIVE CHANGES BUT IT SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.

ON AUGUST 5, 2003, THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULE WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

Estimated Publication Date of the Proposal in the *Texas Register*: August 22, 2003
Estimated End of Comment Period: September 22, 2003

The Texas Workforce Commission (Commission) proposes an amendment to Chapter 815. Unemployment Insurance, Subchapter B. Benefits, Claims and Appeals, §815.16, Appeals to Appeal Tribunals from Determinations.

The purpose of the amendment is to modify the language that describes the procedures for conducting unemployment insurance hearings as provided by §212.106 of the Texas Labor Code. On June 20, 2003, Senate Bill 280 (SB 280), 78th Legislature, Regular Session, was signed into law. SB 280 included Section 7A.02 adding Section 212.106 to the Texas Labor Code. That section requires that "the Commission, by rule, shall develop procedures to ensure that an appeal tribunal make every effort in a hearing conducted by telephone conference under...[the Texas Unemployment Compensation Act] to obtain all relevant facts and evidence from the parties to the appeal." A rule amendment is proposed to §815.16(3)(A) of the Commission's current unemployment insurance rules to conform to this addition to the Texas Labor Code.

Background: The Commission has administrative rules governing the delivery of unemployment insurance benefits and the processing of unemployment insurance appeals. Section 815.15 defines who is a "Party of Interest" to an appeal. Section 815.16 addresses relevant aspects of the hearing procedure applicable to telephone hearings and the responsibilities of an appeal tribunal. Section 815.18 provides for general rules for both the Appeal Tribunal and Commission level of appeal. Section 815.19 provides guidance for the conduct of unemployment fraud hearings. Section 815.32 defines when an appeal will be considered timely.

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect the following statements will apply:

- there are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rule;
- there are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule;
- there are no estimated losses or increases in revenue to the state or local governments as a result of enforcing or administering the rule;
- there are no foreseeable implications relating to costs or revenue to the state or local governments as a result of enforcing or administering the rule; and
- there are no anticipated economic costs to persons required to comply with the rule.

Mr. Townsend, Chief Financial Officer, has determined that there is no adverse impact on small businesses as a result of enforcing or administering this rule because the requirement is directly required by statute.

LaSha Lenzy, Director, Unemployment Insurance and Regulation Division, has determined that for each year of the first five years that the rule will be in effect the public benefit anticipated as a result of the adoption of the rule amendment will be the assurance that parties in the hearings will be heard on matters relevant to the issues in the hearing.

James Barnes, Director, Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of this rule amendment.

Comments on the proposed section may be submitted to John Moore, General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; Fax 512-463-2220; or e-mailed to john.moore@twc.state.tx.us. Comments must be received by the Commission no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

The amendment is proposed under Texas Labor Code §301.061, which provides 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 and §212.106, which provides that the Commission by rule shall develop procedures to ensure that an appeal tribunal makes every effort in a hearing conducted by telephone conference under this subchapter to obtain all relevant facts and evidence from the parties to the appeal.

The amendment affects Title 2 and 4 Texas Labor Code.

§815.16 Appeals to Appeal Tribunals from Determinations.

A party of interest may appeal a determination to the appeal tribunal. Appeals shall be in accordance with the terms of this section, §815.15 of this chapter (relating to Parties with Appeal Rights), §815.17 of this chapter (relating to Appeals to the Commission from Decisions), and §815.18 of this chapter (relating to General Rules for Both Appeal stages). As used in this section and in §§815.17 and 815.18, the term "party" includes a person's or individual's representative. In this section, a reference to the term "supervisor of appeals" includes the supervisor's designee.

(1) Presentation of appealed claims.

- (A) A party appealing from a determination made by an examiner under the provisions of the Act, shall file an appeal by hand delivery, mail, common carrier, facsimile (fax) transmission, or other method approved by the Agency in writing. A written appeal that is sent to the Agency should be addressed to the Texas Workforce Commission, 101 East 15th Street, Austin, Texas, 78778-0001, or faxed to the number provided in the determination. A written appeal may be hand delivered to the Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001, a local office of the Agency, or an agent state, or a workforce center or an office of a Board. The appeal should identify the determination being appealed, the basis for the appeal, the name of the party appealing, and the date of the appeal. The provisions of §815.32 of this chapter (relating to Timeliness) shall determine on what date the appeal was filed.
- (B) Upon the scheduling of a hearing on an appeal or a petition to reopen, notice of the hearing shall be mailed to the parties at least five days before the date of the hearing. The notice shall identify the decision or determination appealed from and shall specify the time and date of the hearing, the party appealing, and the issue to

be heard. If the hearing is an in-person hearing, the notice shall also specify the location of the hearing.

(2) Disqualification of appeal tribunal. The essence of a fair hearing lies in the impartiality of the appeal tribunal. An appeal tribunal should be free not only of any personal interest or bias in the appeal before it, but also of any reasonable suspicion of personal interest. No appeal tribunal shall participate in the hearing of an appeal in which that tribunal has a personal interest in the outcome of the appeal decision. The appeal tribunal may withdraw from a hearing to avoid the appearance of impropriety or partiality. Challenges to the impartiality of any appeal tribunal may be heard and decided by the supervisor of appeals.

(3) Hearing of appeal.

(A) Consistent with Section 212.106 of the Texas Labor Code, all ~~All~~ hearings shall be conducted informally and in a manner to ensure the substantial rights of the parties. All issues relevant to the appeal shall be considered and ruled upon. The parties to an appeal before an appeal tribunal may present evidence that may be material and relevant as determined by an appeal tribunal. The appeal tribunal shall examine parties and witnesses, if any, and may allow cross-examination to the extent the appeal tribunal deems necessary to afford the parties due process. The appeal tribunal, with or without notice to any of the parties, may take additional evidence and shall seek to obtain all facts and evidence from the parties relevant to the hearing that it deems necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.

(B) The parties to an appeal, with the consent of the appeal tribunal, may stipulate in writing the facts involved. The appeal tribunal may decide the appeal on the basis of a stipulation or, in its discretion, may set the appeal for hearing and take any additional evidence it deems necessary to enable it to determine the appeal.

(C) Hearings shall be conducted by telephone conference call unless the supervisor of appeals determines that an in-person hearing is necessary because a party with a physical impairment cannot effectively participate by telephone, because the nature of the evidence to be presented makes a hearing by telephone impractical, or because the supervisor of appeals otherwise determines that an in-person hearing is necessary. The rules and procedures in this chapter govern both in-person and telephone hearings. A party may request an in-person hearing by informally contacting, orally or in writing or by any other reasonable method of communication, the appeal tribunal or the supervisor of appeals before the scheduled time of the hearing and presenting information to support the request. The supervisor of appeals has the discretion to determine whether the party's request for an in-person hearing will be granted.

(4) Adjournment, continuance, and postponement of hearing.

(A) The appeal tribunal shall use its best judgment to determine when to grant a continuance or postponement of a hearing in order to secure all the evidence that is necessary and to be fair to the parties.

(B) Either prior to or during a hearing, an appeal tribunal, on its own motion or on the motion of a party of interest, may continue, adjourn, or postpone a hearing. The continuance, adjournment, or postponement shall not be for the purpose of delaying

the proceeding and may be granted due to illness of the appellant, death in the immediate family of the appellant, or a pending criminal prosecution of the appellant. A continuance, adjournment or postponement may also be granted at the request of the appellant or appellee when there is a need for an interpreter, religious observance, jury duty, court appearance, active military duty, or other reasons approved by the supervisor of appeals. Prior to the hearing, requests for a continuance or a postponement of a hearing may be made informally, either orally or in writing, to the appeal tribunal designated to hear the appeal or to the supervisor of appeals.

(5) Reopening of hearing before appeal tribunal.

- (A) If a party fails to appear for a hearing, the appeal tribunal may hear and record the evidence of the party present and the witnesses, if any, and shall proceed to decide the appeal on the basis of the record unless there appears to be good reason for continuing the hearing. A copy of the decision shall be promptly mailed to the parties of interest with an explanation of the manner in which, and time within which a request for reopening may be submitted.
- (B) A party of interest to the appeal who fails to appear at a hearing may, within 14 days from the date the decision is mailed, petition for a new hearing before the appeal tribunal in the manner set out in subsection (1)(A) of this section. The petition should identify the party requesting the reopening, the applicable decision of the appeal tribunal, the date of the petition, and explain the reason for the failure to appear. The provisions of §815.32 of this chapter (relating to Timeliness) shall determine on what date the petition was filed. The petition shall be granted if it appears to the appeal tribunal that the petitioner has shown good cause for the petitioner's failure to appear at the hearing. In the event that an appeal to the Commission is filed before the filing of the petition for reopening by the appeal tribunal, the appeal shall be referred to the Commission for review.
- (C) For purposes of this section, the term "appear" shall mean participation by a party or a party's representative in the proceeding. Actions that may be considered as participation include offering testimony, examining witnesses, or presenting oral argument. If the hearing is a telephone hearing, a party or a party's representative shall appear at a hearing by calling on the date and at the time of the hearing and participating in the hearing proceedings. If the hearing is an in-person hearing, a party or a party's representative shall appear by being at the location of the hearing on the date and at the time scheduled for the hearing and participating in the hearing proceedings. Mere submission of written documents, whether sworn or unsworn, or observation of the proceedings shall not constitute an appearance.

(6) The determination of appeals.

- (A) As soon as possible following the conclusion of a hearing of an appeal, the appeal tribunal shall issue its findings of fact and decision with respect to the appeal. The decision shall be in writing and shall reflect the name of the appeal tribunal who conducted the hearing and who rendered the decision. In the decision, the appeal tribunal shall set forth findings of fact and conclusions of law, with respect to the matters on appeal, and the reasons for the decision. Copies of the decision shall be mailed by the appeal tribunal to the parties of interest to the appeal. Upon request, courtesy copies may be mailed to other parties to the appeal.
- (B) At any time during the 14-day period from the date a decision on an appeal is mailed, unless a party of interest has already appealed to the Commission, the appeal tribunal or the

supervisor of appeals may assume continuing jurisdiction over the appeal for the purpose of reconsidering the issues on appeal and issuing a corrected decision. During the period in which continuing jurisdiction is assumed, the appeal tribunal, after notice to the parties, may take any additional evidence or secure any additional information it deems necessary to issue a decision.

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