

Chapter 821. Texas Payday Rules §§821.1-821.6, 821.21, 821.22, 821.25-821.28, 821.41-821.46, 821.61-821.63, 821.81

Part XX. Texas Workforce Commission

Chapter 821. Texas Payday Rules

The Texas Workforce Commission (Commission) adopts new §§821.1-821.6, 821.21, 821.22, 821.25-821.28, 821.41-821.46, 821.61-821.63 and 821.81, concerning Payment of Wages. Sections 821.21, 821.25-821.28, 821.41, 821.46, 821.62, 821.63 and 821.81 are adopted with changes to the proposed text as published in the January 23, 1998, issue of the *Texas Register* (23 TexReg 535). Sections 821.1-821.6, 821.22, 821.42 — 821.45 and 821.61 are adopted without changes and will not be republished. The Commission has not adopted proposed §821.23 and §821.24.

The purpose of the rules is to facilitate the Commission's administration of Texas Labor Code, Chapter 61, Payment of Wages. The Commission is responsible for the investigation, determination and collection of unpaid wages for employees. This program is an administrative alternative to litigation in Texas courts.

The Commission made non-substantive corrections to proposed §§821.21, 821.27, 821.41, 821.62 and 821.81 to standardize statutory references, and non-substantive grammatical changes to proposed §§821.25 and 821.46 to improve readability. The Commission added to the proposed text of §821.63 a reference in subsection 821.63(a) to the assignment of lien that had been omitted inadvertently. The Commission has explained the other changes to the proposed text in its responses to the comments below.

Subchapter A of the adopted rules contains provisions of general application relating to the title and purpose of the rules, definitions of terms, jurisdiction and the relation of Texas Labor Code, Chapter 61, to other wage and hour laws. Subchapter B of the adopted rules interprets and clarifies statutory provisions relating to the form and delivery of wages, the timeliness of payment, fringe benefits and commissions, treatment of loans, and withholding wages. Subchapter C of the adopted rules interprets and clarifies statutory provisions relating to various stages in the administrative wage claim process. Subchapter D of the adopted rules addresses the wage collection process. Finally, Subchapter E of the adopted rules sets out the Commission's policy on requiring bonds of certain employers. The Commission held a public hearing on the proposed rules on February 10, 1998 in Room 644 of the TWC Building at 101 E. 15th Street in Austin, Texas.

The Commission received comments on the rules from business, labor, legislators and a private attorney. Some commenters were for the rules, and others had concerns and questions about the rules as proposed, and suggested changes. The names of interested groups or associations offering comments on the rules are as follows:

two Texas State Representatives;

The Texas Association of Business and Chambers of Commerce;

The Texas AFL-CIO;

The Salvation Army;

The Houston Welfare Rights Organization;

The Texas Appleseed Advocacy Fund; and

an individual.

Following each comment or group of related comments is the Commission's response.

Section 821.5. Employment Status: Employee or Independent Contractor.

Comment: The checklist adopted in §821.5 is inconsistent with the common law the Commission is bound to follow.

Response: The Commission disagrees. The Commission believes the checklist is consistent with the federal common law and the Act. Also, the checklist is merely a guide to be used in applying the applicable law.

Section 821.6. Wage Claims Involving Minimum Wage or Overtime.

Comment: Under §821.6, the Commission should limit its consideration of overtime claims to those in which the employer has acknowledged such a liability or the United States Department of Labor (USDOL) has determined it.

Response: The Commission disagrees. While the Commission believes it is appropriate to defer to an existing determination of the USDOL on overtime, the Commission believes it has a mandate to determine unpaid wages if an employee either has chosen not to complain to the USDOL or has been left to private litigation by them.

Comment: Under §821.6, the Commission should consider case law and regulations promulgated under the Fair Labor Standards Act (FLSA) as well as the FLSA itself.

Response: The Commission agrees. The consideration of case law and regulations is implicit in the rule.

Section 821.21. Complete and Unconditional Payment of Wages.

Comment: Section 821.21(b) is unclear as to its intended purpose, its benefit and on whom it ultimately places responsibility.

Comment: The Commission should delete §821.21(b) as it applies to forms of payment that need to be cashed because it is unnecessary, it places an undue burden on employees, it allows employers to realize a windfall and it is not authorized by the Act.

Comment: The Commission should delete §821.21(c), which allows an employee to refuse a paycheck under certain circumstances.

Response: The Commission acknowledges the concerns raised by the comments on this rule and, without agreeing or disagreeing with them, has deleted §821.21(b) and (c) of the rule and re-lettered the remaining subsections accordingly.

Section 821.23. Delayed Wage Payments.

Comment: Section 821.23 prohibits the payment of bonuses on a schedule different from the payment of regular wages.

Comment: Section 821.23 places an unauthorized burden on employees and is vague.

Response: The Commission acknowledges the concerns raised by the comments on this rule and, without agreeing or disagreeing with them, has declined to adopt the rule.

Section 821.24. Electronic Funds Transfer.

Comment: Section 821.24(a) places unauthorized limitations on an employer's right to pay wages by electronic funds transfer (EFT) - that it be agreed to in writing by the employee; and that an employer may not make it a condition of employment.

Comment: The Commission has no authority to, and should not, allow employers to charge employees for the cost of paying wages by EFT as provided by §821.24(b). The cost of doing business belongs to owner not employee.

Response: The Commission acknowledges the concerns raised by the comments on this rule and, without agreeing or disagreeing with them, has declined to adopt the rule.

Section 821.25. Fringe Benefits.

Comment: Section 821.25(b) is unclear on what severance pay is and too narrowly defines wages in lieu of notice.

Response: The Commission agrees in part and disagrees in part. The Commission has deleted references to wages in lieu of notice. The Commission believes that the definition of severance pay is merely a clarification of a term not defined in the Act.

Comment: Section 821.25(b) is irrelevant and should be deleted because it does not matter in the context of a wage claim. The reference seems to be directed at a problem related to unemployment claims.

Response: The Commission agrees that the definition of wages in lieu of notice is irrelevant because the Act makes no reference to that term. The Commission has deleted references to wages in lieu of notice. The Act does, however, refer to severance pay. That definition is relevant.

Comment: Section 821.25(f) is an unauthorized interference with business practices and should be deleted. The Commission should not charge out accrued leave or state how it is to be paid upon separation.

Response: The Commission disagrees. The provision merely clarifies the limitation imposed by the Act that such payments are considered wages only if owed in writing.

Comment: Section 821.25 - The Commission should honor oral agreements between employers and employees.

Response: The Commission disagrees. The Act gives the Commission no authority to adopt a rule inconsistent with the Act's limitation that such payments are covered wages only if owed in writing.

Section 821.26. Commissions.

Comment: Section 821.26 imposes unauthorized limitations on agreements for wages paid on commission basis.

Commissions should not be payable until all facts needed to determine their amount and entitlement are known. The rule should require such agreements to be in writing to be made the basis of a wage claim.

Response: The Commission disagrees. The rule defers to the agreements between parties. The Commission has no authority to limit claims for wages paid on commission basis to those based on written agreements. The Commission has modified §821.26(b) to clarify that the Commission will look to the agreement between the parties whether written or oral.

Section 821.27. Loans and Advances.

Comment: Section 821.27 prohibits the recovery of loans from minimum wage or overtime pay and limits the repayment schedule.

Response: The Commission disagrees. The rule expressly allows an employer to count loan repayments toward required minimum wage and overtime pay, and it allows the parties to agree to any amount of deduction.

Comment: Section 821.27 goes beyond the authority granted by the Act.

Comment: The Commission has no authority to adopt §821.27(d) because that provision was expressly rejected by the legislature in 1997.

Comment: Section 821.27(d) and (e) create confusion, argument, misunderstanding and the ability to mislead the other party by not requiring written authorization.

Response: The Commission acknowledges the concerns raised by the comments on §821.27(d) and (e) and, without agreeing or disagreeing with them, has deleted those subsections, re-lettered the remaining subsections and modified the title of the rule accordingly.

Section 821.28. Deductions.

Comment: Section 821.28 gives no guidance to employers on dealing with foreign wage garnishments and places unauthorized restrictions on employee authorizations.

Response: The Commission disagrees. Section 821.28(a)(1) recognizes the constitutional precept that full faith and credit be given to foreign court orders. The rule merely fleshes out the meaning of the term "authorization." The Commission has amended §821.28(b) to clarify that the Commission's concern is effective notice to the employee rather than a particular form of authorization.

Comment: Section 821.28(b) is unclear as to whether it requires specificity at the time of authorization or at the time of deduction or both. It should require the employer to state the specific purpose of the deduction at the time of authorization and at the time of the deduction.

Response: The Commission agrees in part and disagrees in part. The Commission has amended §821.28(b) to clarify that only the authorization needs to be specific. The Act does not expressly give the Commission the authority to require the employer to specify the purpose of the deduction at the time the deduction is made.

Comment: Section 821.28(c) condones the practice of hiding an authorization to withhold pay in an employee handbook or employer manual. Such a practice defeats the purpose of requiring written authorization.

Response: The Commission disagrees. Section 821.28(c) incorporates the safeguards in §821.28(b). To clarify its intent, the Commission has amended §821.28(c) by adding language aimed at maximizing the notice to the employee of an authorization incorporated into the employer's handbook or manual.

Comment: Section 821.28(d) is too broad as to the authorization required to deduct losses in general and as to the kinds of losses for which an employer may withhold pay even with specific authorization.

Comment: Section 821.28(d) was expressly rejected by the legislature in 1997.

Response: The Commission acknowledges the concerns raised by the comments on §821.28(d) and, without agreeing or disagreeing with them, has deleted that subsection and re-lettered the remaining subsections accordingly.

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

Comment: Employees are unlikely to be able to discover the legal names of their employers.

Response: The Commission disagrees. The Commission must be able to notify the employer. The employee need not provide the exact name, but must give adequate details to allow the Commission to complete a valid investigation.

Section 821.42. Timeliness.

Comment: The Commission should consider a premature wage claim timely filed if the wages remain unpaid after they've become due for payment.

Response: The Commission disagrees. The Act does not recognize a premature wage claim.

Section 821.43. Wage Claim Withdrawal.

Comment: The Commission should expressly prohibit the withdrawal of a wage claim absent an agreement of all parties because claimants will abuse the tactic.

Response: The Commission disagrees. The Commission has no statutory authority to prohibit the withdrawal of a wage claim.

Section 821.44. Bad Faith.

Comment: Employers should be held in bad faith if they continue in wage disputes past the expiration of the initial claim notice period.

Response: The Act does not authorize the imposition of a bad faith penalty against an employer for anything other than for failing to pay wages in violation of the Act.

Comment: Findings of bad faith should be limited to violations of the Act itself, not the Rules.

Response: The Commission disagrees. Any violation of a rule adopted under this chapter will be a violation of the Act as well.

Section 821.45. Appeals.

Comment: The Commission should limit appeals to issues raised by the parties. Response: The Commission disagrees. The Act makes these hearings subject to the rules that govern unemployment benefits hearings. One of those rules requires that a hearing officer conduct the hearings in a manner as to ascertain the substantial rights of the parties and to consider and pass upon all issues relevant to the appeal.

General Comments.

General Comment: By and large, the proposed rules are constructive and helpful in adding certainty to and remaining faithful to the intent of the Act in establishing a system for the collection of liquidated wage claims.

General Comment: The entire chapter as proposed should be withdrawn or re-written and re-proposed because of the many disadvantages they impose on workers.

General Comment: The rules will trap claimants and likely snare the agency in litigation. Because of the number of flaws and imbalances, the Commission should withdraw or at least extend the comment period, and then rewrite the rules.

General Comment: Some rules are unnecessary, some reflect poor public policy and some simply are an illegal exercise of power by the agency. The Commission should decline to enact rules and continue with the orderly and predictable enforcement that employers and employees have come to rely on.

General Response: The Commission believes that the rules interpret and clarify the rights and duties conferred on employers and employees by the Act. The Commission has incorporated the suggestions presented in the comments where appropriate.

Subchapter A. General Provisions

40 TAC §§821.1-821.6

The new rules are adopted under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter B. Payment of Wages

40 TAC §§821.21, 821.22, 821.25-821.28

The new rules are adopted under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

§821.21. Complete and Unconditional Payment of Wages.

(a)

An employer has paid an employee's wages for purposes of the Act if the employer has delivered the wages to the employee:

(1)

in a form authorized by §61.016 of the Act; and

(2)

by a method authorized by §61.017 of the Act.

(b)

An employer has not paid an employee's wages for purposes of the Act if the employee has received the wages subject to a third party claim because:

(1)

the paycheck has been dishonored due to insufficient funds, a stop-payment order or any other reason attributable to the employer;

(2)

the employer has caused a direct deposit of the wages to be reversed; or

(3)

the employer has taken other similar action to undo the payment of wages.

§821.25. Fringe Benefits.

(a)

For purposes of §61.001 (7)(B) of the Act, vacation pay and sick leave pay are payable to an employee upon separation from employment only if a written agreement with the employer or a written policy of the employer specifically provides for payment.

(b)

Severance pay is payment by an employer to an employee beyond the employee's wages on termination of employment, usually based on the employee's length of prior service, and is not attributable to any period of time subsequent to termination.

(c)

For purposes of §61.001 (7)(B) of the Act, the sale of an employer's business is a termination of employment with all of the employer's employees. At the time of termination, the employer becomes liable for the payment of vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay if owed pursuant to a written agreement or written policy between the employer and its employees.

(d)

For purposes of §61.001 (7) of the Act, expense reimbursements paid to employees are not wages. Expense reimbursements are payments to the employee for costs expended by the employee directly related to the employer's business.

(e)

Absent the inclusion of definitions of terms in a written agreement with the employer or under a written policy of the employer, a term will be given its ordinary meaning unless a party establishes that it is defined in another way.

(f)

For purposes of §61.001 (7)(B) of the Act, accrued leave time of an employee shall carry over to subsequent years only if a written agreement with the employer or a written policy of the employer specifically provides for it.

§821.26.Commissions.

(a)

For purposes of §61.015 of the Act:

(1)

Commissions are earned when the employee has met all the required conditions set forth in the applicable agreement with the employer. To change an agreement, there must be prior notice as to the nature and effective date of the changes. Changes to written agreements shall be in writing.

(2)

Commissions are due to be paid, in a timely manner, according to the terms specified in an agreement between an employer and an employee. The terms should specify the time intervals or circumstances (or combinations thereof) that would cause commissions to become payable, such as, but not limited to, weekly, monthly, quarterly, when sales transactions are recorded, upon buyer's remittance, etc.

(b)

Unless otherwise agreed, the employer shall pay, after separation, commissions earned as of the time of separation.

(c)

Commissions due after separation from employment are payable based on the routine or practice specified in the agreement when the employee was employed, or on any special agreement made between the employee and the employer upon separation.

(d)

Draws against commissions may be recovered from the current or any subsequent pay period until fully reconciled.

§821.27.Loans.

(a)

An employer must comply with §61.018 of the Act, and this chapter in order to recoup a loan the employer made to an employee.

(b)

In recouping a loan made to an employee, an employer may count the loan repayment toward any applicable minimum or overtime wages the employer is obligated to pay to the employee.

(c)

In recouping a loan made to an employee from any of the employee's paychecks, including the employee's final paycheck, the employer may not withhold or divert more than the agreed amount. The agreed amount is the amount:

(1)

identified as the amount to be withheld from any one paycheck in the written loan agreement between the employer and employee; or

(2)

otherwise authorized in writing by the employee for repayment of the loan.

§821.28.Deductions.

(a)

The Commission provides the following guidance in determining whether an employer is entitled to withhold or divert wages under court order, by law or with written authorization under §61.018 of the Act:

(1)

A court is presumed to be a court of competent jurisdiction with respect to issuing court orders. The burden shall be on the party opposing a court order to challenge the court's authority by appealing to the issuing court or court of appropriate review as the Commission will presume full faith and credit applies to court orders.

(2)

State or federal law includes statutes and codes enacted by Congress or the Texas Legislature, rules promulgated by a Texas or federal agency, and regulations promulgated by a Texas or federal agency.

(3)

A lawful purpose is one that is authorized, sanctioned, or not forbidden, by law.

(b)

Written authorization for deductions shall be specific as to the lawful purpose for which the employee has accepted the responsibility or liability. Written authorizations shall be:

(1)

sufficient to give the employee a reasonable expectation of the amount to be withheld from pay; and

(2)

a clear indication that the deduction is to be withheld from wages.

(c)

If an employer uses a handbook, policy manual or other similar document instead of a separate writing, the employee's signed acknowledgment of receipt of company policies can be authorization to withhold wages if the acknowledgment meets the requirements of subsection (b) of this section and specifically informs the employee of the deduction. The signed acknowledgment of receipt shall also include language that states that the employee agrees to abide by or be bound to the authorization for deduction.

(d)

The employer shall ensure that properly withheld wages are applied toward their authorized purpose. Properly withheld wages not applied toward their authorized purpose will be considered unlawful deductions.

(e)

The employer shall obtain written authorization as required under the Act to deduct credit card service charges from an employee's tips.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter C. Wage Claims

40 TAC §§821.41-821.46

The new rules are adopted under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

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

(a)

A faxed wage claim does not meet the requirements of §61.051 of the Act and will not be accepted as a valid claim.

(b)

A photocopy of a wage claim is not valid without original signatures of the claimant and the witness.

(c)

A wage claim must be filled out completely, legibly, and sufficiently to identify and allow the Commission to attempt contact with the employer.

§821.46.Void Determination Orders and Decisions.

A preliminary wage determination order and a decision shall be void from its inception when it orders a non-existent entity to pay wages.

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Subchapter D. Collection Action

40 TAC §§821.61-821.63

The new rules are adopted under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

§821.62.Collection Pending Judicial Review.

The Commission may initiate or continue collection on a final order unless a party complies with the payment provision of §61.063 of the Act.

§821.63.Assignment of Lien to Claimant.

(a)

Upon written request by the claimant, the Commission shall execute an assignment of lien to the claimant. The claimant shall bear responsibility for recording the assignment of lien.

(b)

Any partial assignment shall leave in full force and effect the lien regarding the remaining claimants.

(c)

The Commission's assignment of lien is final and irrevocable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter E. Bonds

40 TAC §821.81

The new rule is adopted under Texas Labor Code, Title 2, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of the Commission and compliance with Texas Labor Code, Chapter 61, Payment of Wages.

§821.81.Bonding.

(a)

When authorized by §61.031 of the Act, the Commission may require a bond of an employer if the Commission reasonably believes the employer would otherwise fail to comply with the Act.

(b)

The Commission shall consider the following factors in determining the amount of the bond:

(1)

the seriousness of the violation, including nature, circumstances, extent and gravity of any prohibited acts;

- (2) the history of previous violations;
- (3) the amount necessary to deter future violations;
- (4) efforts to pay past due wages and penalties;
- (5) the total amount of wages not paid in accordance with the Act; and
- (6) any other matter that justice may require.

(c)

The bond shall be in an amount not less than the cumulative total amount of wages finally determined to be due and unpaid by the employer in the past. The maximum bond shall be in an amount not more than five times the cumulative total amount of wages finally determined to be due and unpaid by the employer in the past.

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