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XX.

TEXAS WORKFORCE COMMISSION

The rules are adopted under Texas Labor Code §§301.0015 and 302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

Chapter 821. TEXAS PAYDAY RULES

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.

SUBCHAPTER A. GENERAL PROVISIONS

§821.1. Title and Purpose.

- (a) Title. These rules may be cited as the Texas Payday Rules.
- (b) Purpose. The purpose of these rules is to implement and interpret the provisions of the Texas Labor Code, Chapter 61, Payment of Wages.

The provisions of this §821.1 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) **Act**--Texas Labor Code, Chapter 61, also known as the Texas Payday Act or the Texas Payday Law.
- (2) **Claimant**--A person who has filed a wage claim under the Act.
- (3) **Commission**--The Texas Workforce Commission.
- (4) **Court of competent jurisdiction**--A court authorized to issue an order including, but not limited to, a legislative or statutory county court at law, district court, small claims court, or federal court that acts within the appropriate jurisdiction over the amount in controversy, the person, and other appropriate subject matter.

The provisions of this §821.2 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.3. Jurisdiction.

- (a) The Commission shall exercise jurisdiction over wage claims in which:
 - (1) the work is performed exclusively in Texas;
 - (2) the work is performed in part in Texas and in part in other states within the United States and where the wages would be reportable to Texas for Unemployment Insurance purposes pursuant to Texas Labor Code §201.043; or
 - (3) the work is performed by an individual who is a Texas resident at the time the work is performed and the work is performed outside Texas for a Texas employer or a non-resident employer over whom Texas exercises jurisdiction pursuant to subsection (b) of this section.
- (b) The Commission shall exercise jurisdiction over 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 all three of the following are met:
 - (1) the employer purposely does some act or consummates some transaction in Texas;

- (2) the wage claim arises from the employer's act or the employer's contact with Texas is continuing and systematic; and
- (3) exercising jurisdiction is consistent with:
 - (A) 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
 - (B) the relative convenience of the parties.
- (c) The Commission shall not exercise jurisdiction over wage claims to the extent the wages are for work performed outside the United States.

The provisions of this §821.3 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.4. Political Subdivision.

- (a) An entity is a political subdivision of the state, and therefore not an employer under the Act, if it meets the criteria in either subsections (b) or (c) of this section.
- (b) An entity is a political subdivision of this state if it is a governmental unit having:
 - (1) the power to tax real and tangible personal property;
 - (2) limited geographic and jurisdictional boundaries;
 - (3) locally elected or locally appointed governing members; and
 - (4) the authority to provide a general public service or benefit.
- (c) An entity is a political subdivision of this state if the entity is so designated by Texas statute.
- (d) Entities that are political subdivisions of this state include, but are not limited to:
 - (1) cities;
 - (2) counties;
 - (3) school districts;
 - (4) junior college districts;
 - (5) levee improvement districts;
 - (6) drainage districts;
 - (7) irrigation districts;
 - (8) water improvement districts;
 - (9) water control and improvement districts;
 - (10) water control and preservation districts;
 - (11) freshwater supply districts;
 - (12) navigation districts;
 - (13) conservation and reclamation districts;
 - (14) soil conservation districts;
 - (15) municipal utility districts;

- (16) river authorities; and
- (17) other similar entities.

The provisions of this §821.4 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.5. Employment Status: Employee or Independent Contractor.

The Commission adopts the following form, Form C-8, as its official guideline for use in determining employment status.

EMPLOYMENT STATUS – A COMPARATIVE APPROACH

Under the common law test, a worker is an employee if the purchaser of that worker's service has the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done. Control need not actually be exercised; rather, if the service recipient has the *right* to control, employment may be shown.

Depending upon the type of business and the services performed, not all 20 common law factors may apply. In addition, the weight assigned to a specific factor may vary depending on the facts of the case.

If an employment relationship exists, it does not matter that the employee is called something different, such as agent, contract laborer, subcontractor, or independent contractor.

1. INSTRUCTIONS:

An Employee receives instructions about when, where and how the work is to be performed.

An Independent Contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work.

2. TRAINING:

Employees are often trained by a more experienced employee or are required to attend meetings or take training courses.

An Independent Contractor uses his or her own methods and thus need not receive training from the purchaser of those services.

3. INTEGRATION:

Services of an Employee are usually merged into the firm's overall operation; the firm's success depends on those Employee services.

An Independent Contractor's services are usually separate from the client's business and are not integrated or merged into it.

4. SERVICES RENDERED PERSONALLY:

An Employee's services must be rendered personally; Employees do not hire their own substitutes or delegate work to them.

A true Independent Contractor is able to assign another to do the job in his or her place and need not perform services personally.

5. HIRING, SUPERVISING & PAYING HELPERS:

An Employee may act as a foreman for the employer but, if so, helpers are paid with the employer's funds.

Independent Contractors select, hire, pay and supervise any helpers used and are responsible for the results of the helpers' labor.

6. CONTINUING RELATIONSHIP:

11. ORAL OR WRITTEN REPORTS:

An Employee may be required to submit regular oral or written reports about the work in progress.

An Independent Contractor is usually not required to submit regular oral or written reports about the work in progress.

12. PAYMENT BY THE HOUR, WEEK OR MONTH:

An Employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week.

An Independent Contractor is normally paid by the job, either a negotiated flat rate or upon submission of a bid.

13. PAYMENT OF BUSINESS & TRAVEL EXPENSE:

An Employee's business and travel expenses are either paid directly or reimbursed by the employer.

Independent Contractors normally pay all of their own business and travel expenses without reimbursement.

14. FURNISHING TOOLS & EQUIPMENT:

Employees are furnished all necessary tools, materials and equipment by their employer.

An Independent Contractor ordinarily provides all of the tools and equipment necessary to complete the job.

15. SIGNIFICANT INVESTMENT:

An Employee generally has little or no investment in the business. Instead, an Employee is economically dependent on the employer.

True Independent Contractors usually have a substantial financial investment in their independent business.

16. REALIZE PROFIT OR LOSS:

An Employee often continues to work for the same employer month after month or year after year.
An Independent Contractor is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work.

An Employee does not ordinarily realize a profit or loss in the business. Rather, Employees are paid for services rendered.
An Independent Contractor can either realize a profit or suffer a loss depending on the management of expenses and revenues.

7. SET HOURS OF WORK:

An Employee may work "on call" or during hours and days as set by the employer.
A true Independent Contractor is the master of his or her own time and works the days and hours he or she chooses.

17. WORKING FOR MORE THAN ONE FIRM AT A TIME:

An Employee ordinarily works for one employer at a time and may be prohibited from joining a competitor.
An Independent Contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule.

8. FULL TIME REQUIRED:

An Employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the Employee's time.
A true Independent Contractor cannot be required to devote full-time service to one firm exclusively.

18. MAKING SERVICE AVAILABLE TO THE PUBLIC:

An Employee does not make his or her services available to the public except through the employer's company.
An Independent Contractor may advertise, carry business cards, hang out a shingle or hold a separate business license.

9. LOCATION WHERE SERVICES PERFORMED:

Employment is indicated if the employer has the right to mandate where services are performed
Independent Contractors ordinarily work where they choose. The workplace may be away from the client's premises.

19. RIGHT TO DISCHARGE WITHOUT LIABILITY:

An Employee can be discharged at any time without liability on the employer's part.
If the work meets the contract terms, an Independent Contractor cannot be fired without liability for breach of contract.

10. ORDER OR SEQUENCE SET:

An Employee performs services in the order or sequence set by the employer. This shows control by the employer.
A true Independent Contractor is concerned only with the finished product and sets his or her own order or sequence of work.

20. RIGHT TO QUIT WITHOUT LIABILITY:

An Employee may quit work at any time without liability on the Employee's part.
An Independent Contractor is legally responsible for job completion and, on quitting, becomes liable for breach of contract.

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The provisions of this §821.5 adopted to be effective March 13, 2007, as published in the Texas Register, March 9, 2007, 32 TexReg 1328.

§821.6. Wage Claims Involving Minimum Wage or Overtime.

- (a) The Commission shall consider any applicable minimum wage and overtime requirement in determining if wages are due and unpaid.
- (b) In determining an employee's entitlement to federal minimum wage or overtime, the Commission shall look to the Fair Labor Standards Act (FLSA) of 1938 as amended, 29 U.S.C. 201 *et seq.*, and the regulations promulgated by the United States Department of Labor thereunder. In determining an employee's entitlement to state minimum wage, the Commission shall look to the Texas Minimum Wage Act, located at Texas Labor Code, Chapter 62.

The provisions of this §821.6 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

SUBCHAPTER B. 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.

The provisions of this §821.21 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.22. Payment Other Than on Payday.

- (a) For purposes of §61.013 of the Act, the Commission interprets "another regular business day" to mean any regular business day, which is designated as being such within the customary practice of the employer, following the employer's designated payday.
- (b) When an employee leaves employment other than by discharge on a payday, payment of wages in full will be due the following scheduled payday. The Commission shall consider "discharge" as dismissal or release from employment initiated by the employer including, but not limited to, layoff.

The provisions of this §821.22 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§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.

The provisions of this §821.25 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§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.

The provisions of this §821.26 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§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.

The provisions of this §821.27 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§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.

The provisions of this §821.28 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

SUBCHAPTER C. WAGE CLAIMS

§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.

The provisions of this §821.41 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.42. Timeliness.

- (a) The Commission shall determine the filing date of a wage claim as the date delivered in person to the Commission or the date of a mailed wage claim based on the following:
 - (1) The postmark date of a wage claim properly addressed shall establish by a rebuttable presumption the date upon which the wage claim was filed unless the party opposing this presumption presents evidence to establish some other filing date.
 - (2) Absent a postmark or evidence establishing some other filing date, the date of receipt by the Commission shall control.
- (b) The Commission shall suspend the time limit for filing a wage claim only for those reasons required by law including, but not limited to, bankruptcy stays.

The provisions of this §821.42 adopted to be effective March 13, 2007, as published in the Texas Register, March 9, 2007, 32 TexReg 1328.

§821.43. Wage Claim Withdrawal.

- (a) The Commission shall allow a claimant to withdraw a wage claim when:
 - (1) the order has not become final; or
 - (2) the order has become final but the parties agree on a settlement, part of which is the claimant's agreement to withdraw the wage claim.
- (b) A claimant withdrawing a wage claim must submit a form as prescribed by the Commission before the Commission levies funds to satisfy the order. Regardless of any settlement agreement entered into by the parties, after the Commission has collected funds to satisfy the order, the Commission shall disburse the collected funds in accordance with the final order of the Commission to the claimant unless otherwise ordered by a court.
- (c) The Commission shall apply the withdrawal of a wage claim to both administrative penalties and wages.

The provisions of this §821.43 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.44. Bad Faith.

- (a) An employer acts in bad faith in not paying wages as required by the Act when that employer acts:
 - (1) with the knowledge that the failure to pay wages is in violation of the Act or this chapter; or
 - (2) in reckless disregard for the requirements of the Act or this chapter.
- (b) An employee brings a wage claim in bad faith when the employee does so:
 - (1) with the knowledge that the claim is groundless; or
 - (2) solely to harass the employer against whom the claim is brought.
- (c) An employee brings a wage claim by filing the claim with the Texas Workforce Commission.

The provisions of this §821.44 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.45. Appeals.

- (a) If either party files an appeal to a preliminary wage determination order, the Commission shall consider all issues, including the amount of wages in controversy.
- (b) The Commission shall hear all timely requests for reopening and grant such requests if it appears the petitioner has shown good cause for the petitioner's failure to appear at the prior hearing.
- (c) Hearings conducted under the Act are subject to the rules and hearing procedures set out in the Unemployment Insurance Rules at 40 T.A.C. Chapter 815, except to the extent that such sections are clearly inapplicable or contrary to provisions set out under the Texas Payday Rules or under the Act.

The provisions of this §821.45 adopted to be effective November 6, 2000, as published in the Texas Register, November 3, 2000, 25 TexReg 11104.

§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.

The provisions of this §821.46 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§821.47. Amendment of Wage Claims.

- (a) At the discretion of the Commission, a wage claim may be amended for expediency or to prevent injustice.
- (b) Wage claim amendments are subject to the rules and hearing procedures set forth in Chapter 815 (relating to Unemployment Insurance) of this title, except to the extent that such sections are clearly inapplicable or contrary to provisions set out under this chapter or under the Act.

The provisions of this §821.47 adopted to be effective March 13, 2007, as published in the Texas Register, March 9, 2007, 32 TexReg 1328.

SUBCHAPTER D. COLLECTION ACTION

§821.61. Proof of Payment.

- (a) When the employer submits proof of payment, the Commission shall afford the claimant the opportunity to contest the information submitted.
- (b) A claimant who submits proof of payment shall do so in writing by a signature verifiable by the Commission.

The provisions of this §821.61 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§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.

The provisions of this §821.62 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

§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.

The provisions of this §821.63 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.

SUBCHAPTER E. BONDS

§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.

The provisions of this §821.81 adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.