CHAPTER 844. PROHIBITED CORONAVIRUS VACCINE MANDATES BY PRIVATE EMPLOYER

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

ON **DECEMBER 10, 2024**, THE TEXAS WORKFORCE COMMISSION ADOPTED THE RULES BELOW WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

Publication Date of the Adoption in the *Texas Register*: **December 27, 2024**
The Rules are Effective: **December 30, 2024**

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

Subchapter A. General Provisions, §844.01 and §844.02
Subchapter B. Complaints, §§844.25 - 844.30
Subchapter C. Determinations, §§844.50 - 844.55
Subchapter D. Administrative Hearings and Judicial Review, §§844.75 - 844.92

New §§844.01, 844.02, 844.25 - 844.30, 844.50 - 844.55, and 844.75 - 844.92 are adopted *without changes* to the proposal, as published in the October 4, 2024, issue of the *Texas Register* (49 TexReg 8075), and, therefore, the adopted rule text will not be published.

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

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

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

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS
TWC adopts new Subchapter A, General Provisions, as follows:

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

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

SUBCHAPTER B. COMPLAINTS
TWC adopts new Subchapter B, Complaints, as follows:

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

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

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

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

§844.29. Adverse Action
New §844.29 provides context to the definition of adverse action by further addressing the reasonable person standard. Examples of an adverse action include, but are not limited to, terminating an employee, terminating a contractual relationship, demoting an employee, reducing pay or compensation, not hiring an employee, not offering a contract

for a contract position, or a reduction in hours not related to a business need. When determining whether an employer's action was an adverse action, the Agency will consider the employer's good faith attempt to comply with a legal obligation as evidence that the employer's action would not be considered by a reasonable person to be for the purpose of punishing, alienating, or otherwise adversely affecting a complainant.

§844.30. Investigation of Complaints in Health Care
New §844.30 requires TWC to consult with the Texas Department of State Health Services (DSHS) when a complaint against a health care facility, health care provider, or physician concerns a policy that requires the use of protective medical equipment to determine if the policy is reasonable.

SUBCHAPTER C. DETERMINATIONS

TWC adopts new Subchapter C, Determinations, as follows:

§844.50. Preliminary Determination Order, Determination on Remedial Action, and Penalty and Cost Order
New §844.50 defines the procedures for issuing a determination after the investigation is complete. A preliminary determination order will be mailed to each party informing them whether TWC found a violation, which would require the imposition of an administrative penalty, and whether TWC will seek to recover investigative costs from the employer. SB 7 prescribes the administrative penalty amount of $50,000 for each violation and did not provide TWC with discretionary authority to adjust the penalty amount. The preliminary determination order would inform the parties of appeal rights and the employer's ability to take remedial action to avoid the administrative penalty. If an employer completes remedial action and submits proof of remedial action within 30 days of a preliminary determination order or decision, TWC will issue a determination on remedial action, which is an appealable document. Once the determination or decision is final, a penalty and cost order will be issued instructing the employer to make payment to TWC. If an employer fails to make payment in accordance with the penalty and cost order, TWC will refer the amount to the Office of the Attorney General in accordance with Texas Government Code §2107.003 as well as reporting the indebtedness to the Texas Comptroller of Public Accounts under the warrant hold provisions in Texas Government Code §403.055(f).

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

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

§844.53. Corrected Determinations and Decisions
New §844.53 allows TWC to issue corrected determinations or decisions to correct an error including an incorrect address for a party.

§844.54. Withdrawal of Complaint
New §844.54 allows a complainant to withdraw a complaint before the preliminary determination order becomes final.

§844.55. Appeal and Determination Finality
New §844.55 establishes that a party can file an appeal to a determination within 30 days of the mailing date of the determination by submitting a written appeal by mail, fax, or other method approved by TWC on the preliminary determination order.

SUBCHAPTER D. ADMINISTRATIVE HEARINGS AND JUDICIAL REVIEW
TWC adopts new Subchapter D, Administrative Hearings and Judicial Review, as follows:

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

§844.76. Parties
Under new §844.76, the parties to the hearing are the complainant, the employer and TWC.

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

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

§844.79. Ex Parte Communications
New §844.79 prohibits ex parte communications without notice and an opportunity for all parties to participate.

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

§844.81. Postponement and Continuance
New §844.81 addresses situations when the hearing can be postponed or continued.

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

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

§844.84. Withdrawal of an Appeal
New §844.84 allows a party to withdrawal an appeal before the hearing officer's decision is final.

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

§844.86. Finality of Decision
New §844.86 states that the hearing officer's decision becomes final 14 days after the date the decision is mailed unless before that date the hearing officer reopens the decision, a party files a timely appeal, or the commission decides to remove the case to itself.

§844.87. Commission
New §844.87 sets forth the Commission's duties under this chapter, including which member of the Commission shall serve as chair when the Commission acts under this chapter.

§844.88. Removal of Order Pending Before a Hearing Officer
New §844.88 allows the Commission to remove a pending hearing to itself.

§844.89. Commission Review of Hearing Officer Order
New §844.89 establishes that the Commission may affirm, modify, or set aside a penalty order on the basis of previously submitted evidence or direct the taking of additional evidence.

§844.90. Notice of Commission Action
New §844.90 defines the issues to be addressed in a notice of Commission action and requires the Commission to enter a written order for the payment of any penalty or investigative costs the Commission has assessed.

§844.91. Finality of Commission Order
New §844.91 establishes that the Commission order is final 14 days after the date the order is mailed unless the Commission reopens the appeal or a party files a motion for rehearing.

§844.92. Judicial Review
New §844.92 sets forth the method of seeking judicial review of TWC's final decision or order.

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

PART III. PUBLIC COMMENTS
The comment period ended on November 4, 2024.

TWC received comments from:
-- Texas Medical Association (TMA)
-- Texas Hospital Association (THA)

COMMENT: TMA expressed concern that the proposed rules do not contain a time frame for TWC to complete its complaint investigation. They suggested that the rules should include a 90-day time frame to complete the investigation to ensure that the parties recollection of the events were fresh and records related to the issue were still available. TMA suggested that should TWC need to extend that period, they could do so by notifying the complainant and employer that the investigation would exceed the prescribed period.

RESPONSE: The Commission appreciates TMA's comment and agrees that investigating the allegations in a timely fashion will assist with gathering the necessary information while recollections are fresh and documentary evidence is still available. However, TWC anticipates the average investigation will take a fraction of the time suggested and that creating an artificial deadline for completion that may be waived would only serve to confuse the parties about when a matter may be fully resolved. TWC will adjust the initial notices sent to parties to expressly advise them of the need to retain necessary documents during the investigation. No changes were made in response to this comment.

COMMENT: TMA expressed concern that under the proposed rules an employer that takes an adverse action against an unvaccinated complainant for reasons other than the complainant's vaccination status could be found liable for a violation. To resolve that possibility, they suggest that the rules be revised to include a "but for" causation standard, which they assert would be consistent with the underlying statutory language.

RESPONSE: The Commission appreciates the comment and is aware of the three-part framework used in the *McDonnell Douglas* standard. ""The suggested "but for" language is primarily one used in analyzing discrimination and retaliation claims by courts and

administrative tribunals faced with a lack of direct evidence of the alleged behavior. The agency will use the appropriate standard when assessing the evidence presented, which would include the suggested "but for" causation analysis where there is no direct evidence of the intent behind an adverse action. No changes were made in response to this comment.

COMMENT: THA expressed concern that the proposed rules do not offer health care providers a sufficiently clear understanding of what safety protocols or staffing decisions, based upon vaccination status, they may engage in before those decisions would be considered an "adverse action" under the rules.

RESPONSE: The Commission appreciates the comment and understands THA's desire to better understand which policies are permissible and impermissible under the statute and these rules. The Commission's present interpretation of the statute would permit a health care facility, health care provider, or physician to establish reasonable policies for employees or contractors who are not vaccinated against COVID-19. The statute also requires TWC to consult with the Department of State Health Services (DSHS) when assessing whether a policy covered by §81D.0035 is reasonable. Because TWC's assessment of a policy will be made on a case-by-case basis in consultation with DSHS, the Commission does not take a position at this time whether a policy that includes more than the use of protective medical equipment based upon the level of risk the individual presents to patients would be deemed or found to be reasonable during such a consultation. No changes were made in response to this comment.

COMMENT: THA expressed concern that the proposed rules limit the involvement of the Department of State Health Services to reviewing only those policies involving the use of personal protective equipment by unvaccinated individuals. They assert that TWC should involve the department in reviewing any policy implemented by a health care employer, which when applied to unvaccinated contractors and employees resulted in a complaint to TWC.

RESPONSE: The Commission appreciates the comment but has determined that policies that exceed the use of personal medical equipment by an employee or contractor, of a facility, provider, or physician, who is not vaccinated against COVID-19 are not permitted under Texas Health and Safety Code §81D.0035. TWC will consult with the Department of State Health Services as required by Texas Health and Safety Code §81D.004. No changes were made in response to this comment.

PART IV. STATUTORY AUTHORITY

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

The rules are adopted under:

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

Code, Chapter 81D; and
--Texas Labor Code §301.0015(a)(6), which provides TWC with the general authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules relate to Texas Health and Safety Code, Chapter 81D.

CHAPTER 844. PROHIBITED CORONAVIRUS VACCINE MANDATES BY PRIVATE EMPLOYER

SUBCHAPTER A. GENERAL PROVISIONS

§844.01. Purpose.

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

§844.02. Definitions.

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

(1) "Adverse Action" means an action taken by an employer that a reasonable person would consider was for the purpose of punishing, alienating, or otherwise adversely affecting an employee, contractor, applicant for employment, or applicant for a contract position.

(2) "Agency" shall have the meaning established under §800.2 of this title.

(3) "Applicant for employment" means a person who has submitted a formal application for an employment position for which the person meets the minimum qualifications and who has a genuine interest in the position.

(4) "Applicant for a contract position" means a person who has submitted a formal application or proposal for a contract position for which the person meets the minimum qualifications and who has a genuine interest in the contract position.

(5) "Complainant" means an employee, contractor, applicant for employment, or applicant for a contract position who files a complaint against an employer alleging an adverse action by the employer against the person in violation of Texas Health and Safety Code, Chapter 81D.

(6) "Complaint Form" means the COVID-19 Vaccine Complaint Form approved by the Agency.

(7) "Contractor" means a person who undertakes specific work for an employer in exchange for a benefit without submitting to the control of the employer over the manner, methods, or details of the work.

(8) "COVID-19" means the 2019 novel coronavirus disease and any variants of the disease.

(9) "Day" means calendar day.

(10) "Department" means the Department of State Health Services.

(11) "Employee" means an individual who is employed by an employer, whether or not for compensation. The term does not include:

(A) a person related to the employer or the employer's spouse within the first or second degree by consanguinity or affinity, as determined under Texas Government Code, Chapter 573; or

(B) a contractor.

(12) "Employer" means a person, other than a governmental entity, who employs one or more employees.

(13) "Governmental Entity" means this state, an agency of this state, a local government entity, or a political subdivision of this state as defined in §821.4 of this title. This definition includes the definition of governmental entity as provided by Texas Health and Safety Code §81B.001(2).

(14) "Party" means the agency, a complainant or employer.

(15) "Person" includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

SUBCHAPTER B. COMPLAINTS

§844.25. Complaint Requirements.

(a) A complaint must be filed in writing by the complainant completing the Complaint Form.

(b) A Complaint Form may only be submitted by online submission as identified through the Agency's website page related to COVID-19 mandate complaints or by other means authorized in writing by the Agency.

(c) The complainant must provide the following information on the Complaint Form:

(1) the name of the complainant;

(2) the name of the employer;

(3) the nature and description of any alleged adverse action the employer took against the complainant; and

(4) any other information specifically requested by the Agency on the Complaint Form that is necessary to resolve the complaint.

(d) The complainant must declare that the information provided in the completed Complaint Form is true and correct.

§844.26. Valid Complaints.

(a) A complaint may only be filed for an adverse action that occurred after the effective date of Senate Bill (SB) 7, 88th Texas Legislature, Third Special Session (2023), which was February 6, 2024.

(b) The complaint must be received by the Agency within 90 days of the date of the adverse action. For adverse actions that occurred after the effective date of SB 7, and before the effective date of this chapter, a complaint must be received by the Agency within 90 days of the date this chapter becomes effective.

(c) A contractor or applicant for a contract position may only file a complaint if the contractor or applicant for a contract position was or would have been a party to the contract with the employer.

(d) A complaint must name an employer that is a non-governmental entity that satisfies the definition of employer in §844.02(12) of this chapter.

(e) A complaint may only be filed by a complainant for an adverse action that was taken against the complainant for a refusal to be vaccinated against COVID-19.

(f) A Complaint Form must be filled out completely and sufficiently to allow the Agency to attempt contact with the employer to investigate the adverse action.

(g) A complainant may not file an additional complaint for an adverse action that has already been the basis of another complaint that is still pending or resulted in the issuance of a preliminary determination order, other than a dismissal under §844.28 of this subchapter, or for a complaint that was withdrawn under §844.54 of this chapter.

(h) During the course of an investigation, a complainant or an employer may provide additional information to the Agency prior to the issuance of a preliminary determination order, which the Agency will consider in addition to evidence offered in the original complaint.

§844.27. Jurisdiction.

(a) The Agency may exercise jurisdiction over complaints under this chapter in which:

(1) the work was performed or would have been performed in Texas; and:

(2) the employer:

(A) is a resident employer; or

(B) is a non-resident employer pursuant to the Texas Civil Practice & Remedies Code, Chapter 17, Subchapter C, also known as the "Texas Long-Arm Statute," when the following are met:

(i) the employer employs the complainant in Texas at the time of the adverse action or the employer's contact with Texas is continuing and systematic; and

(ii) exercising jurisdiction is consistent with:

(I) fair play and justice as determined by the quality, nature, and extent of the employer's activities in Texas including the extent to which the employer avails itself of the benefits and protections of Texas law; and

(II) the relative convenience of the parties.

(b) The Agency shall not exercise jurisdiction over complaints based on work performed or intended to be performed outside the United States.

§844.28. Dismissal.

(a) The Agency may dismiss a complaint that is incomplete or does not meet the requirements of §844.26 of this subchapter.

(b) A dismissal under subsection (a) of this section becomes final unless a complainant refiles the complaint within the period to file a complaint or within 30 days of the mailing of the dismissal, whichever is later.

§844.29. Adverse Action.

(a) To support a finding of a violation under this chapter, the adverse action must cause a result that a reasonable person would regard as an objective and demonstrated harm to the complainant.

(b) If an adverse action was taken, the Agency will consider the reason(s) provided by an employer when determining whether the adverse action was taken due to a refusal to be vaccinated against COVID-19 in violation of Texas Health and Safety Code, Chapter 81D.

§844.30. Investigation of Complaints in Health Care.

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

SUBCHAPTER C. Determinations

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

(a) After an investigation, the Agency will mail a preliminary determination order to each party stating whether the Agency determined the employer took an adverse action against the complainant for a refusal to be vaccinated against COVID-19 in violation of Texas Health and Safety Code, Chapter 81D.

(b) If the Agency determines that a violation exists, but no remedial action has occurred prior to the preliminary determination order being issued, the preliminary determination will notify the parties that:

(1) a violation has occurred;

(2) an administrative penalty will be imposed;

(3) the employer may remediate the violation;

(4) the amount of reasonable investigative costs, if any, the Agency will seek to recover from the employer; and

(5) each party has the right to file an appeal.

(c) If the Agency determines that a violation exists, and the employer has taken remedial action prior to the preliminary determination order being issued, the preliminary determination will notify the parties:

(1) that a violation has occurred;

(2) whether the remediation was sufficient to remove the administrative penalty;

(3) whether an administrative penalty will be imposed;

(4) of the amount of reasonable investigative costs, if any, the Agency will seek to recover from the employer; and

(5) that each party has the right to file an appeal.

(d) If an employer submits proof of remedial action after the preliminary determination order is issued, the Agency will issue to each party a separate determination on remedial action with separate appeal rights. An employer has 30 days to submit proof of remedial action from the mailing date of the preliminary determination order. If the employer does not submit proof of remediation within 30 days, and/or does not appeal, the Agency will not consider any proof of remediation. An employer's timely submission of proof of remedial action will be considered an employer appeal of the preliminary determination order and the appeal will be abated until the appeal period for the determination resolving the sufficiency of the remedial action has expired.

(e) If the employer files a timely appeal to the preliminary determination order, the employer may remediate at any time up until the hearing officer issues his or her decision, after which the employer must comply with the requirements of §844.85(e) of this chapter.

(f) After a preliminary determination order, a determination on remedial action, or decision becomes final, the Agency will issue a penalty and cost order to the employer detailing the final amount owed to the Agency by the employer with instructions for submitting payment.

(g) Determinations shall be mailed to each party at the best address available as required by §815.3 of this title, or at the location each party usually receives mail.

(h) A penalty and cost order shall be mailed to the employer at the best address available as required by §815.3 of this title, or at a location the employer usually receives mail.

(i) An administrative penalty under this chapter is not an award of damages to the complainant and no funds will be issued to the complainant by the Agency.

§844.51. Remedial Action.

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

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

(2) if the complainant is currently, or was recently, an employee or contractor of the employer, the employer shall take the following remedial steps as applicable to the violation. Not all steps may be applicable to remedy the adverse action that resulted in a violation:

(A) reinstatement of the employee or contractor;

(B) providing the employee or contractor with back pay from the date the employer took the adverse action; and/or

(C) the employer must take every reasonable effort to reverse the effects of the adverse action. Reasonable efforts include, but are not limited to, reestablishing employee benefits for which the employee or contractor otherwise would have been eligible if the adverse action had not been taken.

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

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

§844.52. Investigative Costs.

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

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

(b) The Agency may not recover from the employer investigative costs incurred in conducting an investigation into whether the employer took remedial action.

(c) The preliminary determination order will inform the employer of the investigative costs calculated by the Agency.

(d) The investigative costs may, at the discretion of the Agency, be included in the amount owed in the penalty and cost order even if the employer took remedial action.

§844.53. Corrected Determinations and Decisions.

(a) If Agency staff discover a clerical error of a non-substantive nature in connection with a determination or decision issued under this chapter, within the applicable appeal period, the Agency may reconsider and reissue the determination unless an appeal has already been filed.

(b) A reissued determination voids and replaces the determination or decision issued under this chapter requiring correction and becomes final unless an appeal is filed from the determination within 30 days of the date the reissued determination is mailed.

(c) Notwithstanding subsection (a) of this section, if a determination or decision issued under this chapter is mailed to a party's incorrect address, the Agency may reissue the determination to the party's correct address at any time.

§844.54. Withdrawal of Complaint.

(a) A complainant may withdraw a complaint at any time before the date the preliminary determination order becomes final.

(b) A complainant withdrawing a complaint shall submit a form as prescribed by the Agency.

(c) A complaint that is withdrawn may not be refiled and a new complaint cannot be filed for the same adverse action as the withdrawn complaint.

§844.55. Appeal and Determination Finality.

(a) Appealable Determinations:

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

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

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

(b) A determination becomes final unless a party files an appeal before the appeal deadline.

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

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

(e) A complainant may appeal any determination or decision issued under this subchapter, regardless of the finding, within 30 days of the mailing date of the determination.

SUBCHAPTER D. ADMINISTRATIVE HEARINGS AND JUDICIAL REVIEW

§844.75. Administrative Hearings.

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

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

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

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

§844.76. Parties.

The parties to proceedings under this chapter are the Agency, the complainant, and the employer named in the preliminary determination order or determination on remedial action.

§844.77. Hearing Scheduling and Notice.

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

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

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

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

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

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

(5) either:

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

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

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

§844.78. Representation.

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

§844.79. Ex Parte Communications.

(a) Except as provided in this chapter, and unless required for the disposition of ex parte matters authorized by law, the hearing officer may not communicate, directly or indirectly, in connection with any issue of fact or law with a party, representative of a party, witness, or individual providing testimony except on notice and opportunity for each party to participate.

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

§844.80. Hearing Procedures.

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

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

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

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

(4) Additional Evidence. The hearing officer, with or without notice to any of the parties, may take additional evidence deemed 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.

(5) Appropriate Hearing Behavior. All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual, including a party, who fails to correct behavior the hearing officer identifies as disruptive. After an expulsion, the hearing officer may proceed with the hearing and render a decision.

(b) Records.

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

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

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

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

§844.81. Postponement and Continuance.

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

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

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

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

§844.82. Default.

If a party to whom a notice of hearing provided under this chapter fails to appear for a hearing, the hearing officer may proceed in that party's absence on a default basis. If a final decision is issued, the factual allegations listed in the notice of hearing may be deemed admitted. If a party fails to appear at a hearing, the hearing officer will issue a notice of default to that party. A party may file a motion no later than 14 days after the notice of default is mailed to set aside a default announced at the hearing and to reopen the record. If a timely motion to set aside a default is filed, the hearing officer may grant the motion, set aside the default, and reopen the hearing for good cause shown, or in the interests of justice. The hearing officer may issue a decision denying the motion to set aside a default without a hearing if the motion fails to allege a reason for the party's failure to appear or if a party has failed to appear at three or more scheduled hearings.

§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);

(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 holiday.

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

§844.84. Withdrawal of an Appeal.

A party may request a withdrawal of its appeal at any time before the hearing officer's decision is issued. The hearing officer may grant the request for withdrawal in writing and issue an order of dismissal.

§844.85. Decision.

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

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

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

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

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

(f) The hearing officer may hold an additional hearing to consider additional evidence of remediation. After consideration of any evidence of proof of remediation, the hearing officer shall issue a combined decision addressing all issues in front of the hearing officer resulting from the complaint.

§844.86. Finality of Decision.

The decision of the hearing officer becomes final 14 days after the date the

decision is mailed unless before that date the hearing officer reopens the decision, a party files a timely appeal to the Commission, or the Commission by order removes to itself the proceedings pending before the hearing officer.

§844.87. Commission.

The duties of the Commission include reviewing the order of a hearing officer under this chapter. The member of the Commission who represents the public shall serve as chair when the Commission acts under this chapter.

§844.88. Removal of Order Pending Before a Hearing Officer.

(a) The Commission by order may remove to itself the proceedings pending before a hearing officer.

(b) The Commission promptly shall mail to the parties to the proceedings a notice of the order under subsection (a) of this section.

(c) A quorum of the Commission shall hear a proceeding removed to the Commission under subsection (a) of this section.

§844.89. Commission Review of Hearing Officer Order.

(a) The Commission may, on its own motion:

(1) affirm, modify, or set aside a decision issued under §844.85 of this subchapter on the basis of the evidence previously submitted in the case; or

(2) direct the taking of additional evidence.

(b) The Commission may permit the parties to initiate a further appeal before the Commission.

§844.90. Notice of Commission Action.

(a) The Commission shall mail to each party notice of:

(1) the Commission's decision;

(2) the violation;

(3) the amount of any penalty assessed;

(4) if applicable, the amount of any investigative costs; and

(5) the parties' right to file a motion for rehearing.

(b) The notice shall be mailed to the party's last known address, as shown by the Agency's records.

(c) The Commission shall enter a written penalty order for the payment of any penalty or investigative costs the Commission has assessed.

§844.91. Finality of Commission Order.

An order of the Commission becomes final 14 days after the date the order is mailed unless before that date:

(1) the Commission by order reopens the appeal; or

(2) a party files a written motion for rehearing.

§844.92. Judicial Review.

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

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

(c) A party may not obtain judicial review of the decision unless the party has exhausted the party's remedies as provided by this subchapter.