

April 29, 2020

Chairman Bryan Daniel
Commissioner Julian Alvarez III
Commissioner Aaron Demerson
Texas Workforce Commission
101 E 15th St
Austin, TX 78778-0001

Dear Commissioners:

We, the undersigned organizations, urge the Texas Workforce Commission (TWC) to take action to strengthen our state's Unemployment Insurance (UI) program to address the urgent needs of Texans facing the impact of COVID-19.

As the risk of infection continues to be present while businesses begin to reopen, the health and safety of our workforce must be a top priority. The Texas Unemployment Compensation Act ("the Act") requires recipients of UI benefits to accept offers of suitable work. Section 207.008 of the Act instructs the Workforce Commission to consider the risk to an individual's health in determining whether work is suitable for an individual.

Additionally, Section 207.053(b) of the Act states that individuals are not deemed ineligible for benefits if they have voluntarily separated from their employer if that employer did not make available the "facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual with the communicable disease."

The Center for Disease Control (CDC) has issued guidance identifying those who are at a higher risk of infection which include people over 65, people with underlying medical conditions including lung disease and severe asthma, or those who are immunocompromised due to other medical conditions as high risk for infection of COVID-19. The CDC has also issued guidance on workplace protections to reduce exposure risk. These guidelines include measures such as protective shields and routine cleaning of frequently touched surfaces.

We request the following concerns be addressed through emergency rule amendments to Chapter 815 of TAC Title 40, Part 20, relating to Unemployment Insurance under the authority given to TWC through Texas Government Code §2001.034, Texas Labor Code §301.0015(a)(6), and Texas Labor Code §301.062.

Clarification of Suitable Work and Workplace Safety

The TWC should amend Chapter 815 to clarify protections for workers from exposure to communicable diseases. Workplaces lacking proper safety precautions do not qualify as suitable work and jobseekers should not be disqualified from UI benefits for refusing to return to a workplace that does not take reasonable precautions to protect workers from communicable disease.

Requested language:

§815.31. Determination of Suitable Work.

- (a) The Commission, as provided by Section 207.008 of the Act, shall consider the risk to an individual's health when making determinations on suitable work. Determination shall include but is not limited to:
- (1) the individual's prior or current health conditions, age, or other risk factor that may lead to the individual to be immunocompromised;
 - (2) the individual is a higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control; and
 - (3) provision of proper facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual from communicable disease in the workplace consistent with guidance issued by the Centers for Disease Control;
- (b) This section continues in effect until six months after the expiration of the Governor's Declaration of State of Disaster, dated March 13, 2020. At such time this provision is no longer in effect, this section is repealed.

Define Good Cause for Voluntarily Leaving Work

The TWC should amend Chapter 815 to clarify good cause for voluntarily leaving work due to COVID-19. Workers who voluntarily leave work due to COVID-19 related issues should not be denied UI benefits. This should include both those who have left due to a lack of reasonable safety precautions at their workplace, as discussed above and defined in Sec. 207.053 of the Act, as well as those who have left to care for themselves or a family member.

Current law is unclear regarding whether workers needing to separate from work for care of themselves or a family member due to COVID-19 would qualify as good cause. Additionally, due to the strains on capacity in our health care system caused by the pandemic, such as limited availability of tests, many workers will lack immediate medical verification. Considerations should be made for those submitting applications without an official diagnosis.

Requested amendment to Chapter 815:

§815.31. Good Cause.

- (a) The Commission's finding of good cause for voluntary leaving employment shall include:
- (1) claimants who left employment based on being diagnosed with COVID-19 or upon experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - (2) claimants who left employment to care for quarantined or sick family or household members with COVID-19 or are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - (3) claimants who have left employment in order to quarantine on a doctor's order;

- (4) claimants who have left employment because their employer did not make available to the individual the facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual with COVID-19 consistent with guidance issued by the Centers for Disease Control; or
- (5) claimants who are at a higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control.

(b) This section continues in effect until six months after the expiration of the Governor's Declaration of State of Disaster, dated March 13, 2020. At such time this provision is no longer in effect, this section is repealed.

Millions of Texans have had their income disrupted due to COVID-19. In order to safeguard the health of Texans we must ensure that UI eligibility requirements are not adversely impacting public health and our efforts to contain the spread of COVID-19. The Texas Workforce Commission has a crucial role to play in ensuring Texans get the resources they need to provide for their families while also ensuring the economy has the fuel it needs to restart. We ask for swift action on these amendments to address the needs presented during these unprecedented times.

Respectfully,

American Federation of Government Employees (AFGE)

American Federation of State, County and Municipal Employees (AFSCME)

Center for Public Policy Priorities

Equal Justice Center

Feeding Texas

Texas AFL-CIO

Texas American Federation of Teachers (Texas AFT)

Texas Appleseed

Texas Freedom Network

United Ways of Texas

Workers Defense Action Fund

For questions or additional information please contact Jonathan Lewis at lewis@cphp.org

cc: Ed Serna, Executive Director, Texas Workforce Commission

cc: Les Trobman, General Council, Texas Workforce Commission



District 13

Ruben Garza
District Director

Larry Burchfield
Assistant to the Director

April 29, 2020

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Additionally, Section 207.053(b) of the Act states that individuals are not deemed ineligible for benefits if they have voluntarily separated from their employer if that employer did not make available the "facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual with the communicable disease."

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Requested language:

§815.31. Determination of Suitable Work.

(a) The Commission, as provided by Section 207.008 of the Act, shall consider the risk to an individual's health when making determinations on suitable work.

Determination shall include but is not limited to:

- (1) the individual's prior or current health conditions, age, or other risk factor that may lead to the individual to be immunocompromised;
- (2) the individual is a higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control; and
- (3) provision of proper facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual from communicable disease in the workplace consistent with guidance issued by the Centers for Disease Control;

(b) This section continues in effect until six months after the expiration of the Governor's Declaration of State of Disaster, dated March 13, 2020. At such time this provision is no longer in effect, this section is repealed.

Define Good Cause for Voluntarily Leaving Work

The TWC should amend Chapter 815 to clarify good cause for voluntarily leaving work due to COVID-19. Workers who voluntarily leave work due to COVID-19 related issues should not be denied UI benefits. This should include both those who have left due to a lack of reasonable safety precautions at their workplace, as discussed above and defined in Sec. 207.053 of the Act, as well as those who have left to care for themselves or a family member. Current law is unclear regarding whether workers needing to separate from work for care of themselves or a family member due to COVID-19 would qualify as good cause. Additionally, due to the strains on capacity in our health care system caused by the pandemic, such as limited availability of tests, many workers will lack immediate medical verification. Considerations should be made for those submitting applications without an official diagnosis.

Requested amendment to Chapter 815:

§815.31. Good Cause.

(a) The Commission's finding of good cause for voluntary leaving employment shall include:

- (1) claimants who left employment based on being diagnosed with COVID-19 or upon experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (2) claimants who left employment to care for quarantined or sick family or household members with COVID-19 or are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (3) claimants who have left employment in order to quarantine on a doctor's order;
- (4) claimants who have left employment because their employer did not make available to the individual the facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual with COVID-19 consistent with guidance issued by the Centers for Disease Control; or
- (5) claimants who are at a higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control.

(b) This section continues in effect until six months after the expiration of the Governor's Declaration of State of Disaster, dated March 13, 2020. At such time this provision is no longer in effect, this section is repealed.

Millions of Texans have had their income disrupted due to COVID-19. In order to safeguard the health of Texans we must ensure that UI eligibility requirements are not adversely impacting public health and our efforts to contain the spread of COVID-19. The Texas Workforce Commission has a crucial role to play in ensuring Texans get the resources they need to provide for their families while also ensuring the economy has the fuel it needs to restart. We ask for swift action on these amendments to address the needs presented during these unprecedented times.

Respectfully,



Ruben Garza
Director
USW District 13

RG/clb

May 19, 2020

To: Office of General Counsel

From: Clay Cole, Director—UI Division

Re: Rule Petition Received April 29, 2020

On April 29, 2020, a petition requesting the adoption of two emergency rules was forwarded from the Office of General Counsel (OGC) to the UI Division. This petition, signed by eleven different groups, requests the adoption of two emergency rules.

Under 40 Texas Administrative Code (TAC) § 800.254, the UI Division Director has 20 days after receiving the petition from OGC to respond, in writing, to OGC and recommend either to deny the request or to initiate the rulemaking process. Such response must contain the reasons for the recommendation. As this response is within the 20-day deadline and contains reasons for the recommendation, it is timely and properly submitted.

I. Substance of the Petitioners' Request

A. Rule to Clarify Suitable work and Workplace Safety

The petitioners first request a rule, to be adopted on an emergency basis during the COVID-19 pandemic, that provides additional guidelines to be used in the adjudication of suitable work issues decided under the Texas Unemployment Compensation Act (TUCA) § 207.047 through the application of TUCA § 207.008.

The rule requested is as follows:

§815.31. Determination of Suitable Work.

(a) The Commission, as provided by Section 207.008 of the Act, shall consider the risk to an individual's health when making determinations on suitable work. Determination shall include but is not limited to:

- (1) the individual's prior or current health conditions, age, or other risk factor that may lead to the individual to be immunocompromised;
- (2) the individual is a higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control; and
- (3) provision of proper facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual from communicable disease in the workplace consistent with guidance issued by the Centers for Disease Control;

(b) This section continues in effect until six months after the expiration of the Governor's Declaration of State of Disaster, dated March 13, 2020. At such time this provision is no longer in effect, this section is repealed.

The petitioners state that this rule is needed to clarify protections for workers from exposure to communicable diseases, and that workers and jobseekers should not be disqualified from the receipt of unemployment benefits for refusing to return to a workplace that does not take reasonable precautions to protect workers from communicable disease.

B. Rule to Expand Good Cause for Voluntarily Leaving Work

The petitioners second request is a rule, again to be adopted on an emergency basis due to the COVID-19 pandemic, that expands good cause for voluntarily leaving work due to the COVID-19 pandemic. The petitioners state that this rule would apply to adjudications under TUCA § 207.053, and although not specifically stated, TUCA § 207.045.

The rule requested is as follows:

§815.31. Good Cause.

(a) The Commission's finding of good cause for voluntary leaving employment shall include:

- (1) claimants who left employment based on being diagnosed with COVID-19 or upon experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (2) claimants who left employment to care for quarantined or sick family or household members with COVID-19 or are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (3) claimants who have left employment in order to quarantine on a doctor's order;
- (4) claimants who have left employment because their employer did not make available to the individual the facilities, equipment, training, and supplies necessary to permit the individual to take reasonable precautions to preclude the infection of the individual with COVID-19 consistent with guidance issued by the Centers for Disease Control; or
- (5) claimants who are at a higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control.

(b) This section continues in effect until six months after the expiration of the Governor's Declaration of State of Disaster, dated March 13, 2020. At such time this provision is no longer in effect, this section is repealed.

The petitioners state that the requested rule is needed in order to provide clarity regarding whether workers needing to separate from work for care of themselves or a family member due to COVID-19 qualifies as good cause, and, that due to the strains on capacity in our health care system caused by the pandemic, many workers will lack immediate medical verification.

II. UI Division Response to Petition

The UI Division shares the concerns of the petitioners, and through utilization of the flexibility provided by the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (Division D of Pub. L. 116-127), also known as EUISAA, the application of existing state and federal law, and the clear leadership provided by Governor Abbott,

these concerns have been addressed and clarity has been provided to Texans in crisis without need for the rules requested by the petitioners. For the reasons set forth below, the UI Division recommends against the adoption of the requested rules and against the initiating of rulemaking at this time.

C. The Issues of Suitable Work and Workplace Safety Have Been Clarified to Address Individuals Directly Affected by COVID-19

The UI Division recognized during the early stages of its COVID-19 response that individuals dealing with the direct effects of COVID-19 are in a unique position with regard to the issue of suitable work. When EUISAA was passed on March 18, 2020, it was determined that, because of the flexibilities provided to states within that Act, a set of guidelines could be utilized in order to address these individuals fairly and compassionately. The guidelines, first publicized through Governor Abbott's press release on April 30, 2020, provide clear guidance and, depending upon the circumstances of each individual, unemployment benefits to Texans that find themselves directly affected by the COVID-19 pandemic. When these guidelines are combined with the provisions of the CARES Act's (Pub. L. 116-136) pandemic unemployment assistance program (PUA), existing state law, and applicable precedents contained within the Appeals Policy and Precedent Manual found on the TWC website, the UI Division is confident that sufficient clarity has been provided to Texans directly affected by the COVID-19 pandemic regarding suitable work.

Additionally, Governor Abbott, in his Report to Open Texas first issued on April 27, 2020 and most recently revised on May 18, 2020, provides specific rules and regulations that employers must adhere to in order to open for business during the COVID-19 pandemic. The UI Division will apply these guidelines, on a case by case basis, to any suitable work situation in which a claimant alleges the refusal of suitable work due to a failure to maintain proper safety in the workplace as a result of the COVID-19 pandemic.

D. Good Cause for Voluntarily leaving Work is Sufficiently Addressed to Provide Clarity to Individuals Who Must Quit a Job as a Direct Result of COVID-19

At the outset, the UI Division points out that, although the petitioners include TUCA § 207.053 in their rationale for the requested rule regarding good cause, this section of law is not applicable to the requested rule because that law has no good cause provision. Also, this section only applies to voluntary leaving situations where an individual quits rather than provide care to someone with an infectious disease. Therefore, the provisions of TUCA § 207.053 are not further considered by this recommendation.

With regard to the petitioners' request for a proposed rule defining good cause, the UI Division responds that the federally-funded PUA program allows, among other criteria, the payment of federal benefits to those who must quit a job as a direct result of COVID-19. It is this safety net, as provided by the PUA program, that directly addresses the petitioners' concerns and renders the adoption of the requested rule unnecessary.

In addition, state law, as currently written, provides exceptions that may allow a person who must quit due to a COVID-19 reason to qualify for regular state unemployment benefits. For example, TUCA § 207.045(d) provides that a separation due to a medically verified illness of that person, or that person's minor child, is not disqualifying for unemployment benefits. That section also states that a separation due to the person's injury or disability is not disqualifying. TUCA § 207.045(g-1) also provides protection in scenarios where a person returns to work after a separation but finds that work not to be suitable.

Furthermore, the rule requested by the petitioners, while good intentioned as it may be, attempts to expand on TUCA § 207.045's limitation that good cause must be connected with the work. While EUSAA does provide flexibility, that flexibility does not allow the imposition of a rule that would undermine the meaning of applicable law. The exceptions proposed by the petitioners require lawmaking, not rulemaking.

Finally, the rules and regulations contained in Governor Abbott's Report to Open Texas also apply to work separation issues. The UI Division will apply these guidelines, on a case by case basis, to any work separations in which a claimant alleges the separation was connected to a failure to maintain proper safety in the workplace as a result of the COVID-19 pandemic.

III. Conclusion

The UI Division acknowledges the uncertain situation Texas faces due to the COVID-19 pandemic. While we currently recommend against the adoption of the requested rules and rulemaking with regard to the petitioners' concerns, the situation is fluid. The UI Division, in order to find the most efficient ways to provide for Texans in crisis, constantly monitors: (1) orders issued by Governor Abbott; (2) federal guidelines; and (3) the performance of our laws, rules, and guidelines. If, at some point in the future, the circumstances surrounding the COVID-19 pandemic change in ways that warrant additional rulemaking, the UI Division will not hesitate to recommend the initiation of that process.