

1 **Amendments to Chapter 815 Unemployment Insurance Rules**
2 **Policy Concept**

3
4 **Background**

5 Severance pay is often granted to employees upon termination of employment. It is usually based
6 on length of service with the employer. Severance pay is a matter of agreement between an
7 employer and an employee (or the employee's representative). There is no requirement in the
8 Fair Labor Standards Act for severance pay.¹

9
10 Until 2011, State law was silent with respect to receipt of severance pay for purposes of
11 unemployment compensation (UC) eligibility. The 82nd Texas Legislature, Regular Session
12 (2011), enacted House Bill (HB) 14, which amended Texas Labor Code §207.049, Texas
13 Unemployment Compensation Act (TUCA), by providing for a disqualification during a claim
14 week in which an individual receives or has received severance pay.

15
16 Section 207.049 defines “severance pay” as dismissal or separation income paid on termination of
17 employment in addition to the employee's usual earnings from the employer at the time of
18 termination. Exempted from the definition of severance pay is remuneration, which is:

- 19 • a release of claims or settlement agreement entered into between the employee and the
20 employer:
- 21 ➤ based on an alleged violation of the Civil Rights Act of 1991 (Pub. L. No. 102-166); or
 - 22 ➤ pursuant to a claim or cause of action filed in connection with the employment
23 relationship; or
- 24 • a written contract, including a collective bargaining agreement, negotiated with the employer
25 before the date of separation from employment of the employee.

26
27 Additionally, HB 14 provided the Texas Workforce Commission’s (TWC) three-member
28 Commission (Commission) with explicit rulemaking authority to administer the provisions of
29 §207.049 under §207.049(c).

30
31 In implementing the new severance provisions, staff have relied on *ad hoc* guidance when questions
32 have arisen. The two principal areas where guidance has been needed involve allocation of severance
33 payments and the provisions related to release of claims and written contracts under severance
34 agreements.

35
36 *Allocation of Severance Payments*

37 The courts have generally defined severance pay to be a payment the employer has obligated
38 itself to make, either verbally or in writing, which is based upon a set formula, such as length of
39 prior service. For example, an employer may have a company policy that a separated employee
40 is entitled to a severance payment or payments equal to one month of wages per year of service

¹ United States Department of Labor – Fair Labor Standards Act Advisor: “The Fair Labor Standards Act (FLSA) requires payment of at least the Federal minimum wage for all hours worked in a workweek and time and one-half an employee's regular rate for time worked over 40 hours in a workweek. There is no requirement in the FLSA for severance pay. Severance pay is a matter of agreement between an employer and an employee (or the employee's representative).”

1 with the employer. The Texas Legislature, however, has taken a broader view of what constitutes
2 severance pay for the purposes of UC.

3
4 As a result, severance agreements covered by TUCA may not speak to a specific period to which the
5 severance payments are meant to apply, e.g. a lump-sum payment that covers a specific date range or
6 a specified number of weeks. To establish UC eligibility, staff must determine if a claimant has
7 received, or is receiving a disqualifying severance payment with respect to each benefit week. HB 14
8 did not contain a statutory severance pay allocation method, nor did it require employers to establish
9 such a methodology in a severance agreement. In order to effectuate the requirements of the new
10 severance pay law, staff provided the method laid out below concerning allocation. In creating this
11 operational guidance, staff incorporated HB 14's clear legislative intent that TWC does not have the
12 authority to divide a lump sum-payment across benefit weeks based on a claimant's wages².

- 13
14 • If the claimant has received additional pay, the additional pay is disqualifying, and is allocated to
15 a specific time frame (e.g., the pay covers specific dates, such as May 1 through August 31), staff
16 should hold the claimant ineligible for the entire specific time frame that falls within the benefit
17 year.
- 18
19 • If the claimant has received additional pay, and the pay is for a specific number of weeks (e.g.,
20 the pay is for 16 weeks, but the weeks do not cover any specific dates), staff should hold the
21 claimant ineligible for the number of weeks beginning with the date the claimant received the
22 pay.
- 23
24 • In either of these two situations (payments have commenced and the pay covers either specific
25 dates or a specific number of weeks), if both parties agree that the additional pay will be
26 distributed in more than one payment, such as payments issued according to the claimant's
27 former payday schedule, staff should hold the claimant ineligible, even if some of the additional
28 pay has not yet been paid to the claimant.
- 29
30 • If the additional pay is disqualifying and is not allocated to a specific time frame or for a specific
31 number of weeks, staff should hold the claimant ineligible ONLY for the week in which the
32 payment was received.
- 33
34 • Staff should not request salary information to calculate the number of weeks that the additional
35 pay covers.
- 36
37 • If the claimant has not received additional pay, but has reported they might receive it, staff cannot
38 hold them ineligible because they are unemployed and not currently receiving compensation.
39 Staff should not create a case for additional pay based on a future event that has not yet
40 happened, but should advise the claimant to report any additional pay as soon as they receive it.
- 41

² The introduced version of HB 14 contained: "(c) The disqualification under this section continues for the number of weeks computed by dividing the individual's gross severance package by the individual's gross weekly wage during the individual's benefit year." This text was removed from the substituted/final enrolled version.

- If even one day of additional pay falls within a benefit week, the entire week is disqualified.³

Release of Claims and Written Contracts Under a Severance Agreement

TUCA section 207.049, subsection (b)(1) places specific conditions on the exemption of remuneration received under a release of claims or settlement agreement pursuant to various civil rights laws and with respect to the employment relationship.

Subsection (b)(2) excludes from severance pay any remuneration received by an employee under a written contract negotiated with the employer before the date of separation from employment of the employee. This may include but is not limited to a collective bargaining agreement.

In order to determine whether a severance payment is not disqualifying under either one of these two exemptions, staff must analyze the particulars of the severance agreement to determine the applicability of release of claims provisions to determine whether the severance agreement was, in reality, negotiated between the parties.

Issue 1: Clarifying the Definition of Severance Pay and Its Exceptions

Severance pay is defined by §207.049(a)(2) as “dismissal or separation income paid in addition to the employee’s usual earnings from the employer at the time of termination.” However, no definition as to what constitutes “income” has been included in statute. This has created the potential for differing interpretations as to what types of payments can be considered severance pay.

Additionally, an exception to disqualifying severance pay is set forth in §207.049(b)(1) related to release of claims and settlement agreements and §207.049(b)(2), which includes “a written contract, including a collective bargaining agreement, negotiated with the employer before the date of separation from employment of the employee.” Claimants and employers routinely ask adjudications staff what interactions would rise to the level of “negotiated.”

It should also be noted that staff has previously referred to all remuneration payments, minus workers’ compensation, as “additional pay” because there has not been a clear definition of what does and does not constitute a severance or wages in lieu of notice payment.

Recommendation

Staff recommends amending TWC Chapter 815 Unemployment Insurance Rules to create rules defining which types of payments constitute “income” and “usual earnings” for the purposes of severance pay. Examples of these payments include cash, insurance payments for an employee, personal property, supplemental unemployment benefits payments, and fringe benefits such as accrued vacation.

Specifically, defining “income” would provide clarity to staff and the parties as to whether certain payments made at the time of termination would be qualifying or disqualifying. Defining “usual earnings” would help clarify that payments such as commissions, bonuses, and vacation

³ This means, for example, that if a claimant is paid disqualifying additional pay on a Friday, which covers two weeks, the claimant would be disqualified for the week of the Friday in which the payment was received and the following week. It would not cover a three week period.

1 pay are not disqualifying payments. Using the examples above, the following would provide
2 useful guidance:

- 3
- 4 • Income paid upon termination shall be guided by the definition of “wages” under TUCA
5 §201.081; remuneration for personal services including cash and non-cash payments (for
6 example, in-kind payments, or chattel). Supplemental unemployment benefits do not
7 constitute wages because they are not guaranteed remuneration for service.
8
- 9 • Usual earnings are defined as income, including wages, bonuses, and commissions, which
10 are attributable to specific pay period(s) of service already performed. This does not include
11 income based upon general tenure.
12
 - 13 ○ Deferred wages earned and available prior to separation, in a monetary or
14 nonmonetary form, are not a disqualifying severance payment as they constitute
15 usual earnings under §207.049(b). This would clarify that accrued vacation leave,
16 sick leave, or paid time off (PTO) paid upon termination are not disqualifying.
17

18 Finally, staff recommends defining the term “negotiated” as it applies to a written contract for
19 purposes of §207.049(b)(2). By definition, negotiation would be an act beyond merely signing an
20 employment agreement or release. Such a definition would also serve to resolve any tensions
21 between subsection (b)(1) and (b)(2) by assuming that such a written contract does not contain a
22 release of claims or settlement agreement provision under civil rights laws or the employment
23 relationship. Otherwise, the issue would be adjudicated under subsection (b)(1).
24

25 **Issue 2: Defining Wages in Lieu of Notice**

26 HB 14 provides a definition for severance pay in §207.049(b). However, HB 14 did not contain a
27 definition for the existing wages in lieu of notice. This has proven to be problematic as the
28 definition of severance pay is quite broad.
29

30 This broad definition could potentially be interpreted to encompass wages in lieu of notice, even
31 though the statutory construction does not lend itself to this outcome, as HB 14 created separate
32 statutory disqualifications for wages in lieu of notice set forth in §207.049(a)(1) and severance pay
33 set forth in §207.049(a)(2). If wages in lieu of notice were to be considered severance pay, they
34 would be subject to the same disqualification exceptions provided in §207.049(b)(1) and (2).
35

36 **Recommendation**

37 Staff recommends creating TWC rules that define wages in lieu of notice for the purposes of
38 §207.049(a)(1). Specifically, creating a separate definition in Chapter 815 for wages in lieu of
39 notice would clarify that it is limited to separation pay solely due to lack of advance notice, and
40 not included in the definition of severance pay. The following definition would provide useful
41 guidance:
42

- 43 • Wages in lieu of notice are post-separation payments intended by the employer to cover a
44 period of time subsequent to the date of termination and made because the employer does
45 not give advance notice of discharge. The payments in question must be made as an
46 actual substitute for advance notification of a separation. The payment represents the

1 wages which the employee would have received if they had received advance notice their
2 employment was ending and the employee continued working through the notice period.
3 The nature of the payment will be determined by the facts surrounding it.
4

5 **Issue 3: How Disqualifying Severance Pay and Wages in Lieu of Notice Will Be Allocated**
6 **to Benefit Weeks**

7 Operational guidance has been issued to staff concerning how to properly allocate a
8 disqualifying severance payment across a claimant's benefit weeks. This new guidance has
9 created some confusion between claimants and employers unfamiliar with the new method of
10 allocation. Additionally, staff has encountered dilemmas not addressed by the original help
11 messages, which has led to additional requests for guidance concerning this new allocation
12 method.
13

14 **Recommendation**

15 Staff recommends incorporating, and expanding to cover additional areas of concern, current
16 operational guidance regarding disqualifying severance payment across a claimant's benefit
17 weeks into Chapter 815. Covering these additional areas would help establish that:
18

- 19 • Wages in lieu of notice will be allocated using the same method as severance pay. This will
20 simplify applying the disqualification period for staff and the parties, especially if both wages
21 in lieu of notice and severance are issued at the same time.
22
- 23 • A disqualifying severance payment determination can only affect the claimant's current
24 benefit year. This would be consistent with current staff guidance.
25
- 26 • Wages paid in a medium other than cash will be attributed only to the week in which it is
27 paid. Due to their nature, certain payments may constitute severance pay, but cannot be
28 attributed to a specific period. If an individual receives any part of his or her severance in any
29 medium other than cash, the remuneration will only be attributed to the week in which the
30 payment was received, whether the payment is lump sum or periodic. Nonmonetary
31 payments have no correlation to an employee's tenure, and staff would have to expend
32 significant resources attempting to determine a cash value for these types of payments and if
33 they are associated with a disqualification period.
34

35 **Issue 4: Removal of Certain Precedents**

36 Before the passage of HB 14, there was no provision in TUCA that required a disqualification of
37 benefits for a benefit period because an employer paid a claimant severance pay upon
38 termination. Therefore, during this period the Commission created precedents that differentiated
39 between disqualifying wages in lieu of payments and nondisqualifying severance pay.
40

41 Because HB 14 requires a disqualification period for certain severance payments, these
42 precedents are now in conflict with §207.049.
43

44 Staff has also received guidance from TWC's Office of General Counsel that supplemental
45 unemployment benefits are not disqualifying because they are not considered wages. This
46 conflicts with the Attorney General Opinion cited in the Appeals Policy & Precedent Manual.

1
2 **Recommendation**

3 Staff recommends amending the Appeals Policy & Precedent Manual to alleviate the conflict
4 with §207.049, which could be accomplished by removing the following precedent cases under
5 MS 375.15 from the manual’s miscellaneous chapter:
6

7 Case No. 176943. The claimant was laid off from his position. He was not given advance
8 notice of this separation. Five days after the separation, the claimant signed an agreement
9 that he would waive any legal claims against the employer and that he would keep certain
10 information confidential. In exchange for this agreement, the employer agreed to pay the
11 claimant 11 weeks’ worth of wages as “severance pay.” Any violation of the agreement
12 would cause the claimant to forfeit these payments. HELD: For a claimant to be
13 disqualified under Section 207.049(a)(1) of the Act, the payments in question must be
14 made as an actual substitute for advance notification of a separation. Here, the claimant
15 was paid in exchange for his agreement not to sue the employer and to keep certain
16 information confidential. Therefore, although this was determined with reference to the
17 claimant’s weekly salary, the employer received something of value from the claimant.
18 No disqualification under Section 207.049(a)(1), as the wages were not in lieu of notice.
19

20 Appeal No. 3913-CA-49 (Affirmed by El Paso Court of Civil Appeals, 243 S.W. 2d 217).
21 A severance payment made in accordance with a contractual agreement which is based
22 on length of service, does not constitute wages in lieu of notice. It is payment for prior
23 services and is not attributable to any period of time subsequent to the separation. The
24 only separation payment which is disqualifying under the Act is wages in lieu of notice.
25 Wages in lieu of notice is applicable to payments made to the employee because the
26 employer does not give the employee advance notice of discharge.
27

28 Appeal No. 96-012205-10-102696, a disqualification under Section 207.049(a)(1) is
29 applicable to all benefit periods covered by a payment made to an employee because the
30 employer does not give the employee advance notice of discharge, even if the payment is
31 mistakenly termed “severance pay”. The payment was made out of employer concern that
32 the claimant was the sole support of her family. There was no contractual agreement for
33 such pay based upon length of service.
34

35 Removing these precedents from the Appeals Policy & Precedent Manual would bring the
36 Commission into compliance with §207.049 and reduce confusion by removing any references to
37 severance pay as non-disqualifying. It would also accurately address the way employers
38 currently make severance payments.
39

40 Staff also recommends amending the Appeals Policy & Precedent Manual to address TWC’s
41 Office of General Counsel’s guidance concerning supplemental unemployment benefits. Such
42 could be accomplished by removing the following precedent case under MS 375.20 from the
43 Appeals Policy & Precedent Manual’s miscellaneous chapter:
44

45 Opinion No. WW-13, the Attorney General of Texas 1-30-57. Receipt of supplemental
46 unemployment benefits from trust funds accumulated and paid out under the provisions of the

1 contracts between Ford Motor Company and the UAW-CIO and General Motors Corporation
2 and the UAW-CIO does not preclude an individual from receiving benefits under the Texas
3 Unemployment Compensation Act. Such benefits are, in effect remuneration for past services
4 and thus are "wages". However, since the benefits are to be received because of services
5 performed by the employee prior to layoff, the benefits are allocable to that prior period and are
6 not "with respect to" the benefit period for which he is seeking unemployment insurance
7 benefits.

8
9 According to General Counsel, Texas Atty. Gen. Op. No. WW-13 has been replaced by Texas
10 Atty. Gen. Op. No. WW-247 as it pertains to supplemental unemployment benefits, and therefore
11 supplemental unemployment benefits are not wages and still are not disqualifying severance pay.
12

13 Finally, staff notes that review of UC precedents for continuation was an issue raised by the
14 Texas Sunset Commission in its July 2015 report to the Texas Legislature. Specifically, the
15 Sunset Commission included the following recommendation with which the Commission
16 concurred:

17
18 "TWC should establish a procedure to annually review precedents, specifically in
19 UI benefit and wage claims, to determine whether any precedents should be
20 recommended for rulemaking. As part of the process, the agency should develop
21 criteria, such as whether a holding has broad applicability or whether an issue is
22 routinely heard by the commission, to decide if it belongs in rule. The criteria
23 should also be applied to existing precedent, and any precedent that belongs in
24 rule should be recommended for and go through the traditional rulemaking
25 process by January 2017."

26
27 Removal of precedents to rule, as this staff recommendation would accomplish, comports with
28 the above recommendation from the Texas Sunset Commission. If the Commission desires to
29 resolve the conflicts these precedent decisions create through removal or other means, ample
30 opportunity exists for staff to accept input.

31
32 Any action taken regarding precedent decisions will occur separately from the potential adoption
33 of the Ch. 815 remuneration rules. Issue 4 of this Policy Concept is only being presented in
34 concert with the proposal of rulemaking in issues 1-3 to give the Commissioners a complete
35 understanding of staff's recommendation and future recommendations as they relate to
36 remuneration.

37
38 Therefore, if this Policy Concept is approved by the Commission, staff will draft Proposed Rules
39 in accordance with issues 1-3. If adopted by the Commission, once the rules are implemented
40 and final, staff will subsequently bring forth a discussion paper with recommendations
41 concerning the precedents cited in issue 4 for the Commission's consideration.