

1 **Purchasing from People with Disabilities Program Temporary Suspension of 40 TAC**
2 **§806.41(f)(9) Direct Labor Hour Ratio, Due to COVID-19 Pandemic**

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4 **Discussion Paper**

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6 **Background**

7 On March 13, 2020, President Trump declared a national emergency in response to the COVID-
8 19 public health emergency. Soon afterward, state government officials issued executive orders
9 directing all Texans to minimize gatherings and enforce federal social distancing guidelines for
10 COVID-19, including the March 13, 2020 Declaration of Emergency and March 19, 2020
11 Executive Order GA-8 issued by the Governor of Texas. Further guidelines followed restricting
12 the travel and gatherings of individuals not providing essential services.

13 On April 1, 2020, in light of the policies instituted by the federal, state and local governments,
14 the AbilityOne Commission, a federal commission overseeing the national program similar to
15 the Texas Purchasing from People with Disabilities (PPD) program, issued an exception to the
16 requirement that 75% of direct labor hours be performed by employees with documented
17 disabilities. The AbilityOne Commission noted that, because of the COVID-19 emergency
18 response needs, many federal agencies have stopped certain activities, and/or have increased
19 demands for products or activities that directly affect nonprofit agency contract performance and
20 direct labor hour (DLH) ratios.

21 On April 2, 2020, WorkQuest, the Central Non-profit Agency that administers Community
22 Rehabilitation Program (CRP) contracts in the PPD program, notified Texas Workforce
23 Commission (TWC) PPD management that, because of reduced availability of employees with
24 disabilities to provide direct labor hours due to the COVID-19 pandemic, PPD CRPs were also
25 experiencing challenges in maintaining the 75 percent DLH ratio required by PPD program rule
26 40 Texas Administrative Code (TAC) §806.41(f)(9).

27 The specific direct labor hour percentage requirement contained in 40 TAC §806.41(f)(9) of PPD
28 rule is as follows: “Notarized statement that the CRP agrees to maintain compliance with the
29 requirement that at least 75 percent of the CRP’s total hours of direct labor, for each contract,
30 necessary to perform services or reform raw materials, assemble components, manufacture,
31 prepare, process and/or package products will be performed by individuals with documented
32 disabilities consistent with the definition set forth in this chapter. If a CRP intends to seek a
33 waiver from the 75 percent requirement of the CRP’s total hours of direct labor for a contract, the
34 waiver request must be submitted with the application for approval”.

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36 **Issue**

37 Texas state agencies that provide essential services are served by the products and services
38 offered by PPD CRPs. Because of the COVID-19 emergency, the increased demand by agencies
39 is resulting in additional production requirements on essential product and service contracts.
40 Additionally, CRPs are having difficulty finding enough employees with disabilities to fulfill

1 contract requirements. Because of the reduction in availability of employees with disabilities and
2 given the 75 percent DLH ratio requirement, CRP's must currently use internal staff or other
3 individuals who do not have disabilities to successfully perform contract requirements.

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5 WorkQuest reported several factors that are causing these staffing challenges, and as a result,
6 making it difficult for CRPs to comply with the 75 percent DLH ratio as required by 40 TAC
7 §806.41(f)(9). For example, many CRP employees with disabilities live in group homes and are
8 subject to local government shelter-in-place or stay-at-home orders or similar COVID-19
9 mitigation orders. Other CRPs rely on individuals who are employed at or sourced from local
10 rehabilitation centers. Some of these facilities are closed and therefore, unable to provide
11 employment services for the individuals with disabilities. In addition, based on the Center for
12 Disease Control guidelines, many CRP employees who are disabled are in a high-risk category
13 for contracting COVID-19. This situation has contributed to the current labor shortage because
14 PPD CRPs do not want to put these individuals at risk or the individual has decided to self-
15 quarantine during the pandemic.

16 WorkQuest proposes a temporary suspension of the PPD requirement that at least 75 percent of
17 the CRP's total hours of direct labor for each contract be performed by individuals with
18 documented disabilities. Such a suspension would assist CRPs to continue to provide products
19 and perform services required by state agencies that perform important essential services and
20 would also assist the CRPs to maintain continuity of operations during and in the immediate
21 aftermath of the pandemic. The duration of the proposed suspension is March 1, 2020 through
22 August 31, 2020. Retroactive application of the suspension is proposed to provide support for
23 CRPs experiencing a drop in available labor shortly after the onset of the pandemic in Texas.
24 After May 30, all CRPs not meeting the 75 percent DLH ratio requirement and anticipating a
25 continuing shortage of employees with disabilities would be required to submit to WorkQuest a
26 justification and request for an adjusted DLH ratio percentage for the next 90 days, July 1 –
27 August 31.

28 As noted in the background section of this paper, the federal AbilityOne Commission has issued
29 an exception to their requirement of their 75% direct labor requirement. THRC Sec. 122.011
30 states that TWC “may adopt procedures, practices, and standards used for federal programs
31 similar to the state program established in this chapter.”

32 **Decision Points:**

33 As a result of the COVID-19 pandemic, staff seeks direction in addressing the current challenges
34 of CRPs in the PPD program in meeting the required minimum 75% DLH ratio performed by
35 individuals with disabilities through the temporary suspension of 40 TAC §806.41(f)(9). A draft
36 order is included with this discussion paper. 40 (TAC) §800.8 authorizes the Commission to
37 suspend the operation of a TAC provision, if the Commission finds a public emergency or
38 imperative public necessity exists, and the Commission finds that the suspension will best serve
39 the public health, safety, or welfare. A Disaster Declaration was issued by Governor Greg Abbott
40 on March 13, 2020 and extended on April 12, 2020, due to the COVID-19 pandemic.

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42 If approved, the temporary suspension would become effective under the following conditions:

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- Consistent with the AbilityOne Commission, establish a minimum 35 percent DLH ratio for each CRP contract that must be performed by individuals with documented disabilities beginning from March 1, 2020 through May 30, 2020. Retroactive application of the temporary suspension is proposed to provide support for CRPs that have had fewer available employees with disabilities shortly after the onset of the pandemic in Texas.
 - After May 30, all CRPs that do not meet the 75% DLH ratio requirement and anticipate a continuing shortage of employees with disabilities would be required to submit to WorkQuest a request, including a justification, for an adjusted DLH ratio percentage for the next 90 days, June 1 – August 31, 2020. The justification must include the following:
 1. the DLH ratio achieved by the CRP in each month of the previous quarter, March – May 2020;
 2. the measures the CRP has taken to ensure the safety of its employees;
 3. the measures the CRP has taken to employ individuals with disabilities at the 75% DLH ratio;
 4. the reasons that the CRP anticipates it will be unable to meet the 75 percent DHL in the June – August 2020 quarter; and
 5. the DLH ratio that the CRP anticipates it will be able to achieve June – August.
 - WorkQuest will evaluate each request and seek clarification from the CRP if needed, before making a recommending to TWC that the request be approved, denied or approved with conditions. TWC staff then will evaluate each request and approve, deny or approve with conditions.

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If approved, staff will seek direction from the Commission regarding continuation of this suspension or other remedy should the need for COVID-19 containment measures extend into fall 2020 and continue to adversely impact CRP compliance with the DLH ratio.