TAX DEPARTMENT LAW MANUAL

Table of Contents

1 EMPLOYING UNIT

This chapter discusses the general aspects of the law that apply to employing units.

1.1 DEFINITION

Section 201.011 defines an employing unit as "a person who, after January 1, 1936, has employed an individual to perform services for the person in this state." Black's Law Dictionary defines a person as "in general, a human being (i.e. natural person), though by statute term may include labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

1.2 GENERAL DISCUSSION

This section discusses the general aspects that apply to all types of employing units with respect to the law.

1.2.1 Application of the Term

Most sections of the Texas Unemployment Compensation Act pertaining to the Tax function use the term "employing unit," and an understanding of the law begins with an understanding of this term. Employing unit refers to an individual or any type of organization which has or which has had one or more persons performing service for him or it.

Exception: A Texas Court has held that a fraternal beneficiary society is not subject to the taxing provisions of the Act because it is not listed as an employing unit in the Act. (Praetorians, 143 Tex 565.)

1.2.2 Use of the Term

The term "employing unit" may be used with respect to any individual, business, or organization, whether or not it is subject to the liability provisions of the Act; whereas the term "employer" (as used in the Act) refers to an employing unit which is liable under Subchapter C of the Act. In correspondence it is preferable not to use either term in referring to a specific entity, but to use the actual name, such as John J. Jones, XYZ Corporation, or the partnership of Jane Jones and Henry Smith.

1.2.3 Origin and Life of an Employing Unit

Any type of organization, which has had in its employ, one or more individuals performing service in this state since January 1, 1936, is an employing unit. The service for which a person is employed need not necessarily constitute employment as this term is defined in the law. Once an organization becomes an employing unit, it continues to have that designation until it ceases to exist, such as death of the individual, dissolution of a partnership or a corporation, or discharge of a legal representative.

1.2.4 Separate Establishments

An employing unit may have one or more establishments, businesses, stores, or enterprises in more than one location. If the establishments are owned and operated by the same employing unit, it must follow that all the individuals performing service in all of the establishments are employed by a single employing unit.

EXCEPTION: See Tax Supplement 88-74, in which a Commission Decision held that an individual who operated a motel as an individual proprietor and the same individual who operated an apartment project as an agent of the Federal Housing Administration constituted two separate employing units.

1.2.5 Individuals Employed to Assist

The status of an individual engaged in the work of assisting another in the performance of services cannot be determined until the status of the person receiving the assistance has been determined. The assisting individual will be in the "employ" of an employing unit only when the person receiving the assistance is in the "employ" of the employing unit. The person receiving the assistance must in effect be an employee of the employing unit even though the Act uses the phrase "any agent or employee." The definition of employment requires that the employee be subject to control in the performance of their duties in order to be in "employment." This is also the test of agency. It should be emphasized that control is the test of whether or not the person receiving the assistance meets the conditions required here and the mere naming of such person as an agent is of no importance.

Constructive knowledge is that knowledge which the law will infer or imply the employing unit actually to have when there are facts to indicate very strongly that the employing unit should have had knowledge.

EXAMPLE: Company X employs B to haul heavy merchandise in a company truck. Company X furnishes other employees to help load the merchandise at its store but does not send anyone on the truck with B to help in the unloading. It would be implied or inferred that Company X should know that B must engage or employ someone to help the employee unload the truck at the end of the haul. In this situation, individuals engaged by B to assist them in unloading the truck would be employed by Company X, if B were employed by Company X.

1.3 INDIVIDUAL

This section discusses the aspects of the law that specifically apply to individuals as employing units.

1.3.1 In General

An individual as the "employing unit" usually will not be difficult to recognize unless there is some question that one or more persons may be partners with the individual in the operation of the business. The "individual" will be recognized through facts which show that individual to have exclusive right of possession of the properties of the business, exclusive right to control the business and exclusive right to all the profits, as such, from the business after all costs of operating the business have been paid. It is possible that someone might be working in connection with the business and be receiving a percentage of the profits; but, when it is found that this person is receiving a percentage of profits as compensation for services or as a gratuity, the "individual" will have the exclusive right to profits, as such, from the business.

1.3.2 Independent Operator

Usually the "individual's" right to possession of the properties of the business arises out of the individual ownership of the properties in the business. It is possible, however, for an individual to be the employing unit in the operation of the business even though that individual owns no part or only a part of the properties used in the business. This situation usually exists under an agreement between the "independent operator" and the owners of the properties in the business; the operator's rights are definitely outlined in the agreement. The best example of an "independent operator" is a prevailing custom in the operation of producing properties in the oil industry. The agreement creating an "independent operator" for the purpose of exploiting oil leases or operating producing properties usually follows this particular form:

1. The operator has certain definite blanket authority to do everything in connection with the operation, with certain exceptions in the agreement calling for consultation with the other owners of the properties.
2. There is a provision that purchasers of the oil produced will remit for the purchase either to the individual owners in a certain ratio or to the operator. The agreement may provide for either method of payment without materially affecting the "independent operator" status under the agreement.
3. If purchasers remit to the operator, cost of operation will be paid from moneys received and then there will be a periodic division of income less expenses to the individual owners in a certain ratio.

4. If the purchaser remits to the individual owners, either the operator will pay all operating expenses out of other funds provided by the owners or else the owners will pay operating expenses periodically after being billed by the operator.

Generally speaking, the independent operator becomes the employing unit when he/she gains, under the agreement, exclusive right to control the operations of the business with certain definite exceptions stating when the owners will be consulted. That is, the individual owners do not have a right to participate in the ordinary operations of the business, if an "independent operator" situation is created. The mere fact that the individual owners in effect share in the profits of the operation of the producing properties does not necessarily make them partners. Further provisions of the usual agreement can show that the individual owners did not intend to be partners in the operation of the properties.

1.4 CORPORATION

This section discusses the aspects of the law that specifically apply to corporations.

1.4.1 Definition

A Corporation has been judicially defined as an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties, which the charter of its creation confers upon it, either expressly or as incidental to its very existence. As defined by another court, "a corporation is a legal entity or artificial person entirely distinct from its members or stockholders transacts its business by and through its officers or agents; and their acts are the acts of this legal entity or artificial person as distinguished from the acts of the persons who compose its membership."

1.4.2 Creation

A Corporation is not created and does not exist as such prior to the date its Charter is granted. A Charter is granted by the Secretary of State at such time as it is approved and filed in the office of the Secretary of State. Evidence of this action is sent to the corporation by the Secretary of State in the form of a copy of the Charter bearing the certificate of the Secretary of State that the Charter has been filed. Some corporations are chartered by authorities other than the Secretary of State. For example, charters for State Banks are issued by the Banking Commission, charters for some insurance companies are issued by the Insurance Commission, and charters for Federal Banks and Federal Savings and Loan Associations are granted by agencies of the Federal government.

1.4.3 Foreign Corporations

Corporations chartered under the laws of another state may legally do business in Texas and become employing units under the Texas law even though they have not obtained a "permit to do business" or a "certificate of authorization to do business." Foreign corporations become employing units when they first have one or more persons employed in service in Texas.

1.4.4 Alien Corporations

An alien corporation is any company that is incorporated outside the United States, but operates within the USA.

1.4.5 Operation Before Date of Charter

If the amount of taxes due the Commission will not be altered by such a ruling, the Commission will recognize a corporation as being in existence for a short period of time prior to the date a charter is obtained if the business is conducted as though the corporation had been formed. If there is an extended period of operation prior to the date the charter is obtained, the Commission may hold that the business during that period was being conducted by the owners of the corporation rather than the corporation itself.

1.4.6 Corporate Records

Statutes require directors of a corporation to "cause a record to be kept of all stock subscribed and transferred, and of all business transactions." This general provision of the statutes would require that there be stock records and recorded minutes of directors' meetings. There is no statutory requirement that there be a written record of the meetings of stockholders. A Corporation may or may not have bylaws, according to the decision of the directors.

1.4.7 Forfeiture of Charter

Forfeiture of a corporation's charter means that the corporation has lost some rights, but does not automatically result in dissolution of the corporation.

A charter may be forfeited by action of the Secretary of State for:

1. Failure to pay annual franchise tax after one year of nonpayment, or
2. Failure by the stock subscribers to pay for capital stock within two years from the date the charter was granted.

The charter may be reinstated upon correction of the deficiency.

A charter may be forfeited and/or dissolved by a suit brought by the Attorney General because of fraud or some other statutory reason. Suit by the Attorney General for collection of franchise tax does not necessarily result in forfeiture of the charter. A Corporation whose charter has been forfeited remains a corporation. It can neither bring nor defend a suit, except one brought to forfeit charter. It remains liable for debts incurred prior to forfeiture. The Commission will sue the corporation for taxes incurred prior to forfeiture of charter; but the stockholders will be joined in the suit if assets were distributed to stockholders in fraud of creditors.

A foreign corporation, i.e., a corporation chartered under the laws of another state or a foreign country, which operates a business in Texas without a permit to do business issued by the Secretary of State, is not operating illegally. It has the disadvantage that it can neither bring nor defend a lawsuit. The corporation may be sued for corporate debts.

1.4.8 Operation Subsequent to Forfeiture

If the corporation whose right to do business has been forfeited takes the necessary action to promptly remedy the defect causing the forfeiture, no status change in the identity of the employing unit is recorded insofar as Commission practice is concerned. Also, no change will ordinarily be recorded where employment has ceased after the corporate right to do business forfeiture date.

However, debts knowingly created by the knowledgeable officers and directors during any period subsequent to the forfeiture of the corporation's right to do business (because of failure to pay franchise taxes) become the personal liability of these individuals as if they were partners. This liability exists regardless of whether or not these officials received any corporate assets or whether the right to do business is later reinstated by payment of corporate franchise taxes. Field assignments with specific instructions as to how to proceed with the status and collection aspects of these accounts will be made in instances where officers and directors are believed to have incurred personal liability.

1.4.9 Methods of Dissolution

A Corporation may be dissolved by:

1. Expiration of the time for which it is chartered.
2. Judgment of a court, i.e., the court order may decree dissolution. This happens most often in bankruptcy proceedings.
3. Agreement of the stockholders representing 4/5 of stock in a meeting.
4. Agreement of all stockholders in writing, even without a meeting for that purpose.
5. Any special provision of law. Example: By action brought by the Secretary of State two years from the date that the charter is forfeited for failure to pay franchise tax.
6. Failure to commence active operation within three years from the date that the charter was granted.
7. Judicial ascertainment that the corporation is insolvent.

1.4.10 Operation After Dissolution

Whoever operates the business subsequent to dissolution of a corporation is a new employing unit. The Commission recognizes no exception to this rule.

1.4.11 Texas Professional Corporation Act

The Texas Professional Corporation Act (Art. 1528e, V.A.C.S.) became effective January 1, 1970, and permits architects, attorneys, CPAs dentists, public accountants and veterinarians (and other such licensed professional people) to incorporate their professions or businesses as a professional corporation. The Act is not applicable to physicians, surgeons, or doctors of medicine.

Pertinent provisions are:

1. Corporation may be organized by one or more individuals;
2. Activity is restricted to one kind of profession;
3. All incorporators must be engaged in the same profession;
4. The Texas Business Corporation Act is applicable to Professional Corporations. In case of conflict, the Texas Professional Corporation Act takes precedence;
5. The corporation has perpetual succession and is a "legal entity";
6. It is to have a Board of Directors and corporate officers;
7. Transferable shares may be issued.

COMMENT: For purposes of administering the TUCA, professional corporations are no different from business corporations. Corporate officers who perform service for remuneration are in employment.

1.4.12 Subchapter S Corporations

The stockholders of some small corporations may, under certain conditions not pertinent to the TUCA, elect under 26 U.S.C.A., Sections 1371-1378, to be taxed at individual income tax rates on their proportionate part of the corporations' net profit. The corporation, as such, does not pay income tax.

The stockholders are required to pay income tax based on the corporate profits whether or not the profit is distributed to them as dividends.

The salaries of corporate officers are deductible in computing the corporation's net profit subject to tax.

An election to be a Subchapter S Corporation does not convert the corporation to a partnership. The stockholders do not become partners.

A stockholder may be an officer. A stockholder and/or officer may be in employment. Whether or not a stockholder/officer is in employment depends on application of the "services, control and remuneration" test as defined in Subsection 201.041 in the Act. However, services must be regular and substantial, rather than occasional and negligible. The work performed must be for remuneration rather than gratuitous.

Profits distributed in the form of dividends to stockholders or money withdrawn, as advances against future dividends do not constitute taxable wages. Salaries paid to corporate officers are taxable wages and the tax is due from the corporation.

When a Subchapter S Corporation distributes its profits to stockholders in the form of dividends, the dividends are not taxable under the TUC Act for the same reason that they are not taxable when paid by any other corporation. Dividends do not represent remuneration for services performed.

In some instances, stockholder-officers are not paid salaries and receive only dividends or advances against dividends. In this event, the stockholder-officers are considered to be employees under FUTA, which may make the corporation liable under FUTA, and Section 201.025 of the Act even though the remuneration they receive may not be taxable under the TUC Act. See Commission Decision of March 25, 1971, in the Airport Florist, Inc. Case.

The meaning of the statement that the corporation is liable under FUTA is that, under the Federal Unemployment Tax Act, it is specifically stated that officers of a corporation are employees with no distinction being made as to whether or not they receive remuneration for their services. However, the Internal Revenue Service does not treat them as employees in determining whether or not their employer is a liable employer under FUTA. They apparently disregard the specific wording of the statement in FUTA because of adverse court rulings. For this reason the Manual does not say that the corporation is liable under FUTA when a stockholder is likewise an officer of the corporation but instead says that the circumstances may make the corporation liable under FUTA. In the event that such a ruling is made, the fact that the corporation is subject under FUTA would automatically make it subject to the TUC Act because of the provisions of our Section 201.025. Even so, advances and dividends would still not be taxable but by being subject the corporation would be required to pay tax on other ordinary employees.

A Subchapter S Corporation is not required to distribute its profits as dividends to its stockholders even though the stockholders are required to pay income taxes on their proportionate part of the corporation's profit. As a matter of practice, Subchapter S Corporations usually do distribute all or part of their profits in the form of dividends. Quite often, however, profits are not determined until the end of a fiscal year and the amount of the dividend is not known during the course of the year. In this situation it is a rather common practice for the corporation to advance money to the stockholders. These advances are, technically, merely loans, which are deducted from each

stockholder's dividend when the dividend is determined and paid. TWC takes the position that the loans or advances are in the same category as dividends and that we are not authorized to treat the advances as salaries even though the stockholder may be an officer or other employee of the corporation.

For Federal Ruling with respect to Subchapter S Corporations, see Revenue Ruling 73-361, Tax Supplement 148-74, and Tax Supplement 156-74.

1.5 LIMITED LIABILITY COMPANY

This section discusses the aspects of the law that specifically apply to limited liability companies.

1.5.1 Definition

A limited liability company is an entity created by the 72nd Texas Legislature that could begin operations effective August 26, 1991. By law, this is a legal business entity distinct from its owners; that is, its owners are protected from liabilities of its activities. There are two basic types of limited liability companies:

1. Domestic Liability Company

   A limited liability company that was formed under Texas law.

2. Foreign Limited Liability Company

   A limited liability company that was formed under the laws of another state. Prior to August 26, 1991, these companies operated as unincorporated associations in the State of Texas.

A limited liability company, by legislative action, must have the word "Limited" in its title, or the abbreviations "LTD," "LLC" or “PLLC.”

Note: PLLC stands for Professional Limited Liability Company and is commonly doctors, lawyers, etc.

Definitions:

1. Limited Liability Company Member
   An owner of a Limited Liability Company. A member functions in a role similar to that of a corporate shareholder. A member has the right to operate the business or elect one or more managers to run it. Unlike limited partners, a limited liability company member does not run the risk of losing liability protection by participating in the affairs of the limited liability company.
2. Limited Liability Company Manager
   Elected by the members to operate the limited liability company, managers function in a role similar to a corporation's board of directors. The managers may operate the business or elect officers to run it.
3. Limited Liability Company Officer
   Elected by limited liability company managers to operate the limited liability company for the limited liability company managers and limited liability members.
4. Limited Liability Company Articles of Organization
   On file with the Secretary of State, the Articles of Organization establish the name of the limited liability company, the longevity of the limited liability company, the

purpose of the limited liability, the address of the limited liability company, who will manage the limited liability company, if management is reserved for members only, the members' names and addresses, and any other provisions deemed necessary.

The Articles also set forth the name and address of its initial registered agent in Texas.

Any changes or amendments to the Articles of Organization must be filed with the Secretary of State. Copies of the Articles of Organization, along with any amendments are available through the Secretary of State.

5. Limited Liability Company Regulations
   Provisions that control the operation and management of the affairs of the limited liability company. They cannot be inconsistent with the law or the limited liability company's Articles of Organization.
6. Certificate of Organization
   Authorization from the Secretary of State to a domestic limited liability company allowing the company to begin to transact business in Texas.
7. Certificate of Authority
   Authorization from the Secretary of State to a foreign limited liability company allowing them to begin to transact business in Texas

1.5.2 Ownership

Ownership will be established based on information provided by the employer via C-1 Status Report or Internet Registration. An owner could be a member, a manager, or an officer. Their authority can be verified through the limited liability company's Articles of Organization or their regulations. These members, managers, or officers will be authorized to sign for the limited liability company. Ownership can also be verified through the Secretary of State.

When a limited liability company registers with the Secretary of State, they must have a registered agent located in Texas. The Secretary of State will assign a file number to the limited liability company. The month, day, and year of the filing and the name and address of the registered agent will be recorded.

1.5.3 Remunerations

All remuneration paid to an individual, including members, managers, and officers, for services rendered, will be considered wages as defined by the Texas Unemployment Compensation Act, except for those distributions of profits taken by percentage ownership.

Reference: Texas Business Organizations Code (BOC) - Title 3 – Limited Liability

Companies, subchapter E – Allocations and Distributions states this.

Sec. 101.20: ALLOCATION OF PROFITS AND LOSSES. The profits and losses of a limited liability company shall be allocated to each member of the company on the basis of the agreed value of the contributions made by each member, as stated in the company's records required under Section 101.501.

Sec. 101.501(states in part)

(1) a current list that states:

(A) the percentage or other interest in the limited liability company owned by each member;

1.5.4 General Collection Guidelines

A subpoena duces tecum (for records), a TWC Warning Letter, or a court order should be issued to the ownership of record as established by the latest status report on file. If a status report is not on file, then the subpoena, TWC Warning Letter, or court order should be issued to a limited liability company member listed in the Articles of Organization on file with the Secretary of State.

Tax liens, bank claim notices, and assessments will be filed in the name of the limited liability company and not against the members or owners. Assessments will be filed in the name of the limited liability company and not the name(s) of the members or owners. When necessary, TWC will serve the Registered Agent or the Secretary of State if service cannot be made on the Registered Agent.

1.6 ASSOCIATION

This section discusses the aspects of the law that specifically apply to associations.

1.6.1 In General

An association is an organization created by an agreement between its member-owners for the performance or transaction of specified business affairs. Associations frequently have continuity of life even though the membership is changed (i.e., by addition, withdrawal, death, etc.) Frequently the conduct and management of the business is vested in a group or individual from among the member-owners.

In most respects, the law in Texas treats an unincorporated association as if it were a partnership (rather than a corporation). As a consequence, the members and officers of an unincorporated association are usually treated as partners rather than as employees (i.e., officers) of the association.

For a discussion regarding the Texas Professional Association Act, see Chapter 1 Professional Associations."

If an unincorporated association possesses substantially all of the attributes of a business corporation, services performed by its member-officers may in rare instances be considered the same as services performed by an incorporated employing unit. Among these attributes of a business corporation are:

1. Ownership by the association (i.e., the entity as distinguished from the several members) of property used in the venture.
2. Centralization of management through representatives chosen by the members. Control of management through selection or election of the managers by the members.
3. Continuity of the enterprise and of the entity without interruption by the death of a member, addition of a member or transfer of membership.
4. Limitation of personal liability (of all members) to the property and assets used in the undertaking. (No personal liability.)

1.6.2 Investigation

In investigations made to determine the "partnership" or "corporate" nature of an association, the first thing that should be examined is the instrument or document creating the association. If the association is incorporated, Paragraph 1.3.2 "Creation" is applicable. In the event the association is not incorporated the examiner is likely to find documented agreements executed by the members. These agreements usually state the purposes for which the association is organized, the type of organization it purports to be and sometimes the powers and duties of various officers or an executive board of the association. These documents and the agreements and relationships undertaken

are of primary importance in determining just what type of association or employing unit is being considered. The Commission will hold the officers or executives of the association liable for any reports and information that is required under the law.

1.6.3 Professional Association

Texas Professional Association Act

The Texas Professional Association Act (Article 1528f, V.A.C.S.) became effective June 18, 1969, and permits one or more persons duly licensed to practice a profession to form a professional association. Professions eligible to form a Professional Association Corporation under the "Texas Professional Corporation Act (Article. 1528e, V.A.C.S.) are likewise eligible to form a professional association.

Pertinent provisions are:

1. Activity is restricted to one kind of profession.
2. All members must be licensed in the same profession.
3. The association has perpetual succession if so provided in Articles of Association and it is a "legal entity."
4. The association must have a Board of Directors or an Executive Committee and officers.
5. A member cannot obligate the association for a debt as in the case of a partnership.
6. Shares or units of ownership may be transferred.

COMMENT: An association formed under the Texas Professional Association Act is actually neither a partnership nor a corporation, but for purposes of the Texas Unemployment Compensation Act, the association will be treated as a corporation. The officers of the professional association will be treated as employees of the corporation and remuneration paid to the officers for services rendered to the corporation is subject to the unemployment tax.

1.7 GENERAL PARTNERSHIP

This section discusses the aspects of the law that specifically apply to general partnerships.

1.7.1 Definition

It may be stated that those persons are partners who join together to carry on an enterprise for their common benefit and who own and share the profits thereof in certain proportions. The word implies and requires a union or association of two or more persons, by agreement and intention, for a common legal objective, business, or enterprise with community in use of money, property, facilities, or service, contemplating the sharing of profits and losses. A "person" is, in general usage, a human being (i.e. natural person), though by statute term may include labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. The test of the existence of the partnership relationship is a common enterprise and a community of interest therein, the prosecution of the same for the joint profit of the parties, and a right in each of them to share in the profits thereof as such.

1.7.2 Formation

A partnership is created by and through an agreement. It follows that any person who becomes a partner under the agreement must have been a party to the agreement. The agreement may be in writing or it may be oral. Normally, a partnership between individuals comes into existence as of the date the agreement is made. However, the agreement itself may evidence a desire by the parties to the agreement that the partnership be created as of a different date. In the absence of language specifying a different date, it may be presumed that the partnership is created as of the date the agreement is executed. However, a preexisting partnership agreement may be reduced to writing today to describe the relationship existing during a prior period. The examination of a written partnership agreement will usually reveal the date the partnership was formed. When there is no written agreement, however, more difficulties will be faced in finding the date a partnership was created. Evidence to support a finding in this situation may come from various sources.

1.7.3 Creation on Future Contingency

Since a partnership has its existence solely out of the agreement and in accordance with an agreement, the terms of the agreement itself should determine the intent of the parties as to when they desire to become partners. The agreement either may be executed as of the present to create some arrangement between the parties as of the

present or the agreement may be written in such language as to evidence an intent between the parties that a partnership will not be created until a future date. This future date may be fixed as a definite date or it may be fixed as a future date to be determined by the occurrence of a certain definite circumstance. That is, the partnership by its terms may be contingent upon the occurrence of any one or more circumstances which the parties agree upon.

1.7.4 Dissolution

This section applies only to partnerships created prior to January 1, 1994 and have not elected to be covered under the Texas Revised Partnership Act.

1. Involuntary Dissolution

   An involuntary dissolution of a partnership occurs through a circumstance, which, of its nature, is something that could not be agreed upon by all of the partners. The law itself controls in these circumstances, and it is usually said that the partnership is dissolved as a matter of law when one of the following circumstances occurs:

   a. One of the partners is adjudged bankrupt.

   b. Withdrawal of a partner. This may occur either by sale of his interest to the other partners or by sale to a third person who becomes a partner.

   c. Death of a partner.

   d. Addition of a partner.

   e. Insanity of a partner.

2. Voluntary Dissolution

   Other than by the occurrence of one of the circumstances named above, dissolution of a partnership is wholly by agreement. The agreement, by its terms, may create a partnership relationship for a period of a definite duration or for a period of an indefinite and continuing duration.

   Normally, partnership agreements create relationships of continuing duration; this relationship is ended by dissolution of the partnership through another agreement between the parties.

   The agreement to dissolve the partnership may be in writing or it may be oral. A written dissolution agreement will state the date of dissolution; if no date is named, it may be presumed that the partnership was dissolved as of the date the dissolution agreement was executed.

1.7.5 Investigation of the Successor

The death of a partner usually dissolves a partnership. This is the general rule stated in Chapter 1, "Dissolution." An exception to the rule is the case of a "continuing partnership" discussed in Chapter 1, Continuing Partnership.

If a business continues to operate following the death of a partner, the successor-employing unit may be:

1. A partnership between the remaining partners, or
2. A partnership between the remaining partners and the estate of the deceased, depending upon what actually has occurred and the intent of the parties.

The surviving partners are trustees of the assets of the partnership. They have the responsibility of protecting the ownership interest of the estate of the deceased partner and have one year in which to liquidate the assets and terminate the partnership's business. They may be given court permission to complete contracts in effect at the time of the partner's death. The estate or heirs of the deceased partner have an ownership interest in the profits from contracts completed after the partner's death; but do not have, as a matter of law, any right to participate in management of the business. Therefore, if investigation discloses that surviving partners are operating the business to complete contracts in progress at time of death, and otherwise doing things to liquidate the partnership, for the purpose of determining the amount of settlement with deceased partner's estate, the Commission will recognize a continuation of the original partnership until such time as the settlement with heirs is made. After the settlement with the heirs, a continuation of the business by the surviving partners will be recognized as a new employing unit.

The surviving partners sometimes enter into a partnership agreement with the deceased partner's heirs or with the legal representative of his estate, for continuation of the business. This may occur immediately after death or at some later date. The Commission will recognize that such an agreement creates a new partnership.

If a single person, who is a member of a partnership, marries, he/she remains personally liable for the partnership's debts. Likewise, his/her capital in the business is subject to levy for the payment of partnership debts. Though their spouse would be joined as a matter of form in a suit against the individual for collection of taxes owed by the partnership, the spouse is not personally liable for the partnership's debts, which were incurred prior to their marriage.

1.7.6 Alteration of Original Agreement

Presuming that the terms of the original partnership agreement are known and have described the capital investment, profit-sharing ratio, managerial responsibilities and other factors evidencing the understanding of the parties to the agreement, a later alteration might not create a new employing unit. This alteration in the original agreement might effect a different profit-sharing ratio, a different capital investment ratio, an expansion of the business to create a new establishment in the same or a different line of business, changed managerial responsibilities, etc. The question of whether a new employing unit is created cannot be answered in this treatment of the subject; but the administrative determination as to whether a new employing unit has been created will depend upon statements received from the partners as to their intentions at the time of the original agreement and a statement that the later alterations were as anticipated at the time of the original agreement.

1.7.7 Operation of Multiple Establishments

The same individual partners may have associated themselves together to operate more than one business, or they may have begun the operation of another business establishment at some time later. Often it becomes important to determine whether the individuals compose one partnership in the operation of one of the places of business and the same individuals compose another separate and distinct partnership in the operation of the other business. As a matter of law, there can be either one employing unit or two employing units.

1.7.8 Investigation

Even though a written partnership agreement can be produced for evaluation, the agreement itself may be subject to different interpretations because of the indefiniteness or ambiguity of language used in it. More often the investigation will concern itself with the relationship between the individuals when a written partnership agreement cannot be produced in evidence. When there appears to be any real and material question of the existence of a partnership relationship under the facts represented by the ostensible partners, a request should be made that the facts be reduced to writing and signed by the questionable partners. This is particularly important in a situation where the alleged partner might be an employee rather than a partner. Stated another way, close examination should be made of a questionable relationship when the alleged partner would otherwise be in employment.

1.7.9 Intent

Partnerships are created out of an agreement by the language of the agreement and by the manner in which the parties conduct themselves as a result of the agreement. From the agreement, or from the agreement and the conduct of the parties, evidence is found to show the relationship, which the parties intended. The intent of the parties is one of the leading tests for a partnership relation. Courts have said that effect should be given to the intention of the parties, if possible; yet they may intend no partnership and yet, in fact, have formed one. This means that the intention of the parties should be given consideration but that such an intention is not the sole test. Persons may be partners without any definite or expressed intent or without expression in the agreement describing the nature of the relation between them. As the agreement becomes less definite in describing the nature of the relationship, more consideration will be given to the manner in which the parties have conducted themselves.

1.7.10 Capital Investment

As defined, "partnership" implies a community of interest in the property, business, or enterprise. At the time the partnership is formed, there may or may not be a community of interest in the physical properties of the business, since the community of interest in the business or enterprise may have been created by a contribution of money or physical property by one party and a contribution of skill, service, or a valued name by the other party. In making an investigation, it should be remembered that a partnership may be created by any kind of a contribution to the business which gives one party a common interest with the other parties in the business or enterprise.

1.7.11 Profits and Losses

The receipt of a share of the profits of a business is prima facie evidence that the recipient is a partner in the business except that no such inference can be drawn if the profits were received in payment of:

1. Installment due on a debt.
2. Wages of an employee.
3. Rent to a landlord.
4. Annuity to a widow or representative of a deceased person.
5. Interest on a loan, though the amount of payment varies with the profits of the business.

Although a person's compensation is measured by the amount of profits or losses in the business, that person is not a partner unless there are other facts pointing to a partnership relationship.

1.7.12 Records

The records maintained for the business, public records and records of dealings by the business with other individuals can furnish evidence bearing on whether or not a partnership exists by showing either the intent of the parties and/or the manner in which they have conducted themselves. Listed below are the types of records, which might be reviewed in an investigation of this nature:

1. Bank Accounts:
   a. Is the bank account for the business maintained in the trade name of the business?
   b. Who has authority to draw checks on the business bank account?
   c. Does the bank's authority to pay checks on the signature designate the signed as a partner or otherwise?
2. Partnership Accounts:
   a. Do the partnership records carry a capital account for each of the alleged partners?
   b. Is a distribution of profits or losses made to these capital accounts when the books are closed at the end of a fiscal year?
   c. How are any draws against profits accounted for in the records? Are draws by partners authorized in equal amounts; if not how are they determined?
   d. What is the beginning date of the partnership's books, that is, the date of first postings to the records?
3. Accounting Between Alleged Partners:

   If the alleged partnership relation has been dissolved prior to the investigation, what was the nature of accounting between the alleged partners at the time of the dissolution?
4. Income Tax Returns
   a. Was a partnership information return filed for preceding fiscal years?
   b. Were the alleged partners named as partners and was the profit-sharing ratio shown on the partnership's information return?
   c. Does the return show the date on which the partnership was formed?

5. Purchase Invoices:
   Is there any evidence on purchase invoices indicating to whom sale was made or credit extended?
6. Leases:

   If alleged partnership has been the lessor or lessee of property, is there evidence in this instrument as to the identity of the partners?
7. Assumed Name Certificate:
   a. What information about the business is shown in the Assumed Name Certificate record in the office of the County Clerk of the county in which the business is operated?
   b. If information is shown in these records, include this information together with the date of the certificate.
8. Deed Records:

   Do the Deed Records in the county courthouse indicate who owns the business property?
9. F.I.C.A. Tax Returns:

   Do the copies of F.I.C.A. tax returns show the name or names under which reports are filed?
10. Other Records:

    Who are the indicated owners as shown in telephone and city directories, Liquor Board permits, letterhead, and advertisements?

1.7.13 Continuing Partnership

Chapter 1, "Definition" and Chapter 1, "Records" state the general rules with respect to partnerships as employing units. It is particularly pertinent to this discussion that a partnership is involuntarily dissolved upon the withdrawal, death, addition, insanity or bankruptcy of one of the partners (see Chapter 1, "Definition"). Employers have often contended that theirs is a "continuing partnership," i.e., one which can and does continue after the death of one of the partners. The Commission has usually denied such a possibility and has ruled that a new employing unit results after the death of a partner. The Commission will continue to rule that a partnership created prior to January 1, 1994 that has not elected to be covered under the Texas Revised Partnership Act cannot be continued in that circumstance, with one exception: There can be a "continuing partnership" in certain, unusual and comparatively, rare cases.

A study of Texas case law reveals that there is a line of court decisions holding that a partnership can continue after the death of a partner if one of these two situations exists:

1. The survival and continuation of the partnership was agreed to by all of the partners while still living, or
2. Continuation of the partnership is directed in the will of the deceased partner in clear and unambiguous terms, and when so directed in the deceased's will, such continuation is agreed to by all of the surviving partners.

Experience shows that there are not many "continuing partnerships" which meet the very strict conditions stipulated in these cases.

Field representatives should not categorically inform an employer that a "continuing partnership" is impossible. When an employer makes such a contention, the facts should be submitted to the State Office Status Section for a ruling. Copies of wills and other pertinent documents and evidence of agreement should be obtained and submitted.

1.7.14 Uniform Partnership Act

The Texas Legislature passed the Uniform Partnership Act (Art. 6132b, V.A.C.S.) pertaining to general partnerships effective January 1, 1962. The provisions of this Act must be taken into consideration in examining any change in composition of a partnership, which occurs on or after January 1, 1962.

Section 31 of the Act provides: "Dissolution is caused:.

1. Without violation of the agreement between the partners,
   a. By the termination of the definite term or particular undertaking specified in the agreement,
   b. By the express will of any partner when no definite term or particular undertaking is specified,
   c. By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,
   d. By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;
2. In contravention of the agreement between the partners where the circumstances do not permit a dissolution under any other provision of this Section, by the express will of any partner at any time;
3. By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;
4. By the death of any partner unless the agreement between the partners provides otherwise;
5. By the bankruptcy of any partner of any partnership;

6. By decree of court under Section 32."

It appears clear that a "continuing partnership" can be recognized (i.e., change in identity of employing unit does not occur) in the situation where a partner dies or withdraws or a new partner is added if the partnership agreement provides for continuation after such an event. This is true whether or not the expiring partner's will provided for continuation.

1.7.15 Change in Composition of the Partnership

A change in composition of a general partnership will affect the entity according to the following:

1. The partnership is governed by laws of another state:

   The Texas Workforce Commission will be guided by the provisions of the other state's law on the question of whether the death, withdrawal, or addition of a new partner dissolves the original partnership. The law governing a partnership is the law of the state in which the partnership was formed, unless its principal place of business is in another state, in which event the law of the second state applies.

2. The partnership is governed by Texas law:

   a. Partnership formed before January 1, 1962, and change in composition occurred before January 1, 1962.

Event	Partnership Agreement & Partner's Will Provide for Continuation after death.	No Agreement of Will
1) Death of Partner	No Dissolution	Dissolved
2) Addition of Partner	Dissolved	Dissolved
3) Withdrawal of Partner	Dissolved	Dissolved

   b. Partnership formed before January 1, 1962; change in composition occurred after January 1, 1962 and before January 1, 1994:

Event	Agreement and Will	Partnership Agreement Provides for Continuation after Death or Addition	No "Continuing Clause" in Partnership Agreement
1) Death of Partner	No Dissolution	No Dissolution	Dissolved
2) Addition of Partner	Dissolved	No Dissolution	Dissolved
3) Withdrawal of Partner	Dissolved	No Dissolution	Dissolved

3. Partnership formed after January 1, 1962; change in composition occurred after January 1, 1962 and before January 1, 1994:

   (All decisions identical with 2b above.)

1.7.15.1 Texas Revised Partnership Act

Based upon the previous Texas Uniform Partnership Act, the Commission has considered a partnership to be comprised of its partners and any change in composition would necessitate the forming of a new legal entity. Under previous rules, withdrawal or addition of a partner created a new partnership. This creation of a new entity required that a new TWC Account Number be established. Under the Texas Revised Partnership Act (TRPA), effective January 1, 1994, a partnership continues until terminated. Partnerships formed before January 1, 1994 can elect to be covered by the Act. Effective January 1, 1998 they are automatically covered by the Act.

A. Definitions:

1. TRPA - Texas Revised Partnership Act (Vernon's Ann. Civ.St. article 6132b-1.01 et. seq.)

   Note: The TRPA is a complete update of the general partnership law of Texas.

2. Partnership - An association of two or more persons to carry on a business as owners. A partnership is an entity distinct from its partners -

3. Winding up a partnership - Formerly known as dissolution: The only events requiring winding up are listed in 6132b-8.01 of the TRPA. Those events are as follows:

   a. If the majority of the partners agree to wind up the partnership,

   b. If the partnership is for a definite term or undertaking, winding up is required upon:

      1. agreement of the partners, or

      2. expiration of the term or completion of the undertaking unless the partners agree to continue either expressly or by action,

   c. If the partnership agreement provides for winding up on a specified event, winding up is required upon:

      1. agreement of the partners, or

      2. expiration of the term or completion of the undertaking unless the partners agree to continue either expressly or by action,

4. If it becomes illegal for the partnership to continue all or substantially all of the business. The partnership has 90 days to correct the condition that makes continuation illegal,

5. If a partner applies for a judicial decree, requiring winding up and the court determines that:
   a. it is not economically feasible to continue the business,
   b. one of the other partners has engaged in business conduct that makes continued business with that partner not reasonable or practical,
   c. it is not otherwise practical to carry on the partnership business in conformity with the partnership agreement,
6. If all or substantially all of the partnership property is sold outside the ordinary course of business, or
7. If one of the partners notifies the rest of the partners of the intention to withdraw from a partnership that has no definite term or undertaking the partnership, winding up must occur within 60 days. The remaining partners have the option of continuing the business. Continuation of the business by the remaining partners is prima facie evidence of an agreement to continue the partnership.

B. Liability of Partners

1. Under terms of TRPA, a partnership continues until terminated. The relationship between the partners may change but the relationship between the partnership and creditors remains unchanged upon withdrawal or addition of a partner.
2. All partners are jointly and severally liable for debts of the partnership. However, before creditors can proceed against individual assets of the partners, partnership assets must first be exhausted, or it must be determined that collection cannot be made from the partnership. Before action can be taken to collect from the partner's individual assets, the assessment or judgment must be 90 days old and unsatisfied.
3. A partner withdrawing from a partnership that continues business is liable for debts incurred by the continuing partnership for a period up to two years after withdrawal, unless the partner gives notice of withdrawal to creditors. Notice of that withdrawal may be written or oral.

   NOTE: If the notice is oral, in addition to adequately documenting the employer file, notification must be obtained from the remaining partners in the form of an amended Status Report. See Chapter 4 – Texas Revised Partnership Act (TRPA).

4. An incoming partner is liable only for debts incurred subsequent to becoming a partner.

   See Chapter 4 – Collecting Partnership Debts.

1.8 JOINT VENTURE

This section discusses the aspects of the law that specifically apply to joint ventures.

1.8.1 Definition

A joint venture, or joint adventure, is but another name for a special partnership. It might be distinguished from a general partnership in that the latter is formed for the transaction of a general business, while a joint venture is usually limited to a single transaction. That is, a joint venture is a special combination of persons in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual benefit or profit.

1.8.2 Investigation

From a practical standpoint, an investigation to identify the joint adventurers in a business transaction will proceed from the same considerations as if the investigation were being made to determine whether a partnership exists or who to identify the partners in a general partnership.

1.9 LIMITED PARTNERSHIP

This section discusses the aspects of the law that specifically apply to limited partnerships.

1.9.1 Formation

The Uniform Limited Partnership Act (Art. 6132a-1, Vernon's Texas Civil Statutes of Texas) became effective on April 30, 1955. A limited partnership is defined in the Act as a partnership formed by two or more persons under the provisions of Section 3 of the Act and having as members one or more general partners and one or more limited partners. The limited partners as such are not bound by the obligations of the partnership. Limited partners may not take part in the day-to-day operations of the business.

Under this Act, a certificate must be made, acknowledged, filed, and recorded in the office of the Secretary of State in Austin, Texas.

It is not necessary for the certificate to be filed and recorded with the County Clerk of each county wherein the limited partnership has a place of business. Some of the more important requirements are that the certificate must show the name of the partnership, character of business, names of all general and limited partners with their residence addresses, location of the principal place of business, the term for which the partnership is to exist, the amount of cash and a description of the agreed value of other property contributed by each limited partner and the right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner.

NOTE: Employers do not have to provide a list of limited partners only the general partner(s). Limited partners are always exempt from TUCA. Whether there is or is not a written agreement. Account is styled using the name of the general partner and ETAL.

1.9.2 Dissolution

A limited partnership is formed for a specified term stated in the certificate filed with the Secretary of State. The retirement, death, or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners under a right to do so stated in the certificate, or with the consent of all members. On the death of a limited partner, the limited partners executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substitute limited partner. The estate of a deceased limited partner shall be liable for all the limited partners' liabilities as a limited partner.

A limited partnership certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such. A certificate shall be amended when:

1. There is a change in the name of the partnership or character of the contribution of any limited partner.
2. A person is substituted as a limited partner.
3. An additional limited partner is admitted.
4. A person is admitted as a general partner.
5. A general partner retires, dies, or becomes insane, and the business is continued under a right to do so stated in the original certificate or with the consent of all members.
6. There is a change in the character of the business of the partnership.
7. There is a false or erroneous statement in the certificate.
8. There is a change in the time as stated in the certificate for dissolution of the partnership or for the return of a contribution.
9. A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or the members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement.

Amendments to or requests to cancel a certificate must be filed with the Secretary of State in Austin, Texas.

A limited partnership formed under any statute of this State prior to the adoption of the Uniform Limited Partnership Act (effective April 30, 1955) may become a limited partnership under this Act by filing a certificate with the Secretary of State in accordance with Section 3 of the Act, provided certain other statutory provisions are met.

1.9.3 Investigation

Information concerning a limited partnership should be obtained from a general partner and a general partner should sign reports. When information is needed from the Secretary of State concerning a limited partnership certificate, cancellation, amendment, or dissolution, the field should ask the State Office to obtain such information.

1.9.4 Establishment of Accounts

The death, withdrawal, or addition of a partner has the following effects, with respect to a Limited Partnership:

1. Partnership formed prior to April 30, 1955, certificate not filed after that date with Secretary of State.
   a. Death, withdrawal, or addition of either a general or a limited partner creates a new employing unit requiring the establishment of a new account for the successor.
2. Partnership formed prior to April 30, 1955, certificate filed after that date; or partnership formed after April 30, 1955.
   a. Death, withdrawal, or addition of a general partner creates a new employing unit (with certain possible exceptions depending upon provisions of certificate and agreement between surviving partners--special case).
   b. Death, withdrawal, or addition of a limited partner does not create a new employing unit.

1.9.5 General Collections Guidelines

If the limited partnership defaults on debts, the general partner becomes liable for the debt. A limited partner is liable only to the extent of his investment, hence his/her exposure to being sued for the partnership debts is "limited."

1.10 REGISTERED LIMITED LIABILITY PARTNERSHIP

This section discusses the aspects of the law that specifically apply to registered limited liability partnerships.

1.10.1 Definition

A registered limited liability partnership is a general or limited partnership that is registered with the Texas Secretary of State. The partnership's name must contain the words "Registered Limited Liability Partnership" or the abbreviation "L.L.P." as the last words or letters of its name.

When registering with the Secretary of State the registered limited liability partnership must provide:

a. the name of the partnership
b. the federal tax identification number
c. the address of its principal office in Texas
d. the address of its home state office if located outside of Texas
e. the number of partners, and
f. a general business activity description.

The registered limited liability partnership does not have to provide the Secretary of State with a detailed listing of the partners.

Registration with the Secretary of State as a "registered limited liability partnership" is good for one year, unless voluntarily withdrawn or revoked prior to that time. Prior to the end of one year the "registered limited liability partnership" must file a renewal application with the Secretary of State.

1.10.2 General Collection Guidelines

The Legislation states in part: a partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence or malfeasance committed while the partnership is a Registered Limited Liability Partnership and in the course of the partnership business by another partner or a representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omission, negligence, incompetence or malfeasance occurred, unless the first partner had notice or knowledge of the errors, omission, negligence, incompetence or malfeasance by the other partner or representative at the time of occurrence.

This legislation does not affect:

a. the joint and several liability of a partner for debts and obligations of the partnership arising from a cause other than the causes specified above; for example, taxes.

b. the liability of a partnership to pay its debts and obligations of partnership property.

1.11 JOINT STOCK COMPANY

This section discusses the aspects of the law that specifically apply to joint stock companies.

1.11.1 In General

A joint stock company has been defined as a partnership with transferable shares and concentration of management. It differs from the ordinary partnership in that the shares in the company are transferable and the transfer of a share does not effect a dissolution of the company. In many respects, these companies may resemble a corporation in their organization and method of operation. The members are personally liable for the acts of the company and for the power to control their representatives.

1.11.2 Investigation

The affairs of the company are usually carried on by a board similar to the board of directors of a corporation; in some instances an individual appointed for that purpose by the members may carry on the affairs. The association being a creature of contract, its nature can be determined by examination of the instrument or instruments relative to its creation. These instruments will usually be found in the hands of the person or persons responsible for the conduct of the affairs of the company. It is of primary importance to determine whether the organization is a corporation incorporated under the laws of this or another state or whether it is in effect a joint stock company. As in the case of other associations or partnerships, these companies may be dissolved by order of a court or by mutual agreement of its members. The dissolution of a company means that its status as an employing unit is destroyed. What has been said with respect to the records pertaining to associations and partnerships is equally applicable here.

1.12 TRUST

This section discusses the aspects of the law that specifically apply to trusts.

1.12.1 In General

A trust is created through a written instrument transferring property to one person for the benefit of another person. Legal title and control of the property vests in the trustee, with equitable title to the property passing to the other person(s) known as the beneficiary or cestui que (pronounced set'-i-kuh) trust. The person transferring the property and creating the trust is usually referred to as the donor. The trustee usually has complete control of the property by reason of the trustee's legal title. The beneficiaries of the trust have equitable title, which is a right to have the legal title to the property transferred to them upon the performance of specified conditions. The trust agreement usually describes the rights of both the trustee and beneficiary, the conditions for transfer of legal title to the beneficiary and states whether the trust is revocable or irrevocable by the donor. Under the language of the Act, the "trust" is the employing unit.

1.12.2 Investigation

When it is represented on behalf of a business that it is owned and operated by a trust, the representation should be accepted and reports should be prepared in that manner. When the employing unit is a "trust," the records of the Commission should show the names of the trustees since all responsibility for management of the business is fixed in these people. The names of the beneficiaries of the trust need not be included in the Status Report. Individuals engaged by a trust company to perform services in connection with trust property are employees of the trust.

1.13 SUCCESSOR OF A DECEASED PERSON

This section discusses the aspects of the law that specifically apply to successors of deceased persons.

1.13.1 In General

The definition of "employing unit" names in the alternative the estate and the legal representative of a deceased person as the employing unit. Both types of employing units are considered separate employing units from the predecessor. The Commission will establish a new account under a new account number for an estate or for a legal representative of a deceased person who is a successor-employing unit. Commission accounting with respect to such a successor-employing unit is accomplished by styling the account to show both the name of the estate and the name of the legal representative of the estate. Since an estate has **equitable interest** it will always acquire the rate from the predecessor.

1.13.2 Investigation

Following the death of an "individual" employer, any one of several situations can exist. At the time of an investigation which occurs sometime after the death, more than one of these situations may have existed during the period between the death of the individual and the time of the investigation. Listed below are several possible situations.

1. The individual may have died intestate without administration of the estate.
    a. Texas law provides that whenever a person dies intestate, the person's estate shall vest immediately in the heirs at law, but with the exception that the estate shall be liable and subject in the hands of the heirs to the payment of debts of the intestate.
    b. The above statutory provision should be construed to have reference only to vesting of ownership in the business immediately after the death of the intestate. One cannot necessarily conclude that, immediately after the death of the individual, the business has been operated by and for the benefit of all the heirs. It is entirely possible that, by some agreement or settlement between the heirs, only a part of the heirs have come to be the owners and operators of the business. It might be represented that only a part of the heirs have been interested in the operation of the business.
2. The individual may have died intestate with administration of the estate.
    a. As set out in item "a" above, the estate of the deceased individual vests immediately in the heirs. However, upon the issuance of letters of administration upon the estate, the administrator has the right to the possession of the estate

and management of the affairs of the estate, subject to direction and control of the court, which appointed the administrator. The administrator cannot dispose of real estate without authorization by the court.

b. Letters of administration are issued by the clerk of the court after the court has entered an order finding that there is a necessity for an administration of the estate and the court has appointed an administrator. After the order of the court, the letters of administration are not issued to the administrator until the administrator has qualified by making the necessary bond, etc. The administrator can be construed to be the employing unit only after qualifying receives letters of administration. To determine the date that the administrator qualified the Probate Court file on the estate can be examined in the County Clerk's Office; particular attention should be given to the copy of the letters of administration.

c. It may be found that the letters of administration were issued very soon after the death of the individual employer. If the interim between the date of death and the date of letters of administration is a brief period, there should be no objection to showing the administrator as the immediate successor to the deceased individual. If this interim period extends over any considerable length of time, it may be necessary to recognize the heirs as the immediate successor to the deceased individual with a later acquisition by the administrator from the heirs. Should this possibility seem important, the facts will be submitted to the State Office for a decision.

3. The deceased individual had a will, which has been probated, but the letters of testamentary have not been issued.

   Immediately upon filing of an application for probate of a will in the County Court, the estate vests in the legatees or devisees under the will. These persons will be recognized as composing the employing unit in the absence of a representation that, in fact, the business is and has been operated by less than all of those persons. This possibility is the same as described above.

4. The deceased individual had a will, which has been probated, and letters testamentary have been issued. The executor or administrator under the will takes possession of the estate and assumes control of the business as executor as of the date letters testamentary are issued. The executor or administrator under the will can be considered the employing unit as of the date letters testamentary are issued or as of the date of death if only a brief period of time has elapsed between the date of the death and the date of the letters. Should there be any extended period between the two dates, it may be necessary to recognize the devisees and/or legatees as composing the employing unit. Should this possibility seem important, the facts will be submitted to the State Office for a decision.

5. An executor (executrix), i.e., one not designated in the will as an independent executor (executrix), is required to post bond with the court. He (or she) must obtain permission of the court to either sell or obligate the assets of the estate.

An independent executor (executrix) must be so designated in the will. He (or she) posts bond only if so directed by the will. The executor operates free from control by the court except that an inventory and appraisal of assets of the estate must be filed. An independent executor may either sell or operate the business at will.

6. The Commission will recognize the sole heir, such as a surviving spouse, as the employing unit succeeding a subject individual employer if:
   a. A representation is made to that effect, and
   b. The employer died intestate and there has been no administration of the estate other than the filing of an affidavit of heirship, or
   c. The employer died testate, the sole heir was named as independent executor (executrix), and there has been no probate proceedings other than the filing of an inventory and appraisal of assets with the court.

1.14 TRUSTEE IN BANKRUPTCY

This section discusses the aspects of the law that specifically apply to trustees in bankruptcy acting as employing units.

1.14.1 In General

A trustee in bankruptcy and a receiver in receivership are considered the same employing unit as the immediate predecessor. This means that the trustee need file only an amended Status Report to record the change in operations when he/she begins to operate the business; and that the style of the predecessor's account will be changed on Commission records, the account number remaining the same.

NOTE: The trustee is responsible for filing reports and payment of taxes (and penalties) only for that period of time during which he/she operated the business.

1.15 OTHER RELATED ITEMS

1.15.1 Separate And Community Property

This section discusses the aspects of the law that specifically apply to separate and community property.

1.15.1.1 Separate Property

Section 3.001 of The Texas Family Code provides as follows:

a) A spouse's separate property consists of:
   1) the property owned or claimed by the spouse before marriage;
   2) the property acquired by the spouse during marriage by gift, devise, or descent; and
   3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Although the above section of the Family Code very clearly sets forth what constitutes the separate property of the couple, it does not address who has control over the separate property. Section 3.101 of the Texas Family Code provides, however, that each spouse has the sole management, control, and disposition of his or her separate property. Thus, it may be seen that a married individual has the exclusive right to manage and control his/her separate property, and there are no restrictions on his/her engaging in any kind of business transaction with respect to his/her separate property. The joinder of the spouse is not necessary to convey title to his/her separate property. In the event property is acquired in trade for separate property this too would constitute separate property to the same extent as the original property.

1.15.1.2 Community Property

Community property consists of property acquired by the couple jointly after their marriage and property acquired by either of them after their marriage by means other than those set forth in Subsections 1, 2, and 3 of Section 3.001 of the Family Code. Section 3.003 of the Texas Family Code provides that property possessed by either spouse during or on dissolution of marriage is presumed to be community property. This presumption, however, may be rebutted by evidence showing that the property is separate property.

Section 3.102 of the Texas Family Code Provides as follows:

a) During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to:
    1) personal earnings;
    2) revenue from separate property;
    3) recoveries for personal injuries; and
    4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.

b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.

c) Except as provided in Subsection (a) of this Section the community property is subject to the joint management, control, and disposition of the couple, unless the spouses provide in writing by power of attorney or other agreement.

As may be seen from the above Section of the Family Code, there are two classes of community property now recognized. The first has been referred to as Special Community Property and is subject to the full management, control, and disposition of the spouse to whom it is attributed. The other class is what may be known as General Community Property and is subject to the joint management and control of the couple unless the spouses have agreed otherwise.

1.15.1.3 Investigations

Where there is a claim of separate property by either individual, all of the available facts must be considered. Knowledge of the following may assist in making a determination:

1. How the married individuals acquired the original capital invested in the business,
2. If the property was kept separate from community property and not commingled,
3. How the profits from the operation of the business are handled. Have they been kept separate and apart from the original investment or capital assets of the business? If an attempt has been made to keep profits separate from capital investment, describe the manner in which this attempt has been made,
4. If there has been any representation or evidence that a gift has been made by the married individuals to their share of the profits. If there has been a gift, what was the nature of the gift? When and how was it made?,

5. In whose name the bank account was carried for the business. How is this bank account handled? What deposits are made to the bank account and for what purposes are withdrawals made from the account? Who is authorized to make withdrawals?

1.15.2 Workforce Development Boards

This section discusses the aspects of the law that specifically apply to establishing UI Tax liability of Workforce Developments Boards.

1.15.2.1 Background

The 74th Legislature authorized the formation of Local Workforce Development Boards (LWDB) beginning July 1, 1996.

1.15.2.2 Board Formation

LWDB's can form as corporations or unincorporated associations. If a LWDB is formed, it will assume the responsibilities of the Private Industry Council (PIC) under the provisions of the Job Training Partnership Act.

1.15.2.3 Board Certification

A LWDB's application will be reviewed by the Texas Workforce Commission and forwarded to the governor for approval and certification.

1.15.2.4 Staffing

A LWDB may employ staff to support its functions. However the staff must be separate from and independent of any organization providing workforce education or workforce training and services in the workforce development area.

1.15.2.5 Definitions

Chief Elected Officials (CEOs)

A. Mayors
    1. Mayor of each city with a population greater than 100,000 in the workforce development area; or
    2. If (1) is not applicable, the Mayor of each city with a population greater than 50,000 in the workforce development area; or
    3. If (2) is not applicable, the mayor of the largest city in the workforce development area.
B. All County Judges in the workforce development area.

Board (WDB) is a local workforce development board created under the Workforce and

Economic Competitiveness Act. Board formation will be decided by the CEOs of a workforce development area. Members of the Board include individuals representing both the private sector and local government.

Presiding Officer is an individual selected from the members of the board who represent the private sector.

Workforce Development Area is a geographic area designated by the governor based upon recommendations from the Texas Council on Workforce and Economic Competitiveness. There are 28 areas in the state.

1.15.2.6 Classification

For the purposes of the TUCA a LWDB can be classified as

A. A Corporation if the LWDB's are registered with the Secretary of State
B. Other if the LWDB is not registered with the Secretary of State or
C. 501(c)(3) Non-Profit Reimbursing – if the LWDB is a corporation that has applied and received a 501(c)(3) exemption from the Internal Revenue Service.

If a Private Industry Council (PIC) is responsible for administration of the Job Training Partnership Act it becomes the LWDB, a new UI Tax account may not be required if the PIC is registered with TWC and the LWDB assumes the PIC's corporate charter. If this occurs the EMF status record will be updated to reflect the corporate name change.

1.15.2.7 Investigation

The State Office Tax, Status Section will contact each certified LWDB and provide each board with a status report. Status will review the completed status report and establish a UI Tax account for each LWDB that meets TUCA liability criteria.

If the Status Section cannot obtain a status report then a field investigation to obtain a completed status report will be issued. Field tax will proceed with the investigation on the same premise as any other status investigation.

Personal Liability: A member or former member of a local WDB may not be held personally liable for any claim, damage, loss, or repayment obligation of federal or state funds... unless the act or omission that causes the claim, damage, loss or repayment obligation constitutes official misconduct on the part of the board member, willful disregard of the requirements of the Act on the part of the board member, or gross negligence on the part of the board member.

2 EMPLOYMENT

This chapter discusses the general aspects of the law that apply to employing units.

2.1 Services Included In Employment

This section discusses the aspects of the law that specifically apply to employment.

2.1.1 Definition of Employment

Under Section 201.041:
In this subtitle, 'employment' means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.

This subsection of the Act contains the general definition of employment. The definition is essentially the master-servant concept of the English Common Law.

For rulings involving the general definition of employment, see Tax Supplements 34-74, 44-74, 54-74, 77-74.

2.1.2 Analysis of Definition of Employment

Tax is collected on the basis of wages paid for employment. Benefits to claimants under the Act are payable on the basis of wages received for employment from subject employers. Therefore, an understanding of the term 'employer' is a prerequisite for understanding other provisions of the law.

There are three essential elements to the definition of employment: first - service, second - wages, and third – direction and control.

2.1.3 Services - Essential to Employment

The services, which are essential to the definition of employment, are personal services. A person who agrees to perform personal services may have specific or implied permission to engage the services of a helper, in which event the helper is in employment if the person who engages the helper is in employment. (See Paragraph 1.2.5, 'Individuals Employed to Assist'.)

The agreement under which a person agrees to perform service is known as a contract of hire. When service is performed as a gratuity with no requirement that services be performed or any understanding that they will be performed, it cannot be said that the services are performed under a contract of hire. A gift in appreciation for gratuitous services cannot be considered wages. However, any gift, including cash, to an individual under contract of hire must be considered wages.

Services performed by a child under the age of twenty-one for a parent are specifically excluded from the definition of employment. Service performed by a son or daughter over the age of twenty-one constitutes employment if the service is performed under a contract of hire or because of an understanding that wages for the service will be paid. However, the payment of money by a parent to a child may actually constitute only a support payment with no services being expected from the child. In such a situation, all facts should be considered prior to making a ruling.

A valid contract of hire may be either written or oral. Either type may state the terms of the agreement, but it is theoretically possible for the terms of the agreement to be implied by the relationship between the parties or other pertinent facts.

Even though services are essential to employment, it may not be necessary that actual service be performed. The contract of hire may be of such a nature that there is a continuing obligation by one party to perform services for the second party, if so required by the second party. An individual may be absent from work on a day and yet be in employment on that day by reason of circumstance that the individual is required to return to work under the terms of the contract of hire. An individual absent from work during a day while on vacation or sick leave could be considered as being in employment on that day. The following three examples will expose some of the problems in analyzing the employment status of an individual on a day when no actual service is performed; actual service as used here means actual work:

EXAMPLE 1: A pharmacist is hired by the owner of a drug store at a salary of $4,700 per month with the understanding that the customary workweek is Monday through Saturday.

The pharmacist does not perform any physical work on Sundays but it appears clear that there is an implied understanding that he/she is to return to work on Monday. Precedent rulings support the position that this obligation constitutes a form of service and that the pharmacist is in employment on Sunday. There is a continuing relationship (employment) which has not been terminated by discharge or resignation.

EXAMPLE 2: Mr. X is hired by Company A to work six days each week, Monday through Saturday, for compensation at the rate of $5.15 per hour. It is understood that he is to receive two weeks' vacation with pay each year and that, after the first year of service, sick leave with pay accumulates to a maximum of two weeks each year.

It would not appear to be important whether Mr. X was to be paid by the month, by the week, or on an hourly basis. The expressed terms of the contract anticipate

vacation and sick leave without change in the employee's relationship since he will return to work under the terms of the contract of hire. The continuing employment relationship and obligation to Company A during absence from work would be presumed to the extent that Company A could require his return to work at its pleasure. It may be safely presumed that Mr. X is in employment on each of the days during his vacation or sick leave.

EXAMPLE 3: A person is employed **OCCASIONALLY** to check groceries in a grocery store at the rate of $5.15 per hour. The person is paid for the actual number of hours worked and does not receive pay for any time absent.

Under these circumstances, the Commission usually holds that the worker is in employment only with respect to those days actually worked. The type of employment and the rate of pay indicate that each period of employment is the result of a separate agreement, and there does not appear to be the type of continuing relationship as described in Example Number 1.

The Commission believes that it is logical that a distinction be recognized between Example Number 1 and Example Number 3. The conclusion in Example Number 1 is applicable to the situation where the employee is paid by the week, month or year and might also be applicable to a full-time, or part-time, regular employee paid at a daily or hourly rate. The conclusion reached in Example Number 3 is applicable where the employee is paid by the hour or by the day or at piecework rates but works intermittently, and a new hiring agreement occurs each time the worker is needed.

2.1.4 Continuous Employment

As a general principle, an employee is considered to be performing service each day of each week during the period of time that there is an employment relationship between the employee and the employer. The relationship exists from the day employment began through the day that it was discontinued by discharge, death, resignation, or an alteration in the terms of the employment agreement, making the individual an independent contractor. This position of the Commission is supported by ruling of the Internal Revenue Service.

Internal Revenue Service, which collects the tax imposed by FUTA promulgated Revenue Ruling 55-19 in 1955 on the subject of proper interpretation of Section 3306(a) of the Federal Unemployment Tax Act. This ruling, particularly with respect to part-time and casual laborers, is based primarily on the continuation of an “employer-employee relationship” rather than the concept of “employment” (i.e., service, remuneration, and control), even though the term “employment relationship” is also used in the ruling. In the Tax Department’s opinion, the IRS position can be more firmly defended under the wording of the FUTA than could an identical position be defended under the wording of Subsection 19(g)(1) now 201.041 of the TUCA. Since an employer liable under FUTA is also a subject employer under the TUCA, it will sometimes be advisable for TWC to assert tax liability under subsection 19(f)(5) now 201.025 rather than subsection 19(f)(1) now 201.021.

Revenue Ruling 55-19 being complete and unambiguous, is reprinted below: Circumstances under which a person may be regarded as an employer within the meaning of section 1607(a) of the Federal Unemployment Tax Act, and accordingly liable for tax imposed under the Act.

Inquiries have been received regarding the method to be used in arriving at a weekly count of employees for purposes of determining liability of an employer under certain conditions, particularly where part-time employees are involved. The following questions and answers illustrate the application of the foregoing provisions of the Act.

Question: Are employees considered to be in the employ of an employer during the entire week where, because of the long daily hours of employment, the employees are granted 1 or 2 days of absence each week and substitutes replace the absent regular employees?

Answer: The regular employees should be considered to be in the employ of the employer during the entire week. The basis of this conclusion is that the employer-employee relationship, which exists between the parties, does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer- employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week.

Question: Is the method or frequency of payment considered to be a factor in determining whether or not an employee is 'regular' or 'permanent'?

Answer: The basis on which compensation is paid is not a factor to be considered in determining whether a person had the requisite number of employees for the prescribed period to qualify as an employer under the Act.

Question: Would a worker who is paid on a daily basis always be construed to be 'in employment' on only a day-to-day basis?

Answer: The existence of an employment relationship is the controlling factor. Whether or not an employment relationship, once established, continues depends upon the intention of the parties. For example, if the agreement between the parties requires the performance of services on 1 day each week, the employment relation continues and the employee should be counted in determining liability under the Act even though he/she is paid at the end of each day. On the other hand, where an employee works 1 day, and the understanding between the parties is that the employer will communicate with the employee if and when his/her services are needed and that the employee will work if not otherwise engaged, the employment relationship is terminated at the end of the day worked. In the latter instance, the employee should be counted in the employ of this employer only on the days he/she actually performed services.

See also Tax Supplement 176-74

2.1.5 Wages -- Essential to Employment

'Wages' are the reward of labor and always come from contracts, expressed or implied. Any doubt that wages are an essential to 'employment' was resolved by court which gave its whole consideration to the question of whether wages were essential to a finding of 'employment' under the Act. The court recognized that the law used the term 'wages' in place of 'contract of hire' but held 'that the purpose and meaning of the Texas Unemployment Compensation Act is that a person shall receive some remuneration, in the form of wages, salary or non-cash remuneration for services performed by such individual before he shall be considered as performing services under a 'contract of hire,' expressed or implied. . . .' See Tax Supplement 176-74.

2.1.6 Control -- Essential to Employment

Under the language of the statutory definition of 'employment,' if services are performed for wages or under a contact of hire, the individual 'shall be deemed to be in employment subject to this Act unless and until it is shown to the satisfaction of the Commission that such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact.' This quotation seems to place upon the employing unit the whole burden of proof of the amount of control or direction over the performance of the service. The Commission, in court, might rest its case on a showing of only the first two ingredients - service and wages. Such an administrative practice by the Commission would, however, finally result in a false claim of employment status in a large number of cases since many individuals perform personal services for remuneration under circumstances which leave them free of control and direction over the performance of such services, and are, in fact, independent contractors.

The meaning of control as used in the Act encompasses the right to control even though control is not actually exercised. If the employer controls the manner and means by which the work is performed or has the right to do so, the person performing the work is in employment. If the employer merely has a right to control and determine the extent or quality of the end result of the services, he/she does not have the type of control, which creates an employment relationship. An independent contractor has a right to determine the ways and means and methods of accomplishing a project and is responsible to the person who engages him/her only to the extent of delivering a finished product which meets the agreed specifications.

It is the responsibility of the Commission to determine whether or not a relationship constitutes employment. The statements made by the parties involved should be given due weight, but often they do not know the legal standing of the relationship between the employer and the person performing the work. Details of the relationship will be determined by detailed questioning of the principals, an examination of written documents, both with respect to the terms of the hiring agreement and the manner in which the work has been actually performed.

2.1.7 Agent-Drivers or Commission-Drivers

Under Section 201.042:

In this subtitle, 'employment' includes service:

1) as an agent-driver or commission-driver who delivers a meat product, vegetable product, fruit product, bakery product, laundry, dry cleaning or beverage except milk, if:
   A) the service is performed for remuneration;
   B) the employment contract provides that the individual personally performs substantially all of the service;
   C) the individual performing the service does not have a substantial investment in a facility used in the performance of the service, other than in a facility for transportation; and
   D) the service is part of a continuing relationship with the principal and is not a single transaction;

COMMENT: An agent-driver or commission-driver may operate his/her own truck or a truck belonging to his/her employer. The driver serves customers designated by his employer as well as those solicited on his/her own. Compensation is either a commission on sales or the difference between the purchase price for the product and the selling price.

In the case Jearl Thorpe, Inc., doing business as Minutemen Gourmet Foods, decided March 9, 1988, the Commission held that agent-drivers who were engaged in route sales and delivery of frozen meat, poultry, fish, and gourmet food products are in employment. In that case, the Commission rejected the appellant's argument that the same services also fell under Section 201.070 of the Act. Upon reviewing the legislative history of both of these two subsections, one an exemption from the definition of employment and the other an inclusion within the definition of employment, the Commission held that because Section 201.042(1) is the more narrowly drawn statute, its specific terms apply.

2.1.8 Service of Salesman

Section 201.042

Individuals performing sales services covered by this section of the law are in employment regardless of whether direction or control is exercised. Section 201.042 reads as follows:

In this subtitle 'employment' includes services:

2) of a traveling or city salesman, except as provided in Section 201.070, an agent-driver, or a commission-driver, who, on a full-time basis, obtains for the individual's principal, except for sideline sales activities for another person, orders from a wholesaler, retailer, contractor, or operator of a hotel, restaurant, or similar establishments for merchandise for resale or supplies for use in the business's operations if:

   A. the employment contract provides that the individual personally performs substantially all of the service;

   B. the individual does not have a substantial investment in a facility used in the performance of the service, except a facility for transportation: and

   C. the service is part of a continuing relationship with the principal and is not a single transaction.

COMMENT: Traveling or city sales representatives who sell to retailers or to the others specified in the statute and operate away from the premises of the employer, and who are generally compensated on a commission basis, are in employment under Section 201.042(2), regardless of whether they are subject to or are free from control over the details or methods of their work.

Previous Commission decisions have held that 'full-time basis' does not pertain to any specific number of hours. Rather, it means substantially all of the business activities of the individual in question.

In order for a traveling or city sales representative to be included within this subsection, his/her principal business activity must be devoted to the solicitation of orders for the employer. Thus, the multiple-line sales representative generally is not within this subsection of the Act. However, if the sales representative solicits orders primarily for one principal, he/she is not excluded from this subsection of the Act solely because of such sideline sales activities on behalf of one or more other persons. In such a case, the sales representative is within Section 201.042(2) with respect to the services performed for the principal or the primary entity for whom he/she solicits orders, and not with respect to the sideline services performed for other persons.

The following examples illustrate the application of Section 201.042(2). Assume, for the sake of these examples, that neither the sales representative nor the wholesaler maintains a regular or seasonal place of business at a trade market facility.

EXAMPLE 1: Sales representative A's principal business activity is the solicitation of orders from retail pharmacies on behalf of X Wholesale Drug Company. A also occasionally solicits orders for drugs on behalf of the Y and Z Companies. A is within Section 201.042(2) with respect to services for the X Company but not with respect to services for either the Y Company or the Z Company

EXAMPLE 2: Sales representative B's principal business activity is the solicitation of orders for retail hardware stores on behalf of the R Tool Company and the S Cooking Utensil Company. B regularly solicits orders on behalf of both companies. B is not within this subsection of the Act (traveling or city sales representative) with respect to the services performed for either the R Company or the S Company.

The term 'employment contract' as used in Sections 201.042(1)(B) and 201.042(2)(A), means an arrangement, formal or informal, under which the particular services are performed. The requirement that substantially all of such services are to be performed personally means that no material part of the services will be delegated to any other person by the individual who undertakes under the contract to perform such services.

The reference to facilities in Section 201.042(1)(C) and 201.042(2)(B) includes equipment and premises available for the work or enterprise as distinguished from education, training, and experience. The term facilities does not include such tools, instruments, equipment, or clothing, as are commonly or frequently provided by employees. An investment by an individual in an automobile used primarily for transportation in connection with the performance of services for another person has no significance under the sections, since such an investment is comparable to outlays for transportation by an individual performing similar services who does not own an automobile. Moreover, the investment in facilities for transportation of goods or commodities to which the services relate is to be excluded in determining whether the investment is substantial. However, if the individual has a substantial investment in other facilities, he/she is not an employee under either Section 201.042(1) or Section 201.042(2).

Finally, if the services are not performed as part of a continuing relationship with the service-recipient, but are instead in the nature of a single transaction, the individual performing services is not in employment. The fact that services are not performed on consecutive workdays does not negate the existence of a continuing relationship. However, if the services are part of a single transaction then the worker is not in employment.

2.1.9 Location of Service / Inter vs. Intra State Employment

Section 201.043 of the Act details the performance of service both within and outside the state of Texas.

If service is performed entirely within Texas, the service is said to be localized within Texas. The person performing the service is not engaged in multi-state employment, and Texas is the state of jurisdiction.

If a person performs service both within Texas and outside of Texas, but the service performed outside of Texas is incidental to the service performed within Texas (for example, is temporary or transitory in nature or consists of isolated transactions), the person's service is said to be localized in Texas. Again, the person is not engaged in multi-state employment, and Texas is the state of jurisdiction.

If service is not localized in Texas or in any other state, and the person performed services both in Texas and outside of Texas, the person is said to be in multi-state employment.

If a person is engaged in multi-state employment, as defined above, the service is considered employment under the jurisdiction of Texas if the employer's base of operations is located in this state. The base of operations is considered to be where the worker returns after performing the work, where the worker receives instructions from the employer, or where the worker receives remuneration for the service performed.

In the situation described above, except that the employee does not have a base of operations (such as a traveling salesman), the fact, which determines jurisdiction, is the location of the place from which the employee's service is directed or controlled. If such location is in Texas, Texas has jurisdiction. However, if the base of operations and the place from which the service is directed or controlled is not in any state in which some part of the service is performed, the location of the employee's residence determines the state of jurisdiction. The employee's residence is construed to be the permanent residence rather than temporary addresses while traveling.

If an employee's services are not localized in any state, and the worker belongs to a class of employees who are required to travel in performance of their duties and the employee's base of operations is in Texas, Section 201.043 authorizes services to be Texas employment even though all of the employee's services are performed outside of Texas (but within the United States). This is likewise true for an employee in this category if the employee does not work from a base of operations but is directed, or controlled from a location, which is in Texas.

If the service of an individual is not covered by a provision of Section 201.043 of the Act, and it is not service performed on or in connection with an American vessel or an American aircraft, the service is Texas employment if contributions are not required under the unemployment compensation law of any other state, provided:

1. The individual is a resident of Texas.
2. The Commission approves an election by the employer that the services shall be deemed employment under the Texas law.

2.1.10 Reciprocal Arrangements - Other States

Section 201.044 and Section 211.001 of the Act authorize the Commission to enter into agreements with other states to determine the state of jurisdiction of services performed by individuals who customarily perform service in more than one state. Texas has entered into two such agreements: The Interstate Reciprocal Coverage Arrangement and the Interstate Maritime Reciprocal Arrangement. These agreements and arrangements were designed to simplify an employer's problem regarding where to report wages. It is the Commission's position that an application filed by an employer under one of these arrangements with respect to the specified type of services should be considered on its merits and approved or disapproved under the terms of the reciprocal agreement with other states and supersedes the standard test of employment outlined in Section 201.043. However, some states are not subscribers to the interstate agreements, and some of those who are subscribers will not honor applications filed under the interstate arrangement if a state of jurisdiction can be determined by application of the standard test of employment.

For a complete understanding of the Interstate Reciprocal Coverage Arrangement, read Commission Rule 815.114, the wording of which is taken from the actual agreement which Texas entered into with the other states who are subscribers. All states are subscribers to the arrangement with the following exceptions:

Alaska	Kentucky	New Jersey
Connecticut	Mississippi	New York
Puerto Rico		

2.1.11 Maritime Reciprocal Arrangement

The agreement known as the Interstate Maritime Reciprocal Arrangement was entered into between Texas and other states under the authority of Section 211.003 of the Act. Under this arrangement, an employer may report wages of maritime employees to the state in which the company's operating office is located. That is, the office, which supervises, manages, directs, and controls the vessels on which the employees perform service. Applications by employers under this arrangement are submitted to the State Office Status Section for handling and approval, and inquiries about the arrangement should also be directed to this office. The subscribers to the Interstate Maritime Reciprocal Arrangement are as follows:

Alabama	Alaska	California	Connecticut
Florida	Illinois	Iowa	Louisiana
Maine	Maryland	Missouri	Nebraska
New Jersey	New York	Ohio	Pennsylvania
Puerto Rico	Rhode Island	Tennessee	Texas
Virginia	Washington	West Virginia	Wisconsin

2.1.12 American Vessel/Aircraft (service on)

Section 201.045 of the Act pertains to service performed on or in connection with an American vessel or an American aircraft under a contract of service which is entered into within the United States or during the performance of the service if the vessel or aircraft touches at a port in the United States. Services performed in connection with such vessel or aircraft when outside the United States provided the vessel or aircraft is ordinarily and regularly supervised, managed, directed, and controlled from an operating office located in Texas, are considered Texas employment. This statutory provision is very similar to the terms of the Interstate Maritime Reciprocal Arrangement.

2.1.13 Employment to Assist Employee or Agent

Under Section 201.046:

a) An individual employed to perform or to assist in performing the work of an employee or agent of an employing unit is employed by that employing unit for purposes of this subtitle if the employing unit has actual or constructive knowledge of the work.

b) Subsection (a) applies without regard to whether the individual is hired or paid directly by the employing unit or by the employee or agent.

2.1.14 Farm and Ranch Labor as Employment

Under Section 201.047:

A) Farm and ranch labor is employment for the purposes of this subtitle if the labor:
   1) is performed by a seasonal worker employed on a truck farm, orchard, or vineyard;
   2) is performed by a migrant worker:
   3) is performed by a seasonal worker who:
      a) is working for a farmer, ranch operator, or labor agent who employs a migrant worker; and
      b) is doing the same work at the same time and locations as the migrant worker;
   4) Is performed and the laborer is employed by an employing unit that:
      a) pays wages in cash of $6,250 or more for the labor during a calendar quarter in the calendar year in which the labor is performed or the calendar year preceding that year; or
      b) employs three or more individuals in farm and ranch labor for a portion of at least one day during at least 20 different calendar weeks of the calendar year in which the labor is performed or the calendar year preceding that year.

B) Wages paid for services described in Subdivision (a)(1), (2), or (3) are included in determining the wages paid for the purpose of Subdivision (a)(4).

2.1.15 Foreign Service

Services performed in a foreign country by a United States citizen as an employee of an American employer is defined as employment. The term ‘American employer’ is specifically defined in section 201.043. The term ‘United States’ is specifically defined in section 201.011. The conditions of such coverage are outlined in detail in Section 201.043. The foreign countries to which these sections of the law are not applicable are the Virgin Islands and Canada.

It is not known why the provision does not pertain to the Virgin Islands. It does not pertain to Canada because Canada is a country contiguous to the United States with which we have an agreement relating to unemployment compensation. Mexico is a country contiguous to the United States, but we do not have an agreement with that country relating to unemployment compensation. Regarding service in Guam; amounts paid to Guamanian citizens, not otherwise citizens of the United States, for services performed on the island of Guam for an American employer are not subject to the TUC Act.

2.1.16 Effect of Previous Determination

Section 213.011 of the TUCA states in part:

> " (a) Subject to subsection (c), it is reasonable for an employer to rely on a court ruling or commission determination that, for the purposes of this subtitle, service performed by an individual, including service in interstate commerce, is not employment under this subtitle if:
>
> (1) the ruling is:
>
> (A) a judicial decision or precedent, including a published opinion, from a court in this state; or
>
> (B) a commission decision involving the employer as a party or a subject; and
>
> (2) the ruling or determination has not been reversed or otherwise invalidated.
>
> (b) The commission shall relieve an employer that reasonably relies on a ruling or determination described by Subsection (a) from penalties, interest, or sanctions under this chapter or Chapter 214 that result from a subsequent ruling or determination that the service in question is employment."

TWC has determined that previous commission determinations can include audit decisions, b-27 decisions, Rule 13 decisions or other similar decisions.

These requests will be handled by the Regional Tax Manager and documented on FTC.

Any request for abatement action under this provision will be forwarded via e-mail to Tax Abatements.

2.2 Services Excluded

This section from Employment discusses the aspects of the law that apply to services excluded from employment.

2.2.1 Service Eligible Under Act Of Congress

Under Section 201.061:

In this subtitle, 'employment' does not include service for which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress.

COMMENT: Section 201.061 of the Act excludes from the definition of employment service performed by an individual who is covered under an unemployment compensation system established by an act of Congress. The only known example of such an act of Congress is the Railroad Retirement Act. If the Railroad Retirement Board rules that an employing unit is subject to the provisions of the Railroad Retirement Act, the Commission honors that decision and takes the position that the employees of that employing unit are not in employment. If an employing unit states that it is covered under the Railroad Retirement Act, the Accounts Examiner can verify the information by calling the Railroad Retirement Board number on the "Contact Us" page of their website at www.rrb.gov.

2.2.2 Other State/Federal UI Agencies

Under Section 201.062:
In this subtitle, 'employment' does not include service under an arrangement that is between the Commission and the agency that administers another state's or a federal unemployment compensation law and that considers the service for an employing unit during the period covered by the employing unit's approved election to be performed entirely within the agency's state or under the federal law.

COMMENT: Section 201.062 applies to individuals who are working in Texas and administering the unemployment compensation laws of other state and federal agencies. While the services of these workers may constitute employment in the 'home' states, it is not covered employment for Texas purposes.

2.2.3 Certain Government Service

2.2.3.1 Elected Official

Subsection 201.063(a) states:
"In this subtitle, 'employment' does not include:.

1) service in the employ of a political subdivision or an instrumentality of a political subdivision that is wholly owned by one or more political subdivisions:

   A) as an elected official";

COMMENT: This section exempts from the definition of employment and coverage under the Texas Unemployment Compensation Act services performed as an elected official.

This section of the law exempts those who hold an office, which is normally filled as the result of a vote. It does not exclude the deputies of an elected official because they are not elected officials, but are hired or appointed by the elected official to assist in his/her work or to act on his/her behalf. This exemption speaks of the office rather than the individual occupying it. Accordingly, one who is appointed on an interim basis to fill an elective office would also be exempt under this subsection.

2.2.3.2 Member of a Legislative Body

Subsection 201.063 (a) states:

"In this subtitle, 'employment' does not include:.

1) service in the employ of a political subdivision or an instrumentality of a political subdivision that is wholly owned by one or more political subdivisions:

   B) as a member of a legislative body";

COMMENT: This subsection exempts services performed by a member of a state legislature or a city council or some other body which has the power to make, promulgate, or pass legislation. This particular exemption, although permitted by federal law, is to some extent redundant because in the state of Texas, all members of legislative bodies are also elected officials.

2.2.3.3 Member of the Judiciary

Subsection 201.063(a) states:

"In this subtitle, 'employment' does not include:.

1) service in the employ of a political subdivision or an instrumentality of a political subdivision that is wholly owned by one or more political subdivisions:

   C) as a member of the judiciary";

COMMENT: This subsection exempts services performed as a member of the judiciary.

This subsection exempts services performed as a justice of the Texas Supreme Court, a justice of the Court of Criminal Appeals, a justice of the Court of Civil Appeals, a judge of a District or County Court, a Justice of the Peace or a judge of a Municipal or Corporation Court. It would also exempt from coverage judges of special district courts such as domestic relations courts or criminal district courts. In addition, it would exempt from coverage services performed as the judge of a county court at law or county criminal court. It would not exempt the clerks or bailiffs of such courts, however.

2.2.3.4 Temporary Employee in Case of Emergency

Subsection 201.063(a) states:

"In this subtitle, 'employment' does not include:.

1) service in the employ of a political subdivision or an instrumentality of a political subdivision that is wholly owned by one or more political subdivisions:

   D) as a temporary employee in case of fire, storm, snow, earthquake, flood, or similar emergency";

COMMENT: This subsection exempts services performed as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency. Employees who serve temporarily as a result of the various natural disasters are exempted. The term 'similar emergency' does not include heavy loads of routine work such as a 'blizzard of paperwork.'

2.2.3.5 Nontenured or Advisory Position

Subsection 201.063(a) states:

"In this subtitle, 'employment' does not include:.

1) service in the employ of a political subdivision or an instrumentality of a political subdivision that is wholly owned by one or more political subdivisions:

   E) in a position that is designated under law as a major nontenured policy-making or advisory position or a policy-making or advisory position that ordinarily does not require more than eight hours of service each week;"

COMMENT: This subsection exempts services performed in a position which is designated as a major, nontenured policy-making or advisory position, the performance of the duties of which ordinarily does not require more than eight (8) hours per week.

A nontenured position is one, which is not covered by merit system or civil service laws or rules with respect to the duration of service or the length of the appointment.

The word 'major' in the phrase 'major nontenured policy-making or advisory position' refers to high level government positions which are filled by appointment by either the chief executive of a political entity, such as a governor, a mayor, a city council, or a county commissioner's court. A major position would be one, which involved responsibilities affecting the entire political entity. The term 'policy-making' refers to determining the direction, emphasis, and scope of action in developing and administrating governmental programs.

In instances in which the law or ordinance does not specifically categorize or label a position as a major, non-tenured, policy making or advisory position, other pertinent factors may be considered. Factors such as job descriptions, the qualifications of the individuals considered for or appointed to the position, and the responsibilities involved should be taken into account in determining the character of the position for the purpose of applying the exemption.

The term 'advisory' refers to a position in which one advises an established government agency officer with respect to policy, programs, and administration without having the authority to implement the recommendation.

Note: School Superintendents may not come under this exemption. The burden of proof is on the School District to provide proof (documentation) under their law that the School Superintendent does make policy decisions in order for the wages to be exempt.

2.2.3.6 Election Workers

Section 201.063(a) states:

"In this subtitle, "employment" does not include:

1) service in the employ of a political subdivision or an instrumentality of a political subdivision that is wholly owned by one or more political subdivisions:

   F) as an election official or worker if the remuneration received by the individual during the calendar year is less than $1,000; (effective 9/1/2013)

Background: A precedent-setting Rule 13 Hearing decision dated January 23, 1990, TD-89-123-0589, held that the services of election workers were exempt from "employment". In 2013, the 83rd legislature amended Section 201.063(a)(1) of the Texas Unemployment Compensation Act (TUCA) with the passage of HB 983, which states that "employment" does not include service as an election official or worker if the remuneration received by the individual during the calendar year is less than $1000.

COMMENT: Because the law is effective September 1, 2013, only wages paid September 1, 2013 through December 31, 2013 will be used to determine if an election official or worker should be reported for calendar year 2013. Starting January 1, 2014, all wages paid during a calendar year will be used to determine if an election official or worker meets the definition of "employment" under Section 201.063(a)(1).

This subsection exempts services performed by an election official or election workers when the remuneration received for these services is less than $1000 in the calendar year. Elections officials/workers can include by are not limited to: election judges, associate election judges, voting clerks, or other personnel used during a regular/special election, etc.

Regular or administrative employees employed by an election authority (state, county, school district, etc.,) holding the election are in employment.

2.2.3.7 Service for Foreign Governments

201.063(a) states:

"In this subtitle, 'employment' does not include:.

2) service in the employ of a foreign government, including service as a consular or other officer or employee or as a non-diplomatic representative;

3) service in the employ of an instrumentality wholly owned by a foreign government if:

   A) the service is similar to service performed in a foreign country by an employee of the United States government or an instrumentality of that government;

   B) the United States secretary of state has certified to the United States secretary of the treasury that the foreign government grants an equivalent exemption for

similar services performed in the foreign country by an employee of the United States government or an instrumentality of the United States government; or"

For specific details regarding this exclusion, refer to Section 201.063. Any inquiry concerning employment status of this nature should be directed to the State Office Status Section for a determination.

2.2.3.8 Service for the United States Government

Under Section 201.063(a) states:

"In this subtitle, 'employment' does not include:.

4) service in the employ of the United State government or an instrumentality of the United States exempt under the United States Constitution from the contributions imposed by this subtitle."

COMMENT: Under Section 201.063(a)(4), service performed in the employ of the United States Government is excluded from the definition of employment.

Texas has no authority to levy unemployment compensation taxes against an instrumentality of the United States without specific statutory permission by the Congress of the United States.

Although National Banks are federal instrumentalities, they are not wholly owned by the United States nor are there any provisions of law exempting service for such banks. Services for Production Credit Associations are also included.

Although officers' dining facilities and military exchanges, as they are ordinarily operated at military and naval bases, are instrumentalities of the federal government, no exclusion is applicable to concerns or business establishments, which are privately operated on military bases. Such exclusion does not apply to establishments directly under the control and direction of the Armed Forces and to those owned either by branches of the Federal Government or by the various officers in the Armed Forces who are stationed at a particular military or naval base and who own membership in the Club or Officer's Mess. Should a representative encounter any type of establishment or employing unit at a military or naval base that is different from Officer Messes as they are ordinarily operated, a statement as to the manner of operation should be submitted to the State Office Status Section for an opinion.

2.2.4 Domestic Service

Section 201.064:

In employer under Section 201.027.

Domestic employment is defined as:

Work performed in a private home by a baby sitter, butler, caretaker, chauffeur,

companion, cook, footman, furnaceman, gardener, governess, groom, handyman, housekeeper, houseman, janitor, laundress, maid, nursemaid, seamstress, sitter, waiter, watchman, or valet.

COMMENT: The term 'private home' as used in Section 201.064 is defined as the place of abode of an individual or family. If the home is utilized primarily for the purpose of supplying board and/or lodging to the public as a business enterprise, such as a bed and breakfast operation, it ceases to be a private home.

Such services as those described above, although excluded from regular employment, are included in domestic employment as described in Section 201.027.

Concerning Nurses in private household:

Nurses working in a private home under the direction and control of the homeowner would be considered "domestic employment." However, a nurse taking care of a resident in a nursing home would not be considered domestic employment.

2.2.5 Relative

201.065 states:

In this, Service By subtitle, 'employment' does not include:

1) service of an individual in the employ of the individual's son, daughter, or spouse; or
2) service of an individual younger than 21 years of age in the employ of the individual's father or mother.

2.2.5.1 Father or Mother, Service By

Under Section 201.065, service performed by an individual for his or her son or daughter is excluded from the definition of employment. This exclusion exempts services performed by the father or mother of an individual employing unit. The exclusion is likewise applicable to services performed by a parent for a partnership if all of the partners are the children of the parent who performs the service.

This exclusion from the definition of employment has been extended to cover service performed by a stepparent for a stepchild or stepchildren. It is a common practice to consider the relationship between a stepparent and a stepchild as though there were a blood relationship.

The exclusion from employment has also been extended to cover service performed by a foster parent for a foster child. The foster parent stands in 'loco parentis' to the natural parent, i.e., in place of the natural parent. Both the foster parent and the foster child have the same (or some) of the rights that would exist if the relationship was natural, regardless of whether or not there have been legal adoption proceedings.

This exclusion from the definition of employment has likewise been extended to service performed by a father-in-law or mother-in-law of the individual employing unit or to a partnership composed of two or more individuals who are sons-in-law or daughters-in-law of the person performing the service. This is due to the provisions of the community property laws of Texas. Example, the father-in-law who performs service for his son-in-law is in reality performing part of his service for his daughter who owns an interest in the community property and business of her spouse.

2.2.5.2 Spouse, Service By

Ordinarily this exclusion applies only to an individual employing unit. However, service performed for a partnership is excluded if an exclusion applies to all of the partners. For example, service performed by a woman for a partnership composed of her spouse and her son.

2.2.5.3 Son or Daughter, Service By

Services by a son or daughter under the age of 21 years are excluded from employment. This exclusion generally extends only to an individual employing unit. In some circumstances, however, it is possible under the Texas law for married individuals to create a valid partnership. In such a situation, service performed for the two-member partnership by a son or daughter under the age of 21 years is exempt.

The exemption has not been extended to service performed by a minor child for his or her father-in-law or mother-in-law for the reason that there is no provision in the community property laws, which would justify such an interpretation.

2.2.6 Partners

This section discusses the aspects of the law that apply to partners.

2.2.6.1 Payments made to a partner

Are payments made to partners (guaranteed or otherwise) considered "wages" for purposes of the Texas Unemployment Compensation Act?

Since amounts due under the Act are based on "Wages," it is necessary to first define the term. Section 201.081 of the Texas Unemployment Compensation Act provides, in part: “Wages” means all remuneration paid for personal services, including the cash value of all remuneration paid in any medium other than cash and gratuities **received by any employee** in the course of employment...
It then becomes necessary to define employment: Section 201.041 of the Texas Unemployment Compensation Act provides, in part: "Employment" means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire....
Therefore, persons who do not provide services described as employment are not

employees. Since partners do not operate under a contract of hire and are free from direction and control, they are not employees and payments to them do not constitute wages.
Payments to partners fall into two categories. In the case of a net profit for a given period of time, a distribution will constitute a share of the profits, the reward for managerial success. On the other hand, assuming no net profit, a distribution constitutes a return of capital, simply giving back something that was already his to begin with.
Since neither of these types of payments are "Wages" neither are subject to tax.

Therefore, since service provided by a partner does not meet the definition of employment as defined under section 201.041 of the Act and payments are not contained in the definition of Wages under section 201.081 of the Act, the payments (guaranteed or otherwise) are not reportable to the commission.
The IRS does allow guaranteed payments to be deducted from gross revenue to determine partnership income. However, this is to insure that only one partner bears the tax liability of those amounts. The balance of the distributive share of the net income (or loss) is distributed out to the partner on Form K-1, and is carried to the Form 1040. In the event of a net loss by the partnership, the partner guaranteed payments will be reduced by his share of the loss. The IRS does not require nor even allow such guaranteed payments to be reported on Form 941 nor 940. On the contrary, guaranteed payments are subject to Schedule SE, Self-employment tax. At any rate, the Commission is not bound by any ruling of the Internal Revenue Service unless by not doing so would cause the Commission to be out of conformity with DOL requirements or the Federal Unemployment Tax Act.
In summation, payments to partners guaranteed or otherwise, are not "Wages" as defined by the Act and therefore not reportable.

2.2.7 Religious Service

This section discusses the aspects of the law that apply to religious service.

2.2.7.1 Churches & Religious Organizations

Section 201.066 states:

“In this subtitle, ‘employment’ does not include:.

1) service in the employ of:
   A) a church;
   B) a convention or association of churches; or
   C) an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
2) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the individual's ministry; or

3) service performed by a member of a religious order as required by the order."

COMMENT: Section 201.066 of the Act contains two separate and distinct provisions. Service performed in the employ of a church, convention, or association of churches is excluded from the definition of employment. This is true even though the activity may ordinarily be considered a commercial activity, such as the operation of a used clothing store. If, however, the activity is being performed by a separate legal entity, that is supported or sponsored by a church, this separate organization must stand on its own regarding the status of its workers.

Church: There is no definition of a church in the TUC Act. It is the position of the Commission that the word does not pertain to a church building, but rather to the membership which collectively constitutes a church. Black's Law Dictionary, in quoting from various court decisions, defines a church as 'a body of communicants gathered into church order', 'body or community of Christians, united under one form of government by the profession of the same faith, and the observation of the same ritual and ceremonies', either of which we consider to be a valid definition of a church.

Convention or Association of Churches: This phrase refers to an organization in which more than one church are members.

Religious Organizations: The second part of Section 201.066 excludes from the definition of employment

1. services performed for an organization which is operated primarily for religious purposes and,
2. which is operated, supervised, controlled, or primarily supported by a church, convention, or association of churches.

Operated Primarily for Religious Purposes: A religious purpose is considered to be an activity required by a religion that refers to man's relationship to a Divinity. A religious purpose should be distinguished from a charitable or moral purpose.

In order for the service performed for an organization other than a church, convention or association of churches to be exempt, the organization must be operated primarily for religious purposes and, in addition, the organization must be operated, supervised, controlled, or principally supported by a church, convention or association of churches. This criteria is not met simply by the presence of the word Methodist, Baptist, Catholic, etc., in the name of the organization.

This exclusion from employment is applicable to service for a theological seminary whose curriculum is composed primarily of religious subjects or courses and is owned or operated by a convention or association of churches. The exclusion is not applicable to a college, which offers degrees in fields other than religion and is only partially supported by a church, convention, or association of churches.

The Salvation Army is considered to be a church.

In a Status investigation involving Section 201.066, it is often helpful to obtain answers to the following questions:

1. Is service performed in the employ of a church, convention or association of churches?
2. Is it an organization, which is operated primarily for religious purposes?
3. Is it operated by a church or convention or association of churches?
4. Is it supervised by a church or convention or association of churches?
5. Is it controlled by a church or convention or association of churches?
6. Is it principally supported by a church or convention or association of churches?

An affirmative answer to Question 1 entitles the organization to exemption. Questions 2 - 6 are then unimportant and need not be investigated.

If the answer to Question 1 is 'No,' Question 2 must be answered. If the answer to Question 2 is 'No,' the organization is not exempt. If the answer to Question 2 is 'Yes,' Question 3 - 6 must be answered. A 'Yes' answer to Question 2 plus a 'Yes' answer to either Question 3, Question 4, Question 5 or Question 6 entitles the organization to exemption.

2.2.7.2 Ministers

Section 201.066 states:

"In this subtitle, 'employment' does not include

2) Service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order."

COMMENT: Service of a licensed or ordained minister as a salaried chaplain on a hospital payroll who performs religious functions is exempt. It is not necessary for a minister to exercise his religious duties as pastor of a church.

2.2.8 Rehabilitation Organization

Section 201.067 states:

"In this subtitle, 'employment' does not include:.

1) service performed by an individual receiving rehabilitative or paying work in the employ of a facility that is conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency or injury or that provides paying work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market;"

COMMENT: This exclusion from employment is not applicable to an employee of such an organization unless the employee is likewise receiving rehabilitative service.

Effective January 1, 2016 per HB 3685 this section will read as follows:

Section 201.067 states:

a. In this subtitle, "employment" does not include service performed
   1. by an individual whose earning capacity is impaired by age, physical impairment, developmental disability, while the individual is in training at a sheltered workshop or other facility operated by a charitable organization under a rehabilitation program that includes:
      A. an individual plan for employment as required by 29 U.S.C. Section 722, as amended by the Workforce Innovation and Opportunity Act (Pub. L. No. 113-128);
      B. a timeline for completion of the training; and
      C. a planned employment outcome; or
   2. by an individual who receives work relief or work training as a part of an unemployment work-relief or work-training program assisted or financed in whole or in part by a federal agency, an agency of a state, a political subdivision of a state, or an Indian tribe.

b. Notwithstanding Subsection (a)(1) , in this subtitle "employment" includes service performed by an individual whose earning capacity is impaired by age, physical impairment, developmental disability, mental illness, or intellectual disability or injury, other than an individual compensated as provided by Section 62.057, and who, after training, is working for a sheltered workshop or other facility operated by a charitable organization:
   1. temporarily while awaiting placement in a position of employment in the competitive labor market; or
   2. permanently because the individual is unable to compete in the competitive labor market.

2.2.9 Work-Relief/Work-Training Program

Section 201.067 states:

“In this subtitle, ‘employment’ does not include:

2) service performed as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by a federal agency, an agency of a state, or a political subdivision of a state by an individual receiving the work relief or work training.”

COMMENT: This exclusion from employment does not pertain to an instructor unless he or she is receiving work-relief or work training. The exclusion applies to someone who is both an employee of the organization and who is enrolled as a work-relief

measure or as a work-training measure. The exclusion is aimed at the 'sheltered work shop' type of establishment, which pays the trainees for the work they do although this provision could have broader applications. A provision in the Revenue Act of 1971 offers an income tax credit to employers who employ individuals enrolled in the WIN Program. When the individual is hired by the employer, the worker no longer performs service under the Win Program but becomes an employee of the employer to the same extent as any other regular employee. The services, therefore, constitute employment and the wages paid by the employer are taxable. For Job Training Partnership Act (J.T.P.A.) details, see Tax Supplement 3-85.

2.2.10 Student Nurses and Interns

201.068 states:

"In this subtitle, 'employment' does not include:.

1) service as a student nurse who is:
   A) employed by a hospital or a nurses' training school; and
   B) enrolled and regularly attending classes in a nurses' training school chartered or approved under state law;
2) service as an intern in the employ of a hospital by an individual who has completed a four-year course in a medical school chartered or approved under state law;"

COMMENT: The services of a student nurse are excluded from employment under Section 201.068 if the nurse is employed by a hospital or a nurses' training school and is enrolled and regularly attending classes in a nurses' training school, chartered or approved pursuant to State law. The nurses' training school where the student nurse is employed need not be the same nurses' training school where the nurse is enrolled.

The service performed by an intern in the employ of a hospital is excluded from the definition of employment if the intern has completed a four-year course in a medical school chartered or approved pursuant to State law. Intern is an obsolete term in the medical world according to the Accreditation Council for Graduate Medical Education. No longer used by the AMA or ACGME; replaced by "resident" or "resident physician." Historically, "Intern" was used to designate individuals in the first post-MD year of hospital training; less commonly, it designated individuals in the first year of any residency program. After graduation from an accredited medical school, a doctor usually continues in a training program called residency. The residency can last anywhere from three to eight years depending on the individual's specialty. After completion of the required internship, the doctor may continue to work at the hospital as a salaried resident physician. Services as a resident physician constitute employment.

Effective January 1997, the Tax Department interprets the term "intern" to mean service performed during the first year of residency and thus exempt under Section 201.068 of the TUCA. Wages paid to physicians during subsequent years of training will be taxable for TUCA purposes.

A medical fellowship is an award to a postgraduate student who may be doing research or engaged in a course of study, which requires the student to do some practice teaching. Fellowship grants received by a person who is not a candidate for a degree constitute gross income, but are neither wages subject to employment taxes nor self-employment income.

2.2.11 Hospital – Patient

Section 201.068 states:

"In this subtitle, 'employment' does not include

3) service in the employ of a hospital by a patient of the hospital."

2.2.12 Student of a College

Subsection 201.069 states:

"In this subtitle, 'employment' does not include:.

1) service performed in the employ of a school, college, or university by a student who is enrolled and regularly attending classes at the school, college, or university."

COMMENT: A student is a 'Work Study Student' if they are employed by an institution of higher education and are enrolled at and regularly attending classes at that institution.

Services performed by a student in a work study program are exempt.
'Regularly' has been interpreted as having at least 12 hours of academics, except for graduate students who should be carrying at least six (6) hours.

2.2.13 'DE' or 'VOE' Students

Section 201.069 states:

"In this subtitle, 'employment' does not include:

1) service performed by an individual who is enrolled as a student in a full-time program that combines academic instruction with work experience and that is taken for credit at a nonprofit or public educational institution normally maintaining a regular faculty and curriculum and having a regularly organized body of students in attendance at the place where its educational activities are conducted, if the service is an integral part of the program, and the institution has so certified to the employing unit, except:
   A) Service performed in a program established for an employer or a group of employers;

B) service in an apprenticeship training program; or

C) service performed by a teaching assistant";

COMMENT: These programs are commonly referred to as Distributive Education (DE) and Vocational Office Education (VOE) Programs. Services performed between academic years are not included in this exemption.

2.2.14 Full-time Student for an Organized Camp

Section 201.069 states:

"In this subtitle, 'employment' does not include

3) service by a student in the employ of an organized camp if:

A) the camp:

i) did not operate for more than seven months in the current calendar year and did not operate for more than seven months in the preceding calendar year, or

ii) had average gross receipts for any six months in the preceding calendar year which were not more than 33 1/3 percent of its average gross receipts for the other six months in the preceding calendar year; and

B) the student performed services for the camp for less than 13 calendar weeks in the calendar year and the student:

i) is enrolled as a full-time student at an educational institution, or

ii) is between academic terms or years and:

a) the student was enrolled as a full-time student at an educational institution for the preceding academic term or year, and

b) there is reasonable assurance that the student will be so enrolled for the immediately succeeding academic term or year."

COMMENT: This subsection was effective August 31, 1987.

Exempt employment includes service performed by a full-time student in the employ of an organized camp for less than 13 weeks in a year if the camp did not operate more than seven months in the current or preceding year, or the camp had average gross receipts for any six months in the preceding year which were not more than 33 1/3 percent of its average gross for the other six months. An individual is a full-time student if enrolled for a minimum of twelve hours at an educational institution, or if the student is between academic years or terms, was enrolled at an educational institution for the immediately preceding term and there is reasonable assurance of enrollment the following year or term.

2.2.15 Product Demonstrators

Section 201.070 states:

"In this subtitle, 'employment' does not include:.

3) service by an individual as a product demonstrator if:
   A) the service is performed under a written contract between the individual performing the service and a person whose principal business is obtaining the service of a demonstrator for a third person for product demonstration purposes; and
   B) In contract and in fact the individual;
      1) is not treated as an employee with respect to that service for federal unemployment tax purposes;
      2) is compensated for each demonstration or is compensated based on factors that relate to the work performed;
      3) determines the method of performing the service;
      4) provides each vehicle used to perform the service;
      5) is responsible for the completion of a specific job and is liable for any failure to complete the job;
      6) may accept or reject a job from a product demonstrator business;
      7) is free from control by the principal business as to where the individual works;
      8) controls solely opportunity for profit or loss; and
      9) pays all expenses and operating costs, including fuel, repairs, supplies, and motor vehicle insurance."

2.2.16 Direct Seller

Federal and state law provide that an individual working as a direct seller of consumer products shall not be treated as an employee, and the person for whom the services are performed shall not be treated as an employer if **ALL** of the conditions listed below are met.

Section 201.070 states:

"In this subtitle, 'employment' does not include:.

2) Services by an individual as a direct seller if:
   A) the individual is engaged in the business of:

i) in person sales of consumer products to a buyer on a buy-sell basis, a deposit-commission basis, or a similar basis for resale in a home or in a place other than, and not affiliated with, a permanent retail establishment; or

ii) sales of consumer products in a home or in a place other than, and not affiliated with, a permanent retail establishment;

B) substantially all remuneration for the service, whether in cash or other form of payment, is directly related to sales or other output, including the performance of the service, and not to the number of hours worked; and

C) the service is performed under a written contract between the individual and the person for whom the service is performed, and the contract provides that the individual is not treated as an employee with respect to the service for federal tax purposes";

COMMENT: These services are excluded if the following conditions are met:

1. Sales must be performed by an individual in a place other than a permanent retail establishment, and
2. Remuneration must be based on sales, rather than the number of hours worked, and
3. A written contract must exist between the individual and the person for whom the services are performed, providing that the individual is not an employee for Federal tax purposes.

The individual may provide these services by in-person sales of consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for resale in the home, or any place other than a permanent retail establishment or place affiliated with a permanent retail establishment.

Definition of 'CONSUMER PRODUCTS' -- The term 'consumer products' is not defined in the Act. However, the Commissioners may take official notice of the definition contained in the Texas Business and Commerce code which states in part, that goods are 'consumer goods' if they are used or bought for use primarily for personal, family, or household purposes. Similarly, Black's Law Dictionary, 6th Edition (1990) defines a consumer product as 'any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes including any such property intended to be attached to or installed in any real property without regard to whether it is attached or installed.'

The requirement that the sale be in a home or in a place other than a permanent retail establishment has been interpreted by the Commission to mean that the exemption does not apply if any sales are made at a place which is or is affiliated with a permanent retail establishment. See the Commission's decision in American Remodeling, Inc., decided January 25, 1988. (Sales representatives engaged in the sale of aluminum siding are not exempt from the definition of employment under Section 201.070(2) of the Act because of an affiliation with Sears, a permanent retail establishment.)

In order for the exemption to apply, the sales representatives must be paid based upon their sales or other output rather than upon the number of hours worked. Sales representatives who are paid by the hour are not exempt. The Act requires that the services must be performed pursuant to a written contract between the individual and the person for whom the services are performed and that the contract must contain an express provision stating that the individual is not treated as an employee with respect to those services for Federal Tax purposes. Such an agreement must be in writing.

In Mr. Happiness Corporation, decided February 13, 1990, the Commission held that Section 201.070(2) did not apply because there was no written agreement between the workers and the corporation which contained the express statement that the individual is not treated as an employee with respect to those services for Federal Tax purposes. In short, if there is no written agreement, or if there is a written agreement but it does not contain the necessary statement -- that the worker is not treated as an employee with respect to those services for Federal Tax purposes -- the exemption for direct sales of consumer products in a home contained in Section 201.070(2) does not apply.

2.2.17 Trademart, Services Performed at:

Section 201.070(3) states:

"In this subtitle, 'employment' does not include:.

3) service performed by an individual at a trade market for a wholesaler or sales representative of a wholesaler or manufacturer of consumer goods under a written contract, or as a salesman for a wholesaler consumer goods, if the wholesaler or sales representative maintains a regular or seasonal place of business at a trade market facility in a municipality with a population of more than 750,000."

COMMENT: This section exempts services performed by individuals for a wholesaler or sales representative of a wholesaler or manufacturer of consumer products or services performed by a salesman for a wholesaler of consumer products if the wholesaler maintains a regular or seasonal place of business at a trade market in a city with a population of 750,000 or more.

There is nothing in the language of this section, which limits the trade market facility to a Texas city. Rather, any trade market facility in any city of the requisite size or larger will trigger the application of this exemption, if the other criteria are met. For example, a trade market facility in Chicago, New York City, or even Hong Kong will trigger the exemption.

2.2.18 Sales Persons, Provisions Relating to:

There are four separate provisions in the Texas Unemployment Compensation Act which are or may be applicable in determining the status of sales persons. They are:

1. Section 201.070(2) (direct sales);
2. Section 201.070(3) (trade market facility).
3. Section 201.042(1) (agent-drivers or commission-drivers);
4. Section 201.042(2) (traveling or city salesmen);

If the sales persons or those working on a commission basis are not covered by one of the provisions listed above, the employment status is determined by the general definitions of employment in Section 201.041 which references three specific requirements:

1. The performance of services;
2. The payment of wages for those services;
3. The right to control or direct the workers as to the performance of those services.

The last requirement incorporates the common law factors of direction and control. The determination can be simplified by asking who the seller is, what is sold, where the sale takes place, and to whom the sale is made.

2.2.19 Insurance Agents

Section 201.071 states:

"In this subtitle, 'employment' does not include service as an insurance agent for which the only remuneration for the service is a commission."

COMMENT: An insurance agent or an insurance solicitor is not in employment under Section 201.071 if all services are performed for remuneration solely on a commission basis. The exclusion does not apply if the agent or solicitor receives a fixed compensation and commission. A guaranteed salary is indicative of covered employment. For the purposes of this subsection, advances against commissions are considered the same as commissions. Most all insurance agents and solicitors perform services under a written contract of hire. If the terms of the contract present any question regarding the basis of compensation, submit the contract submitted to the State Office Status Section for a ruling.

2.2.20 Real Estate Professionals

This section discusses the aspects of the law that apply to real estate professionals.

2.2.20.1 Real Estate License Act

Definitions related to the Texas Real Estate License Act, appearing in Section 201.072:

'Real estate broker' means a person who, for another person and for a fee, commission, or other valuable consideration, or with the intention or in the expectation or on the promise of receiving or collecting a fee, commission, or other valuable consideration from another person:

A. sells, exchanges, purchases, rents, or leases real estate;

B. offers to sell, exchange, purchase, rent, or lease real estate;

C. negotiates or attempts to negotiate the listing, sale, exchange, purchase, rental, or leasing of real estate;

D. lists or offers or attempts or agrees to list real estate for sale, rental, lease, exchange, or trade;

E. appraises or offers or attempts or agrees to appraise real estate;

F. auctions, or offers or attempts or agrees to auction, real estate;

G. buys or sells or offers to buy or sell, or otherwise deals in options on real estate;

H. aids, attempts, or offers to aid in locating or obtaining for purchase, rent, or lease any real estate;

I. procures or assists in the procuring of prospects for the purpose of effecting the sale, exchange, lease, or rental of real estate; or

J. procures or assists in the procuring of properties for the purpose of effecting the sale, exchange, lease or rental or real estate.

'Broker' also includes a person employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a salary, fee, commission, or any other valuable consideration, to sell the real estate or any part thereof, in lots or parcels of other disposition thereof. It also includes a person who engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract whereby he undertakes primarily to promote the sale of real estate either through its listing in a publication issued primarily for such purpose, or for referral of information concerning the real estate to brokers, or both.

'Real estate salesman' means a person associated with a Texas licensed real estate broker for the purposes of performing acts or transactions comprehended by the definition of 'real estate broker' as defined in this Act.

2.2.20.2 Real Estate Broker and/or Salesman (Agent)

Section 201.072 states:

"In this subtitle, 'employment' does not include:.

1) service performed by an individual as a real estate broker or salesman if:

A) the individual engages in activity described by the definition of 'real estate broker' in Section 2, The Real Estate License Act (Article 6573a, Vernon's Texas Civil Statutes);

B) the individual is licensed as a real estate broker or salesman by the Texas Real Estate Commission;

C) substantially all the remuneration for the performance of the service, whether in cash or other form of payment, is directly related to sales or other output, including the performance of the service, and not to the number of hours worked: and

D) the service is performed under a written contract between the individual and the person for whom the service is performed, and the contract provides that the individual is not treated as an employee with respect to the service for federal tax purposes";

COMMENT: A person who appraises or offers or attempts or agrees to appraise real estate is within the definition of a 'real estate broker.' Real estate appraisers must be licensed under the Real Estate License Act. Real estate appraisal, along with all the other above-listed activities, is exempt from the term 'employment' under Section 201.072(1), if all of the conditions of subsections A) to D) of that statute are also met.

2.2.20.3 Real Estate Instructor

Section 201.072 states:

"In this subtitle, 'employment' does not include

2) service performed by an individual as an instructor of person licensed or seeking license as real estate broker or salesman if:

   A. the individual instructs in an educational program or course approved by the Texas Real Estate Commission; and

   B. the service performed under a written contract between the individual and the person for whom the service is performed, and the contract provides that the individual is not treated as an employee with respect to the service for federal tax purposes."

2.2.21 For Delivery/Courier Service

Section 201.073 states:

"In this subtitle, 'employment' does not include:.

1) service performed for compensation by an individual for a private for-profit delivery service if the individual:

   A. may accept or reject a job from the delivery service;

B. is free from control by the delivery service as to when the individual works;

C. is compensated for each delivery or is compensated based on factors relating to the work performed, including receipt of a percentage of a rate schedule;

D. controls solely the opportunity for profit or loss;

E. pays all expenses and operating costs, including fuel, repairs, supplies, and motor vehicle insurance;

F. determines the method of performing the service, including selection of routes and order of deliveries;

G. is responsible for the completion of a specific job and is liable for failure to complete the job;

H. enters into a contract that specifies the relationship of the individual to the delivery service to be that of an independent contractor and not that of an employee; and

I. provides the vehicle used to perform the service;"

COMMENT: This section deals with service performed for compensation by an individual for a private for-profit delivery service. Services under Section 201.073 are excluded from the definition of employment if all of the conditions are met.

2.2.22 Newspaper Delivery Service

Section 201.073 states:

"In this subtitle, 'employment' does not include:.

2) service by an individual younger than 18 years of age in the delivery or distribution of newspapers or shopping news, except delivery or distribution to any location for subsequent delivery or distribution."

COMMENTS: Under Section 201.073(2), an exclusion applies when an individual under the age of eighteen (18) years delivers newspapers or shopping news to their ultimate point of reading consumption. The exclusion does not apply if there must be subsequent delivery or distribution in order for the material to reach the final point of distribution.

2.2.23 Inmate, Services by:

Section 201.074 states:

“In this subtitle, ‘employment’ does not include service performed by an inmate of a custodial or penal institution.”

Section 201.074 of the TUCA, was amended in 1999, clarifying that the service provided by an inmate of any prison, **public or private**, is ineligible for unemployment insurance benefits, based upon service provided while an inmate.

“Inmate” is defined as an individual actually incarcerated in a prison. Once an individual has been released on parole, probation or to a halfway house they are no longer considered an inmate. An individual is still considered an inmate even though they may leave the prison during the day to perform services elsewhere. The key factor is that they must return to the prison facility at the end of each workday. This definition is consistent with IRS interpretation.

Comment: Before it was amended in 1999, section 201.074 read as follows: “employment does not include services performed by an inmate of a custodial or penal institution that is owned or operated by the state or a political subdivision of the state.”

2.2.24 Fishing Vessels, Service On:

Subsection 201.075 states:

“In this subtitle, ‘employment’ does not include service performed on a fishing vessel normally having a crew of fewer than 10 members if:.

1) the crew member's payment is a share of the catch; and
2) the service is not employment under the Federal Unemployment Tax Act (26 U.S.C. Section 3301 et seq.).”

COMMENT: This subsection would appear to exempt services performed on commercial fishing vessels, such as shrimp boats, as the latter usually have a crew of only two to four individuals. However, the Federal Unemployment Tax Act also adds another requirement to the exemption, i.e., that the service must be performed aboard a vessel of less than ten (10) tons displacement. As many of the aforementioned vessels are larger than ten (10) tons displacement, services performed aboard them would be covered under the Federal Unemployment Tax Act and, by virtue of the wording of Section 201.075, they would also be covered under the Texas Unemployment Tax Act.

2.2.25 Drivers as Independent Contractors:

As enacted by the 85th Texas Legislative Session:

Section 1. Subtitle C, Title 14, Occupations Code, is amended by adding Chapter 2402.114 to read as follows:

A driver who is authorized to log in to a transportation network company's digital network is considered an independent contractor for all purposes, and not an employee of the company in any manner, **if:**

(1) the company **does not:**

(A) prescribe the specific hours during which the driver is required to be logged in to the company's digital network;

(B) impose restrictions on the driver's ability to use other transportation network companies' digital networks;

(C) limit the territory within which the driver may provide digitally prearranged rides; **or**

(D) restrict the driver from engaging in another occupation or business; **and**

(2) the company and the driver agree in writing that the driver is an independent contractor.

Note: No updates were made to the Texas Unemployment Compensation Act.

2.3 INCLUDED AND EXCLUDED SERVICE

Under Section 201.076:

a. All of the service of an individual performed during a pay period for a person employing the individual is employment if the service performed during one-half or more of the period is employment. (commonly referred to as the 50/50 rule)

b. None of the service of an individual performed during a pay period for a person employing the individual is employment if the service performed during more than one-half of the pay period is not employment.

c. This section does not apply to service performed in a pay period by an individual for a person employing the individual that is service that does not constitute employment under Section 201.061.

d. 'Pay period' means the period, not to exceed 31 consecutive days, for which a person employing an individual ordinarily pays wages to the individual.

COMMENT: Under Section 201.076, if the service performed during one-half or more of any pay period constitutes employment with less than one-half of the employee's service consisting of non-employment activities, all of the employee's services for that pay period constitute covered employment. If the service performed during more than one-half of any pay period does not constitute employment, then none of the services for that individual for that pay period can be deemed to be employment. The pay period referred to may be hourly, daily, biweekly, monthly, etc., except that the pay period may not exceed thirty-one (31) consecutive days. The pay period considered is the pay period customarily used with respect to the individual whose services are being considered.

2.4 LANDMAN, SERVICE BY:

Section 201.077 states:

"In this subtitle, 'employment' does not include service performed for a private for-profit person by a landman, as defined by Section 1702.324, Occupational Code, if:

1. the compensation paid to the landman directly relates only to the performance of the service; and
2. the service performed by the landman is performed under a written contract between the landman and the person for whom the service is performed that provides that the landman is to be treated as an independent contractor and not as an employee with respect to the service provided under the contract."

Comment: Section 1702.324, Occupational Code reads in part: "…landman means an individual who, in the course and scope of the individual's business:(1) acquires or manages petroleum or mineral interests; or (2) performs title or contract functions related to the exploration, exploitation, or disposition of petroleum or mineral interests."

2.5 INDIAN TRIBAL COUNCILS

The U. S. Department of Labor instructed the Commission (in 1995) to classify Indian Tribal Councils as exempt for State Unemployment Tax purposes. Prior to that time, most Indian Tribal Councils were classified as political subdivisions. They were reported and paying unemployment taxes to the State of Texas and their employees were eligible for unemployment benefits.

After April 1995, in order to continue coverage for their employees the Indian Tribal Councils are required to voluntarily elect coverage under the Texas Unemployment Compensation Act.

This option is open to the Indian Tribal Councils **ONLY**. Companies operating on Indian land are still covered by the TUC Act.

HB 2029 – Federally-recognized Indian Tribes & their instrumentality's are eligible to be reimbursing.
Service performed in the employ of a federally-recognized Indian tribe or any of it instrumentality's will be considered as "employment." All other Indian tribes may continue to choose to voluntarily elect coverage but will otherwise be exempt.
There are only 3 federally-recognized Indian tribes operating in the State of Texas.

1. Alabama-Coushatta Tribes of Texas
2. Kickapoo Traditional Tribe of Texas
3. Ysleta Del Sur Pueblo of Texas

If federally-recognized then they are automatically liable if they have employment.

- Ownership (06)
- Subject under 201.025 since they are liable for FUTA
- If they elect to reimburse, ownership code will be changed to "21"

If not federally-recognized they can volunteer under 201.024 & ownership is "06".

In January 2001 section 201.048 – Service for Indian Tribes was updated as follows:

"Except as provided by Sections 201.063 and 201.067, in this subtitle, **"employment"** includes service performed in the employ of an Indian tribe if the services are excluded from the definition of employment under the Federal Unemployment Tax Act (26 U.S.C. Section 3301 et seq.), as amended, solely because of Section 3306(c)(7) of that Act."

The Consolidate Appropriations Act (CAA) was amended under Federal law to cover how American Indian tribes are treated under FUTA. Specifically the Indian tribes are now treated similarly to State and local governments, which means.

- Services performed in the employ of tribes generally are no longer subject to FUTA tax.
- As a condition of the participation in the Federal – State UC program

  - Services performed in the employ of tribes are, with specified exceptions, required to be covered under State UC laws. Prior to the CAA amendment, coverage was at the option of the state.

  - Tribes must be offered the reimbursement option. Prior to the CAA amendments, States were prohibited from offering the reimbursement option to Indian tribes.

- Extended Benefit payments based on services performed in the employ of tribes no longer qualifies for Federal sharing.

Unlike State and local governments, if the Indian tribe fails to make required payments to the State's unemployment fund or payments of penalty or interest, then the tribe will become liable for the FUTA tax and the State may remove tribal services from State UC coverage.

Are any services exempted from the required coverage of tribal services?

Yes – The same services which may be excluded from coverage for State and local governments may be excluded when performed for a tribe. These exceptions now provide that States are not required to cover services performed –

- "as a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof, **or of an Indian** Tribe." (Section 3309(b)(3)(B), FUTA)

- "in a position, which under or pursuant to the State **or tribal** law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week." (Section 2209(b)(3)(E), FUTA)

2.6 SPECIAL TYPE CASES

This section discusses the aspects of the law that apply to special type cases.

2.6.1 Apprentices, Clerks, etc.

Persons serving apprenticeships, clerkships, etc. and receiving wages are in employment, since no exception to them is made in the Act.

2.6.2 Directors of a Corporation

Corporation directors who receive no remuneration other than directors' fees for attendance at directors' meetings are not in employment of the corporation. Other amounts paid to directors for services performed under a contract of hire or for services subject to the control and direction of the corporate officers or the corporate board of directors are deemed to be wages.

Examples:

	TUCA	FICA	FUTA
• If **ONLY** remuneration is directors' fees plus incidental travel allowance, meals and/or lodging furnished while attending Director's meetings			
Director's Fees	Exempt	Exempt	Exempt
• If performs services for company and is paid wages and directors' fees and a single accounting record is maintained			
Director's Fees	Taxable	Taxable	Taxable
Salary	Taxable	Taxable	Taxable
• If separate accounting records are maintained for wages and directors' fees			
Director's Fees	Taxable	Exempt	Exempt
Salary	Taxable	Taxable	Taxable

Reference:

T.U.C.A. 201.076(a): if service performed during one-half or more of pay period constitutes employment, all services shall be considered employment (since in most circumstances, wages are for continuous service, it is unlikely that directors' meetings would represent the major service). Prentice-Hall [96-B] 09-28-90

A director is not an employee under the federal payroll tax laws and most of the state unemployment insurance laws. But, if the director also works for the company and draws a salary, his or her salary is subject to social security, unemployment tax, and withholding of income taxes.
Since a corporate director's fees are self-employment income, the director computes and pays the self-employment tax. Keep separate records of taxable and non-taxable income people draw. If you do this, you only pay social security tax on what's paid as salary. Otherwise you may have to pay tax on the entire amount when you cannot show which payments are exempt [IRC Reg. §31.6001-2(a)].

2.6.3 Officers of a Corporation

Election by the board of directors of an individual as an officer of the corporation and acceptance of this appointment by the individual fixes on the individual a continuing responsibility to perform for the corporation the services prescribed by the corporate by-laws. Services may be performed daily or less often. Control of such services by the corporation through its board of directors can be presumed, but the officer is not in employment unless wages are paid for such services. Any amounts paid by the corporation to an officer must be construed to be salary or wages unless the amounts received are a loan to the individual from the corporation, a dividend on stock in the corporation, professional fees, a repurchase of stock, or a reimbursement of business expenses.

Salary voted to an officer by the board of directors at the beginning of a calendar year is deemed to be salary for services performed each day in the calendar year unless the minutes expressly provide that the salary is for services performed for only a part of the year. In corporations where a very few individuals hold the stock, salaries to officers are often voted by the board of directors at the end of a fiscal year. This situation presents the question of whether the officer has been in employment on each of the days in the fiscal year just completed. There cannot be a contract of hire between the corporation and the officer unless there is the promise of wages, either expressed or implied, at the time the services are performed. There may be an implied understanding that wages will be paid, even though there has not been an expression by the board of directors as evidenced by the minutes of board meetings. This implied understanding of a promise to pay wages may arise through the practice of the board of directors in past years of authorizing payment to its officers at the end of the fiscal year of a fixed salary in an amount determined by the corporation's ability to pay based on profits. In the absence of facts which might evidence an implied understanding that wages will be paid the officer for the year, a finding as to the employment status of the officer cannot be made until the end of the fiscal year. If salary for the fiscal year is voted by the board of directors, the Commission would presume that the officer was in employment on each day in the fiscal year, unless the minutes of the board of directors' meetings evidence a payment of wages for a different period.

2.6.4 Officer of an Unincorporated Association

The officers of an association, which is not incorporated under a charter from the State, are usually (in Texas) in the same category as partners. Therefore, the officers are usually treated as partners and not as employees of the association. This is generally true even though the officers may receive remuneration labeled as 'salaries' for services performed.

In rare and unusual instances an association may be organized and conduct its affairs in such a manner that it has substantially all of the attributes of an incorporated business. In such a situation, after consideration in the State Office, the organization may be treated as a corporation and the members and officers who receive salaries may be treated as employees. It does not follow, however, that any organization which is treated as a corporation by the Internal Revenue Service will be treated automatically as a corporation for purposes of the Texas Unemployment Compensation Act.

2.6.5 Aliens

Services performed by aliens are not specifically excluded in the TUC Act. Employment status will be determined by an examination of the facts in each individual case.

Note: A foreigner or foreign exchange student with a work permit is generally found to be in coverage employment. However benefit payments are subject to review under section 207.043 of the TUCA. Subsequently, a foreigner without a work permit (an illegal alien) is generally covered for employment, yet under certain circumstances, the foreign employee may not be able to draw unemployment benefits, especially the illegal alien.

2.6.6 Pecan Sheller's

The Commission decisions have rather consistently held that pecan shelling services performed in the owner's plant are subject to the control and direction of the plant owner; hence, these services were found to be employment.

2.6.7 Pieceworkers

Persons who are paid on the basis of amount of work accomplished are given no special distinction under the Act.

2.6.8 Shrimp Headers

An early Commission decision held that shrimp headers were not in employment. However, in most previous cases, shrimp headers were found to be in employment.

The status of shrimp headers will continue to be determined by an examination of each case, and each case will be submitted for decision based upon its individual facts.

2.6.9 Temporary, Casual & Workers in Training

The length of employment, however short or casual, of an individual employee and the amount of the remuneration, however small, is not important. There is **NO** exclusion from "employment" for temporary or casual workers.

2.6.10 Trusts or Estates, Services for:

Normally the trustee of a trust and the executor or administrator of an estate is not an employee of the trust or estate. One exception is noted in Revenue Ruling 69-656 (Tax Supplement 135-74) in which a co-executor performed operational-type services for the estate under the direction and control of the other co-executors. He was held to be in employment of the estate under those circumstances.

A trust or estate is a different employing unit from the fiduciary (trustee, executor or administrator) managing the trust or estate. For example a trust management company, such as a bank, hires persons to work for one of the trusts, which it manages. The persons are employees of the trust, not the bank.

An estate is a different employing unit from the deceased individual. For example, a father works for a son while the son is alive. Payments to the father are exempt under the TUC Act. The son dies and the father works for the son's estate. Payments to the father become wages since there is no familial relationship between the father and the estate.

Revenue Ruling 70-307 held minor children who were beneficiaries of their father's estate and who were employed by it to be in employment, provided it was being managed by an outside administrator (a bank).

2.6.11 Health Care Workers

Services provided by Registered Nurses (RN's), Licensed Vocational Nurses (LVN's), Licensed Practical Nurses (LPN's) and nurses' aides are considered to be in employment. Employment status will be determined by an examination of the facts in each case regardless of whether the services were provided by the workers through a referral agency or whether the worker obtained the job assignment on his or her own initiative.

2.6.12 Bingo Operations

The Texas Bingo Enabling Act mandates that bingo in Texas can only be operated by an organization licensed by the Texas Lottery Commission and must be a religious society, a nonprofit organization (501(c)(3)), a fraternal organization, a veterans' organization, or a volunteer fire department.

The licensed organization is the employer for TWC purposes and is required by the Texas Lottery Commission to:

1. Designate an operator (one or more 2-year members of the licensed organization) to run the bingo operation.
2. Maintain a separate bank account for all bingo activities;
3. Renew their license annually; and
4. Report the name, social security number, driver's license number, and address of each person who will work at the bingo games as well as the nature of the work to be performed.

License Renewal: Each year the Licensed Authorized Organization must renew their license in order to keep operating. At that time the application must include the name, social security number, driver's license number and address of each person who will work at the proposed bingo games and the nature of the work to be performed.

Texas Lottery Commission will also license individuals or organizations as an 'Authorized Commercial Lessor.' The lessor will only lease bingo premises to a Licensed Organization, and will not have any involvement with the bingo workers.

Employment status of workers will be determined by an examination of the facts in each case.

2.6.12.1 Joint Employment of Bingo Employees

Until September 1, 2003, The Texas Bingo Enabling Act required that employers maintain separate tax accounts for each legal entity. The 78th Legislature amended the Bingo Enabling Act as follows:

> "Two or more licensed authorized organizations conducting bingo at the same premises may jointly hire bingo employees. One organization may act as the employee's employer and the other organization may reimburse the employing organization for the other organization's share of the employee's compensation and other employment-related costs. A reimbursement under this section is an authorized expense and must be made from the bingo account of the reimbursing organization."

Therefore, when two or more licensed authorized organizations, which conduct bingo <u>on the same premises</u>, jointly hire bingo employees they may be established as a single entity for tax purposes. If two or more licensed authorized organizations, which conduct bingo operations on the same premises, move their employees into a single tax account, it will be treated as an acquisition.

Total and partial acquisitions of bingo operating entities will be treated in accordance with established Status procedures at the time the acquisition occurred.

Any bingo operating entity established under this procedure that holds a 501(c)(3) exemption will be provided with the option of being a taxed employer or a reimbursing employer in accordance with specific Status procedures.

In no situation will there be a rate transfer when the successor employer has elected to pay reimbursements in lieu of taxes. The acquisition will be recorded with no rate transfer.

2.6.13 AmeriCorps Participants

Under the NCSA, the Corporation for National Service is charged with operation of the AmeriCorps program and makes grants to states. The states grant the funds to local non-profit organizations and educational institutions, which operate the National, and Community Service Programs. The Corporation also grants funds directly to national non-profit organizations, state and local governmental entities and Native American Indian Tribes for public service programs.

AmeriCorps Participant: An individual who performs full-time or part-time public service in exchange for post-service educational benefits. Full-time participants receive a stipend for living expenses while enrolled. Participants generally perform unskilled service in one of four areas:

1. education
2. environment
3. public safety
4. human services

Under current TWC interpretation:

A. AmeriCorps workers employed by governmental and non-profit organizations will not be considered in covered employment for TUCA purposes;

B. Living expense stipends and post-educational benefits paid to AmeriCorps participants will not be considered covered wages for TUCA purposes. Payments to the AmeriCorps participants should not be used as wage credits in monetary determination, and should not be reported by employer to the Texas Workforce Commission.

2.6.14 Sheep Sheerer

Previous commission decisions have held that sheep shearers were not in employment. Status of these workers will continue to be examined on an individual basis.

2.6.15 Temporary Workers Due to Hurricane Katrina and Rita.

To notify agency staff of the procedures to use in determining if payments made to temporary, emergency, work relief, or work training workers employed as a result of Hurricanes Katrina and/or Rita are “covered wages” for unemployment insurance reporting purposes.

Reference: ' 201.063(a)(1)(D) and 201.067(a)(3) of the Texas Unemployment Compensation Act, Labor Code (TUCA); ' 3309(b)(3)(D), '3309(b)(5) and '3302(a) of the Internal Revenue Code (FUTA); P.L. 109-72; UIPL 15-86.

2.6.15.1 Background

National Emergency Grants (NEG) have been awarded due to the widespread damage suffered as a result of Hurricanes Katrina and Rita. These grants must be used for projects that provide food, clothing, shelter, and other humanitarian assistance for hurricane disaster victims. NEG funds may also be used for other public service employment based upon the Katrina Tax Relief Act (P.L. 109-72). In addition, other disaster funds may be provided by an agency of a state, a political subdivision of a state or an Indian tribe.

Two exemptions from employment in TUCA are applicable for temporary, emergency positions financed by NEG funds or one of the above-referenced funding sources. Subchapter E (Exceptions to Employment):

Sec 201.063(a)(1)(D)

This exemption applies only to political subdivisions or an instrumentality of a political subdivision, which employ persons in a temporary position that is involved in an emergency situation such as the recent hurricanes. Private (for profit) and non-profit (governmental and private) organizations are not included in this exemption.

“Temporary” has traditionally been defined by Tax and Labor Law as employment of less than one year. The person must not be a former employee of the political subdivision and the funding may be, but not necessarily must be, from an NEG.

Whether services performed as a result of these disasters are also “performed in case of emergency” must be determined on a case-by-case basis. Since disaster-related services may be performed after the need for immediate action has passed, they are not necessarily performed "in case of emergency.” For example, services performed removing hurricane debris to gain access to a hospital are performed “in case of emergency” when there is an immediate need to obtain access to the hospital.

However, when the removal of hurricane debris from the roadside does not require immediate action, services are not performed “in case of emergency” and may not be exempted from coverage on that basis. The exemption does not apply to permanent employees of state and local governments whose usual responsibilities include emergency situations.

Sec 201.067(a)(3)

This exemption applies to work performed for any employer (public, non-profit or private, for-profit employer) who provides work relief or work training. The funding may be, but not necessarily must be, from an NEG. Financing may also come from an agency of a state, a political subdivision of a state, or an Indian tribe. Private (for-profit) employers providing work relief or work training will not receive the FUTA offset credit on these wages because they are not exempt for FUTA purposes. Rather than paying the FUTA tax at 0.8 percent, the employer would pay at a rate of 6.2 percent. It is important that this distinction be made in any discussions with private employers. If they desire the full offset credit against the FUTA tax, they can elect coverage of these services under §206.003(a), TUCA.

Work relief or work training programs must have the following characteristics:

1. primarily benefit community and participant needs (versus normal economic considerations); and
2. services are secondary to providing financial assistance, training or work experience, even though the work may be meaningful or serve a useful public purpose.

In addition, a work relief or work training program must have at least one of the following components:

1. the wages, hours, and conditions of work are not commensurate with those prevailing in the locality for similar work;
2. the jobs did not, or rarely did, exist before the program began (other than under similar programs) and there is little likelihood they will be continued when the program is discontinued;
3. the services furnished, if any, are in the public interest and are not otherwise provided by the employer or it's contractors; and
4. the jobs do not displace regularly employed workers or impair existing contracts for services.

Below is a chart illustrating the inconsistency between TUCA and FUTA as they apply to "emergency" and "work relief or work training" employment. FUTA excludes work relief or work training employment from non-profit organizations or governmental entities only, while TUCA makes no distinction in the type of employer. Therefore, under TUCA it is assumed that services performed by an individual who receives work relief or work training while working for any employer (public, non-profit or private, for-profit employer) are exempted from coverage for UI purposes.

EMPLOYER TYPE	**FUTA**		**TUCA**	
	Emergency	Work relief or work training	Emergency	Work relief or work training
Governmental	Exempt	Exempt	Exempt	Exempt

Private (for profit)	Not Exempt	Not Exempt	Not Exempt	Potentially exempt *
Non-profit Organization (Governmental and Private)	Not Exempt	Exempt	Not Exempt	Potentially exempt **

* See discussion Sec 201.067(a)(3) above.
** Organizations not subject to FUTA, generally non-profit organizations and any other organization exempt from payment of Federal income tax under §501(a) of the IRS Code.

2.6.15.2 Scope

These exclusions from employment apply to services performed in temporary, emergency positions for political subdivisions under TUCA §201.063 and any employer (public, non-profit or private, for-profit employer) under § 201.067.
Questions may be directed to the Tax Department, Status Section, (512) 463-2731, or by e-mail at tax.statussection@twc.texas.gov.

2.6.16 Texas Military Department and the Texas National Guard

2.6.16.1 Purpose

To update agency staff regarding procedures for determining if services provided by the Texas Military Department or other State Military Units, during a temporary or emergency situation are "covered wages" for unemployment purposes.

2.6.16.2 Reference

- Sections 201.063(1)(d) of the Texas Unemployment Compensation Act (TUCA);
- Texas. Gov't Code 431, 437.001;
- FUTA Section 3309(b)(3)(c);
- Titles 10 & 32 of the United States Code;
- Tax Letter 05-05

2.6.16.3 Background

Tax Letter 05-05 discussed exemption from employment for individuals providing services for a political subdivision or an instrumentality of a political subdivision during a temporary or emergency situation such as a hurricane or other natural disaster.

Recently, staff sought clarification from the Office of General Counsel on these provisions due to several military-related claims and claims associated with 'Operation Border Star' And 'Operation Strong Safety'.

Section 3309(b)(3)(c) of FUTA covers State Military personnel when those individuals perform services as a result of a Federal Government declaration which calls members

or units of the State Military to "Active Duty"; therefore those services and wages are exempt under the TUCA and any claim would be processed through the UCX (unemployment compensation for ex-service members).

TUCA Section 201.063(1)(d) applies to political subdivisions or an instrumentality of a political subdivision which employ persons in a temporary or emergency situation.

Texas Government code established a "political subdivision" as a county or municipality, and as such this definition does not include the state.

Texas Government code 437.001(9) establishes that when a State Military member is called into state active duty status or state training and other state duties, their status is as a ***temporary state employee***.

Therefore any services performed by State Military personnel while on state active duty service, including temporary or emergency situations are performed as a ***temporary state employee*** and are not exempt under 201.063(1)(d) and are reportable to Texas, since, as noted above, the exemption applies to service with a political subdivision and not the state.

2.6.16.4 Guidelines

The Texas National Guard functions as an organized state militia under the authority of the Texas Government Code, Chapter 431 and as the reserve component of the Army/Air Force under Title 32 of the United States Code.

Who is considered the employer for service and how wage credits are assigned depend on the following 3 types of military orders:

1. The Governor can activate Texas National Guard personnel to State Active Duty which would be paid in accordance with State Law. "State active duty" means the performance of military or emergency service for this state at the call of the governor or the governor's designee. Tex. Gov't Code 437.001(9). "Temporary state employee" means a service member who is not a full-time or part-time state employee and who is on state active duty. Tex. Gov't Code 437.001(12). If on State Active Duty, wages would come from State funding and wage credits should be assigned from the Texas Military Department. There is no exclusion provided by Sec. 201.063(1)(d), TUCA for this type of employment, as a temporary state employee is not a political subdivision or an instrumentality of a political subdivision.
2. Under Title 32 of the United States Code, the Governor, with the approval of the President or Secretary of Defense may order the Texas National Guard to duty for operational Homeland Defense activities under Sections 502(f), 901 and 902, which are funded by federal dollars. These are UCX wage credits (Unemployment Compensation based on their active service).
3. The third alternative is when the State National Guard is brought to full-time active duty in the active military service of the US under Title 10 of the United States

Code. These are UCX wage credits (Unemployment Compensation based on their active service).

2.6.17 Substantially All Assets vs. # of Employees

Rule 13 decision for TD-11-082-1011: Company A hired employees that previously worked for Company B and C and were laid off after those companies lost their respective business contracts. Company A competitively won the contracts for janitorial services that had previously been performed by Company B and Company C. Company A did not have any common ownership or share any common officers with Company B or C. Company A did not and does not possess or control any assets or property that belonged to Company B or C. Furthermore, Company A never entered any agreement or obtained any legal right from Company B or C to hire their employees.

HELD: Simply winning a contract and hiring some of the workers who were being laid off by the previous contractor does not constitute an “acquisition” of the organization, trade, or business for purposes of section 204.086(a). Therefore, because there was no kind of previous relationship between Company A and either Company B or C, the Commission holds that Company A did not acquire the tax liabilities of B or C.

3 EMPLOYER

This chapter discusses the aspects of the law that apply to employers in general.

3.1 GENERAL DEFINITION

The definition of the word "employer" in the Texas Unemployment Compensation Act differs from the usual definition of the word. An "employer," as such word is used in the Act, is liable for payment of tax on wages paid during periods when the employing unit has such "employer" status or is liable for reimbursement of benefits paid. Subchapter C of the Act defines when an employing unit qualifies as an "employer."

An employer is any individual or employing unit who:

1. Employs one (1) or more individuals in employment for twenty (20) weeks during a calendar year or pays wages of $1,500 or more in a calendar quarter, or
2. Is a successor to an employer, or
3. Is a nonprofit employer as described in Section 501 (c)(3) of the Internal Revenue Code and employs four (4) or more employees for twenty (20) weeks in a calendar year, or
4. Has filed a Commission approved election of coverage, or
5. Is liable for payment of taxes under the Federal Unemployment Tax Act, or
6. Is not otherwise covered under this Act, but is required to be so by the Federal Unemployment Tax Act, or
7. Is a state or political subdivision, or
8. Employs domestic employees and pays $1,000.00 in a calendar quarter, or
9. Employs farm or ranch employees in accordance with the following:

   Section 201.028 (Effective January 1, 1987)

   1) Employs seasonal farm or ranch labor on a truck farm, orchard or vineyard, or
   2) Employs three or more employees in farm or ranch labor for twenty (20) weeks or pays $6,250.00 in cash wages in a calendar quarter, or
   3) Employs migrant farm or ranch labor, or
   4) Employs seasonal farm or ranch workers if the seasonal farm or ranch workers work at the same time, same location and do the same work as the migrant workers.

Section 201.028

1) Employs seasonal farm or ranch labor on a truck farm, orchard or vineyard, or
2) Employs four or more employees in farm or ranch labor for twenty (20) weeks or pays $7,500.00 in cash wages in a calendar quarter, or
3) Employs migrant farm or ranch labor, or
4) Employs seasonal farm or ranch workers if the seasonal farm or ranch workers work at the same time, same location and do the same work as the migrant workers.

Section 201.028 (Prior to January 1, 1986)

Agricultural employers who employ as many as ten (10) employees for twenty weeks, or pay as much as $20,000.00 in cash wages in a calendar quarter.

3.2 SECTION 201.021

Under Section 201.021:

a) In this subtitle, “employer” means an employing unit that:

1) paid wages of $1,500 or more during a calendar quarter in the current or preceding calendar year: or

2) employed at least one individual in employment for a portion of at least one day during 20 or more different calendar weeks of the current or preceding calendar year.

b) The definition provided by this section does not apply to an employing unit covered by Section 201.023 or to farm and ranch labor covered by Section 201.028.

c) A single employing unit for purposes of this subtitle employs an individual who performs a service in this state for an employing unit that maintains two or more separate establishments in this state.

3.2.1 Individuals in Employment

An individual counted under this subsection must have been in "employment" as that term is defined in the Act. (See Section 201.041, of the TUCA.) If all service performed by an individual is employment, this individual is counted consistently in the same manner for each day on which he/she performs service. If part of the service performed by an individual is employment and part of his/her service is exempt, then the individual is counted in accordance with the language of Section 201.076, Included and Excluded Service in Pay Period.

In order for an individual to be omitted in counting employment for application of this definition of an employer, the employing unit must have records showing which portion of the individual's service was exempt. If this information is not shown in the records, the individual will be counted in employment on each day of service unless the employing unit otherwise claims and proves its right to the exclusion. When such a claim of exclusion is made, the burden of proof is on the employer to show the right to have the service excluded from employment.

3.2.2 Week

This section discusses the aspects of the law that specifically apply to the use of the term “week.”

3.2.2.1 Section 201.011(25)

"Week” means seven consecutive calendar days as prescribed by the Commission.

3.2.2.2 Rule No. 815.1

"Week" means a period of seven consecutive calendar days ending at midnight on Saturday.

3.2.2.3 Discussion

The qualifying experience with individuals in employment under this subsection must be in twenty different calendar weeks. The weeks of qualifying experience need not necessarily be consecutive and thus may be scattered throughout a calendar year.

3.2.2.4 Application to Sec. 201.021

The wording of Section 201.021 defines liability in terms of one or more employees on each of twenty days within a calendar year, each day being in a different calendar week. If an employing unit has an employee on a day at the beginning of a year, that day may be counted in establishing liability even though the calendar week in which the day occurs began in the preceding calendar year.

3.2.3 Day

Employment experience on any day in a calendar year is considered in determining liability under this subsection. Liability is created by having one or more employees in employment on twenty or more different days in a calendar year, each day being in a different calendar week. An individual is in employment during a day regardless of whether he performed service for all or only a part of a full working day. A "day" is the twenty-four hour period, midnight to midnight. An individual is in employment on a day if he/she has performed on that day any service included within the definition of employment. The Act provides no exclusion for service that may be described as "casual," "part-time" or "temporary" labor.

3.2.4 One or More Individuals

Experience required under this subsection to create "employer" status is one (1) or more individuals in employment for some portion of a day in each of twenty (20) different calendar weeks. It is not necessary that the individuals perform services during the same hours of the day, nor is it necessary that the individuals counted on different days be the same persons. An organization operating its business by use of two "shifts," with two individuals on one shift and two other individuals on the second shift, had four individuals performing service during that day. It is again noted that the individuals counted need not be regularly employed and that the individuals counted on the different days do not have to be the same persons.

3.2.5 Fifteen Hundred Dollars in Wages

"Wages" means gross wages before pay deductions. Also, the criteria is "wages constructively paid" rather than "wages payable."

3.2.6 Subject Date

An employing unit becomes an employer under this subsection on whatever day of the twentieth week the necessary qualifying experience is completed. Technically applied, the subject date may be on whatever day in the twentieth calendar week. However, the practice has been adopted of fixing the "subject date" (the date on which the employing unit becomes an employer) as the last day in the calendar week within which the last day of qualifying experience occurred. An employing unit who becomes an employer by paying either $1,500 in wages (Section 201.021) $1,000.00 in wages (Section 201.027) or $6,250.00 in wages (Section 201.028) during a calendar quarter is assigned a subject date effective the date on which the employer meets the assigned wage amount. If it is difficult to determine the exact date, the date on which the employer is subject may arbitrarily be assumed in all cases to be the **LAST** day of the third month of the quarter in which the payroll reaches the requisite wage amount. Action by a corporation's Board of Directors in authorizing payment of wages to officers may determine the corporation's subject date as shown by the following example:

A Corporation has no employees in year 1 other than four corporate officers. They perform service throughout the year but salaries are not authorized until the meeting of the Board of Directors in December. Subject date for the corporation is the end of the twentieth week in year 1. (Since wages are not paid until December, tax may be paid in January year 2, without interest under Section 213.021.)

3.2.7 Investigations

Employer status and liability for taxes are established under Section 201.021 more often than under any of the other definitions of an "employer." An investigation or an audit of an employing unit's records is easily accomplished if the employing unit has maintained records to include the information prescribed by Commission Rule Number 815.6. However, many employing units do not maintain the complete information prescribed by the Commission Rule. When the employee count is close to the border line of one individual for twenty weeks, the requirement for records becomes important. Failure to keep the prescribed records may be through ignorance. It would be difficult to prove that such failure was a deliberate attempt to evade the provisions of the law. Unless there is substantial proof that there was a deliberate attempt to evade, there is little likelihood that the penalties prescribed in the statute for failure to keep adequate records will be imposed.

The type of inadequate records most often found are those which show the names of the individuals performing services during each week and then give the total amount of wages received for the week by each individual. There is probably no other instance in which the exercise of discretion and good judgment can so effectively assist the Commission in good administration. The Commission representative examining records of this type should first make an open-minded study of the employing unit's business operations. Talk to the employer about the normal number of employees required in his business and about the circumstances which occur to cause an unusual need for more employees. Learn the type of work done by all of the individuals listed in the records, their usual working schedule, and their rates of pay. Make thorough inquiries about each of the individuals appearing in the records. When this type of information has been secured, the representative examining the payrolls is in a position to speculate on the question of whether or not there is likelihood that the employing unit became an employer in some calendar year. This type of discretion can be placed in Commission field representatives only when carefully, judicially and conscientiously used. When a question of employer status appears unresolved because of inadequate records, field representatives are not required to furnish proof that there is no employer liability. In every instance, however, the Act and Rules require that an employing unit file a report with the Commission giving the information needed to determine its status. Whether or not liability is questionable, this information must be secured from the employer, by means of a status report or otherwise. By examining the records and by use of discretion, the representative must determine whether the facts appear to be such that he/she should take exception to the employer's statement of non-liability and attempt to prove, through audit working papers and other information, that there has been the qualifying experience required under this subsection.

When submitted in refutation of an employing unit's statement, the Accounts Examiner's proof of liability under this subsection must support the belief that liability exists.

The information on working papers prepared from the records and other sources should be presented in such form as to analyze the employer's records as they have been

maintained and also to explain their contents through information regarding the type of work done by each individual, his usual working hours, his rate of pay, any provisions for overtime pay, and the usual times the business is open to the public. If possible all of this information should be presented in a manner that will substantially support liability in the event it is necessary to place the Commission's claim for taxes before a court in civil action.

3.3 SUCCESSOR – SECTION 201.022

Under Section 201.022:
In this subtitle, “employer” means an individual or employing unit that acquires the organization, trade, or business of another or substantially all of the assets thereof, of another that was an employer subject to this subtitle at the time of the acquisition.

Employer status under this subsection can attach only after the finding of:

1. Acquisition, and
2. Acquisition by an individual or employing unit, and
3. Acquisition from an employer subject to the Act, and
4. Acquisition of the organization, or
5. Acquisition of the trade, or
6. Acquisition of the business, or
7. Acquisition of substantially all of the assets of the organization, trade or business.

3.3.1 Acquisition (Acquired)

For the purposes of this subsection, an acquisition is a gaining by any means. In most cases, it can be expressed as gaining of possession. The acquisition does not have to be one that transfers all the title. It can be the mere right to possess and use under any kind of an agreement. The acquisition may be under an agreement to rent, to lease or otherwise to possess and use. It would seem to be limited only insofar as there is a legal right to possess.

The acquisition, through the gaining of a right to possession and use, need not be an acquisition for any specific period of time. The acquisition can be under an agreement transferring the possession for an indefinite period of time, the limitation of which is based upon a contingency. Through the gaining of the right to possession for any period of time, there is the type of acquisition which fulfills this one condition.

The language of the subsection conditions its application to create liability on the fact of acquisition without reference to the purpose of the acquisition or the intended use to be made of the things acquired. If the language of the Act is literally applied, it seems to be unimportant whether there was any intent to continue the trade or business of which assets or organization was acquired. For this reason, the subsection is applied to create liability on the basis of an acquisition, even though the assets acquired are never used in the operation of the business. The assets may have been immediately stored, sold or otherwise disposed of. The point is that inquiry need not be made into the question of intended use or actual use of the assets acquired.

It appears impossible to claim there was an acquisition of any thing which cannot thereafter by some means be discovered in the transferee. In the usual situation, the actual transfer of assets is easy to discover. Even though it appears that the organization, trade or business was acquired, however, such a claim cannot be made to support liability under this subsection unless it can be shown that the organization, trade or business was received through the acquisition in such a manner that it can be discovered after the acquisition. Difficulty in supporting a finding of liability by reason of acquisition of the organization, trade or business arises because each of these things is somewhat nebulous and of such a nature as to make following the transfer from one person to another uncertain.

A Texas Court of Civil Appeals held in the Lewis Case that, in separating the provisions of the subsection with the word "or," such word was used by the Legislature in the disjunctive and the provisions of the subsection are therefore to be applied separately.

3.3.2 By an Individual or Employing Unit

The reasons for having a provision using language of this subsection appear to be: (1) to prevent avoidance of tax liability for any part of the calendar year by the device of changing ownership of the business within the year, and (2) to provide a full year's unemployment insurance coverage for individuals working in a particular business if any coverage at all is provided for that calendar year.

The specific language of the subsection covers an acquisition by "an individual or employing unit." The quoted phrase is interpreted quite literally.

While most individuals are employing units, by virtue of having at some time employed someone to perform service; individuals can become subject employers whether or not they are employing units.

Organizations, other than individual proprietorships, can become subject employers only if they are employing units. Technically, such an organization can be an employing unit without having "employment" as defined in the Act, but for all practical purposes this wording could be "employing unit with employment."

3.3.3 From Employer Subject to the Act

Tax liability under Section 201.022 is contingent upon acquisition of the organization, trade or business or substantially all of the assets of another subject employer. Usually, the business, etc., of an employer is acquired from that employer. In most instances, there is no intermediate ownership to be taken into consideration, and the employing unit who becomes subject under Section 201.022 does so by acquiring the business of a predecessor employer from that employer. Exceptions are discussed in the following paragraph and in Chapter 3 - "Application of Sections 201.022 and 204.083".

The acquisition can be from an employer even though the dealings with respect to the acquisition and the transaction itself were conducted through another person who has acted as the agent of the employer. If it is found that the transaction bringing about the acquisition was with some person other than the employer, there is no liability under this subsection unless facts reveal that this person was, in truth, acting as an agent for the employer. The Commission must be prepared to prove that an agency relationship existed between the employer and the alleged agent.

3.3.4 Of the Organization

The word "organization" refers to people and the arrangement of people. The organization within any business is a pattern of people arranged singly or by groups. Imposition of liability under this subsection by reliance upon acquisition of the organization alone would be difficult to sustain because of the likelihood that the same group of people previously organized by the predecessor would not be arranged in that same pattern by the successor after the acquisition. An attempt to sustain liability under this subsection by acquisition of the organization alone is discouraged. Nevertheless, any case under this subsection can be strengthened by a showing that all or substantially all of the same people continued in the business after the date of acquisition and that these people are working at the same jobs they had prior to the date of the acquisition.

3.3.5 Acquisitions Involving Franchises

Analysis of franchisee to franchisee transfers under §204.081 etc., should be based upon a complete review of all available information in order to determine the relationship between the two franchisee entities.

Court decisions have reviewed the Commission position on this issue and their response was based upon on their interpretation of the plain meaning of 204.081(a)(3) to make their decision.

Therefore, future analysis of franchisee to franchisee transfers under §204.081(a)(3) should be based upon the relationship between the two franchisee entities, independent of the appearance of control by the franchisor in the franchise agreement. Only where the selling franchisee independently meets the requirements of §204.081(a)(3) should an acquisition and transfer of experience be considered.

Based on available information, the following guidance is provided for acquisitions involving franchises:

- Franchisor to Franchisee acquisition: Franchise agreement. 204.083 applies. Franchisor to Franchisee relationship. Common management and control.

- Franchisee to Franchisee acquisition: 204.083 does not apply. The predecessor franchisee has no control over the successor franchisee and there is no common ownership/equitable interest.
    - IMPORTANT: Some franchisee to franchisee acquisitions do have common ownership/equitable interest therefore a careful review is necessary to properly determine if 204.083 applies or not.
- Franchisee back to Franchisor: Franchise agreement. 204.083 applies. Franchisor to Franchisee relationship. Common management and control.

As always, once Tax decides on this issue, all parties must be informed of their Rule 13 rights, should they disagree with the Tax Departments decision.

3.3.6 Of the Trade or Business

The Commission considers trade and business to be synonymous since proof that either has been acquired is likely sufficient to sustain an assertion that the other has also been acquired. It would be difficult to support proof of liability under this subsection by showing the acquisition of only trade or business; however, any evidence that the successor has the same trade or business as that of the predecessor makes a stronger total case when considered together with the acquisition of assets or organization. There may be some evidence that the trade or business has been acquired if it is found that:

1. The same type of business is being conducted;
2. The business is being conducted in the same location;
3. The business is being conducted under the same trade name;
4. The doors of the place of business were not closed at the time of the change of ownership;
5. The successor acquired use of the same franchises from the predecessor or from the manufacturer;
6. The successor, through some arrangement, distributes the same line of products as an agent, consignee, etc.;
7. Through advertisements, letterheads, or other media, the public is notified that the previously existing business has been continued without change other than a change of ownership.

Reference Section 2.6.16 regarding Rule 13 precedent case.

3.3.7 Of Substantially All the Assets

The word "assets" as used in this subsection refers to those assets of the predecessor used in the conduct of a business on which taxes are payable. This means that assets

used in agricultural pursuits, domestic usage or other businesses with all services excluded from employment are not assets to be considered when applying the provisions of this subsection. If, however, Sections 201.028 or 201.027 are applicable, then the farm and ranch assets and/or domestic assets would be considered "assets" as used above.

Also, assets of a business retained by the predecessor are not to be considered if the retained business is of a nature, which does not ordinarily, require employment. If a business retained by the predecessor is of a type which ordinarily does require employment, regardless of whether there has ever actually been any employment, the assets would be considered.

There have been no court cases in Texas or other states construing the words "substantially all" as used in this subsection of the Texas law or in a similar section of other state laws. The words have been used in other statutes, however, and have been defined by court decisions; these decisions, taken together, indicate that "substantially all" may be any percentage between 80 and 90. It seems that 90% or more of the assets may be safely construed as "substantially all." A percentage of assets ranging between 80% and 90% may logically be questioned as not being "substantially all." Field personnel can presume that liability will be established under this subsection if there is an unquestionable finding that as much as 90% of the assets of the predecessor were acquired and that the other conditions of this subsection have been met. If the facts clearly show the acquisition of assets by a percentage figure between 80 and 90, it can be presumed that liability as an employer under this subsection will not be established by the Commission without additional facts supporting a showing that the organization, trade or business has also been acquired. In any situation investigated, the conclusion reached should not be totally based on the percentage of assets acquired if there is a possibility that further facts about the organization, trade or business will make a stronger case for liability.

Few definite statements can be made as to those things which should be considered as assets of the predecessor. Moreover, certain things will be considered assets of the predecessor when there can be no certainty as to the value of the assets. These two facts are important considerations when investigating some cases raising the question of liability under this subsection.

It seems certain that cash in the predecessor's business at the time of the acquisition should not be considered as an asset for the application of this subsection; however, accounts receivable will be considered as assets of the business. The accounts receivable should be given the value appearing in the predecessor's records, without regard to whether some of them may never be collectible. The percentage of assets acquired and of assets not acquired is determined in accordance with the dollar value of each of the groups of assets. If the values of all assets, on any basis, appear in the predecessor's records, these values furnish a sound basis for comparison. A logical exception might be taken to this method of comparison of values by a showing that the market value of some assets has increased more than others. In the absence of recorded values of assets in the predecessor's books, the comparison between the

value of assets acquired and the value of assets not acquired can probably be made only by comparison of the purchase price of assets acquired with the estimated present market value of the assets not acquired. These suggested means of comparisons may not be adaptable to all circumstances.

Nothing definite can be said here as to whether a franchise, agency or similar business arrangement belonging to or used by the predecessor should be considered as an asset of the predecessor. Neither can any definite suggestion be made as to any method of determining the value of such an asset. It is sufficient to suggest that these things may be considered as assets of the predecessor and may have values to be considered in determining whether substantially all the assets were acquired.

This subsection requires that there be the acquisition of substantially all the assets of the organization, the trade or the business of the predecessor. There can be no question that assets have been acquired under these required circumstances if: (1) the place of business was open for trade and business, and (2) the business was being conducted by the person from whom it was acquired. A question arises if either condition (1) or condition (2), as stated, is not clearly present.

The acquisition may have occurred on a day when there was no visible business being conducted; that is, the doors of a mercantile business may not be open to customers, drilling equipment may not actually be in operation, or some other type of business may not be in actual operation on that day.

The absence of visible activity within the business does not necessarily mean that there had been a cessation of business. A business place may be closed or business operations may not be conducted on a day because of any number of circumstances. Rain may prevent any outdoor activity; absence of contracts on which to work may prevent actual activity; holidays, sickness, renovation of the establishment or any number of other things may prevent the doors of a mercantile business from being open; shortage of equipment, materials, manpower, etc., may sometimes prevent actual operations within a manufacturing business; some businesses have actual operations only within certain seasons. Under any one or all of the circumstances named above, it may well be shown that the business had not been discontinued. If all equipment and facilities are retained intact with the evident intent to continue the business or reopen it at such time as the preventive conditions do not exist, there seems to be considerable evidence that the business was still there even though it was not presently being operated. A business that does not have actual activity in any day or week might be asked, "Are you out of business?" Under any one or possibly all of the circumstances given above, the answer would likely be, "No, I am not out of business, my business is closed today or this week because of this or that." Should an acquisition occur from a predecessor at a time when the business is not operating, extensive investigation may be necessary to determine whether or not the business was discontinued for all purposes. Assets formerly used in the operation of a business can cease to be "assets thereof," i.e., assets of a business when the business has ceased to exist. Acquisition of such assets would not result in Section 201.022 liability for the purchaser any more

than would purchase of similar assets from the stock in trade of a wholesale equipment dealer.

3.3.8 Relationship of Secs 201.022 and 206.004

The status of a successor as an employer is not affected by the question of whether the predecessor is eligible, at the time of the acquisition, to terminate coverage.

EXAMPLE: Predecessor became an employer in 1996 but is eligible to terminate coverage as of January 1, 2000. On February 8, 2000, successor acquires all of predecessor's organization, trade or business and becomes an employer under Section 201.022. On March 31, 2000, predecessor files an Application for Termination of Coverage which is approved, thereby terminating liability for contributions as of January 1, 2000. The Commission will not close the successor's account as being erroneously established, for the reason that as of February 8, 2000, predecessor was an employer and remained in that status until approval of an Application for Termination of Coverage.

3.3.9 Acquisitions & SUTA Dumping Legislation – September 1, 2005

Amendments to Chapters 201 and 204 of the Texas Unemployment Compensation Act, Labor Code as the result of the passage of State Unemployment Tax Act (SUTA) dumping legislation in the Texas Legislature.

3.3.9.1 Background

The purpose of this legislation is to amend the Texas Unemployment Compensation Act to incorporate provisions mandated by federal legislation. Employers engage in SUTA dumping when they unlawfully attempt to lower the amount of their unemployment insurance taxes by altering their experience ratings. Chapters 201 and 204 of the Texas Unemployment Compensation Act have been revised in an attempt to strengthen the financial integrity of the unemployment insurance program by reducing tax avoidance due to this manipulation of unemployment experience.

Liability under Section 201.022 of the Labor Code is broadened to include all acquisitions, total or partial. “Employer” means an individual or employing unit that receives, “by any means,” all or part of the organization, trade, business, or “workforce” of another that was an employer subject to this subtitle at the time of the acquisition.

Section 204.081 is amended by adding two new definitions. The term “person” is defined as an individual, trust, estate, partnership, association, company, or corporation. “Substantially common management or control” exists if the predecessor continues to:

- own or manage the organization that conducts the organization, trade, or business.
- own or manage the assets necessary to conduct the organization, trade, or business.
- control through security or lease arrangement the assets necessary to conduct the organization, trade, or business.
- direct the internal affairs or conduct of the organization, trade, or business.

Effective 9/1/2015: “Substantially Common” ownership regarding partial acquisition is amended to state:

“For purposes of Subsection 204.081 (a)(4), following a partial acquisition of an organization, trade, or business of an employing unit, substantially common ownership does not exist solely because the predecessor employing unit has the right to repossess the part acquired by the successor employing unit in the event of the successor ’s failure to complete a condition of the acquisition.”

The common ownership **does not** apply to successor business solely because the predecessor can take the business back if the successor does not fulfil the conditions of the acquisition.
Section 204.083 now requires the transfer of compensation experience in acquisitions of all or part of an experience-rated organization, trade or business in which there is substantially common management or control or substantially common ownership.
Section 204.084 is changed to address approval of compensation experience for partial

acquisitions of businesses that do not have substantially common management or control or substantially common ownership. In addition, this section states the conditions under which the businesses involved in those partial acquisitions may apply for a transfer of compensation experience and the conditions under which the commission shall approve or deny such a transfer. The method used to calculate the successor employing unit's initial contribution rate is outlined for both experience-rated and non-experience rated successor employers.
Section 204.085 now addresses the contribution rate for successor employers that acquire part of the organization, trade, or business that is definitely identifiable and segregable when there is substantially common management or control or substantially common ownership. It details the computation of an experience rate for a partial acquisition and clarifies when a new computation of experience rate will take effect for a successor employing unit with an experience rate and without an experience rate. In addition, this section sets the contribution rate for a successor engaging in a partial acquisition solely to obtain a lower contribution rate at the initial contribution rate in Section 204.006.

Effective 9/1/2015 204.085 is amended regarding partial acquisition as follows:

"In the case of a partial acquisition for which the transfer of compensation experience is required under Section 204.085, the predecessor employer and successor employer may jointly submit, not later than the second anniversary of the date the partial acquisition was completed, information necessary for making the determination described by Subsection

(a). The period for which the information is submitted must be the lesser of:

(1) four years; or

(2) the length of time the predecessor employer was liable for the payment of a tax under this subtitle."

The new Section 204.0851 addresses the contribution rate for total acquisitions and partial acquisitions in which there is substantially common management or control or substantially common ownership. This section excludes partial acquisitions that met the identifiable and segregable requirements under section 204.085. It details the computation of experience rates and clarifies when a new computation of experience rate will take effect for a successor employing unit with an experience rate and without an experience rate. It also addresses the computation of the predecessor employing unit's contribution rate.

The new Section 204.087 defines an offense and sets the penalties for persons that advise others to violate the provisions of this subchapter, or commit violations of the subchapter. Violations are Class A misdemeanors.

The new Section 204.088 charges the commission with adopting a rule that establishes procedures for identifying the transfer or acquisition of a business.

The new Section 204.089 requires that the commission administer this subchapter in conformity with federal regulations prescribed by the United States Secretary of Labor.

3.3.9.2 Procedures

Mandatory transfer of compensation experience applies to all acquisitions, total or partial that involves common management or control or substantially common ownership occurring after September 1, 2005. The successor employer is to be informed in their C-198 Employer Liability Notice, of the right to submit an application to transfer only the compensation experience of the portion of the predecessor business acquired, if it is identifiable and segregable. Partial applications submitted by successors without common management, control, or ownership will continue to be handled in the same manner as under the current law.

3.3.9.3 Scope

The legislation became effective September 1, 2005.

All acquisitions occurring before that date are governed by the law in effect on the date of the acquisition.

3.3.10 Subsection 204.083 Acquisitions – Amended September 1, 1989

Subsection 204.083 was amended effective September 1, 1989, to make transfer of compensation mandatory only:

... if, on the date of the acquisition, a shareholder, officer, or other owner of a legal or equitable interest in the predecessor employer, or the spouse or a person within the first degree of consanguinity or affinity, as determined under Article 5996h, Revised Statues, of the shareholder, officer, or other owner:

1) is a shareholder, officer, or other owner of a legal or equitable interest in the successor employing unit; or
2) holds an option to purchase a legal or equitable interest in the successor employing unit.

For successions occurring on or after September 1, 1989, if a total transfer of compensation experience is in order, there must be the prescribed relationship between the predecessor and successor. There is no optional total transfer. See Tax Supplement 9-90.

Black's Law defines Legal Interest as: "Interest in property or in claim cognizable (capable of being known) at law in contrast to equitable interest.

Black's Law defines Equitable Interest as: "The Interest of a beneficiary under a trust is considered equitable as contrasted with the interest of the trustee, which is a legal trust."

The following situations illustrate Section 204.083.

Situation Number 1:

A (Subject employer)
Organization, trade, or business, or all assets acquired by "B."

B (Individual or employing unit who is a father to "A.")

RULING:

"B" must take compensation experience of "A."

Situation Number 2:

A (Subject employer)
Organization, trade, or business, or all assets acquired by "B."

B (Individual or employing unit that is not related by blood or marriage to "A" and "A" does not have an option to buy.)

RULING:

"B" is liable under 201.022 but 204.083 does not apply. "B" will receive an entry level tax rate.

Situation Number 3:

A (Subject employer with option to buy equitable interest in "B.")
Organization, trade, or business, or all assets acquired by "B."

B (Individual or employing unit)

RULING:

"B" must take the compensation experience of "A," since "A" held an option to buy the business back.

3.3.11 Sections 201.022 and 204.083 – June 1985 through August 31, 1989

Mandatory Transfer Provision

Section 204.083, effective June 10, 1985, through August 31, 1989, provided, in part,
> "An employing unit that acquires all of the organization, trade, or business of an employer and that continues the operation of the organization, trade, or business acquires the compensation experience of the predecessor employer . . . ."

COMMENT: In simplest terms, during this period Section 204.083, as amended, makes total transfers mandatory, rather than optional, when a total acquisition occurs. Under the prior law, the transfer of compensation experience was optional; that is, the compensation experience was transferred only if the predecessor and the successor

voluntarily agreed to a transfer of the compensation experience, and signed the appropriate tax forms to formalize that transfer. This was true regardless of whether the transfer was a total or a partial transfer. That law no longer exists as to any total transfer occurring on or after June 10, 1985, and through August 31, 1989, as the prior subsection was replaced by the mandatory transfer provision of Section 204.083 for that time period. In short, if a total acquisition occurred within the above-referenced dates, and the successor continued the operation of the organization, trade, or business, the compensation experience of the predecessor employer was transferred to the successor. Partial transfers continue to be optional under Section 204.084 of the Act.

3.3.12 The Mandatory Transfer Provision

The mandatory transfer provision asks if all of the organization, trade or business acquired.

The word "all" in the language of the mandatory transfer provision has been consistently interpreted by the Commission to mean "total." That is, the word "all" in the context of the mandatory transfer provision was intended to distinguish total transfers from partial transfers under the Texas Unemployment Compensation Act.

3.3.12.1 Mandatory Transfer - History

3.3.12.1.1 Prior to 1985

Under the law as it existed prior to 1985 the enactment of the mandatory transfer provision, a successor that acquired only an identifiable and segregable part of the predecessor's organization, trade, or business was treated differently with regard to the transfer of compensation experience than was a successor who acquired all of the predecessor's organization, trade, or business. See Subchapter E - Acquisition of Experience-Rated Employer of the Act, as amended effective August 22, 1957. Note also that the language of the prior law refers to "an employing unit (that) acquires all or part of the organization, trade, or business of an employer, without using the terms "total acquisition" or "partial acquisition."

3.3.12.1.2 June 10, 1985

In enacting the provisions of Section 204.083 effective June 10, 1985, the Legislature meant to maintain this same distinction between an acquisition of "all" and an acquisition of "part," making the transfer of compensation experience mandatory in the former (total transfer) situation while keeping it optional in the latter (partial transfer). Like the prior law, the amendments at 204.083 use the word "all" to mean total transfer, and, at 204.084, the word "part" to mean partial transfer.

It is a basic rule of statutory interpretation that the prior law may be examined to determine the Legislature's intent in amending that law. A law that has stood for a long period of time is generally viewed as being of sound construction. The TWC's past practice with total and partial voluntary transfers of compensation experience over the course of more than twenty-seven years (from August 1957, to June 1985) supports the

conclusion that the Legislature intended the word "all" in Section 204.083 to identify total acquisition situations. The amendment changed the law to make the transfer of compensation experience mandatory for all total acquisitions occurring on or after June 10, 1985, through August 31, 1989, but the amendment did not change the meaning of the word "all."

3.3.12.1.3 After September 1, 1989

For the period beginning September 1, 1989 and subsequent, the transfer of compensation experience is mandatory provided, as of the date of acquisition, a shareholder, officer, or other owner of a legal or equitable interest in the employing unit that is transferring the organization, trade or business, or the spouse or a person within the first degree of consanguinity or affinity of such an individual is a shareholder, officer, or other owner of a legal or equitable interest in the acquiring successor employing unit, or holds an option to purchase such an interest.

Those not familiar with the TWC's long standing practice of using the words "all" and "part" to distinguish between total transfers of compensation experience and partial transfers of compensation experience often, and mistakenly, believe that the word "all" in the mandatory transfer provision means absolutely one hundred percent. Instead, "all" refers to a total, as opposed to a partial transfer. If the facts are sufficient to establish that a total transfer of the organization, trade, or business has occurred within the referenced time frame, (June 10, 1985 to August 31, 1989) then the predecessor's compensation experience must be transferred to the successor. The criteria used in making this determination will be discussed more fully below; however, those criteria are substantially similar to the factors listed in Chapter 3 - Of the Trade or Business in this Tax Manual.

Past experience demonstrates that it is not necessary to have acquired absolutely one hundred percent of the predecessor's organization, trade, or business for a total acquisition to have occurred. Likewise, a partial acquisition can only be established if, among other things, the successor acquired a part of the predecessor's organization, trade, or business "to which a definitely identifiable and segregable part of the predecessor's compensation experience was and is attributable." See Section 204.084 of the Act.

3.3.12.1.4 After September 1, 2005

Section 204.083 now requires the transfer of compensation experience in acquisitions of all or part of an experience-rated organization, trade or business in which there is substantially common management or control or substantially common ownership.

3.3.12.2 Statutory Language

"Organization" usually refers to the people within a business or the pattern or arrangement of people within a business either singly or in groups. The words "trade or business" are considered synonymous and, in this context, are generally held to refer to the trade name, the location and physical structure of the business, the equipment,

fixtures, furniture, and inventory used in the business, and the type of business or product or service sold.

Note that a successor who acquires all of the trade or business need not have acquired all of the "organization" of the predecessor in order for the mandatory transfer provision to apply. The phase "organization, trade, or business" as used in this statute denotes alternatives. That is, the comma after the word "organization" is treated in the disjunctive, because it is followed by the word "or" in the phrase "trade or business." Thus, if it is established that the successor acquired the "trade or business" of the predecessor, it is not necessary that the successor also have employed all of the same individuals who were employed by the predecessor in order for the mandatory transfer provision to apply.

3.3.12.3 Acquisition

For purposes of the mandatory transfer provision, the same definition of "acquisition" applies as is used under Section 201.022 of the Act. See Chapter 3 – Acquisition (Acquired) in this Tax Manual, which defines acquisition in more detail. In general, an acquisition may be defined as:

> *A gaining by any means. In most cases it can be expressed as a gaining of possession. The acquisition does not have to be one that transfers all of the title. It can be the mere right to possess and use under any kind of an agreement. The acquisition may be under an agreement to rent, to lease, or otherwise to possess and use. It would seem to be limited only insofar as there is a legal right to possess.*

3.3.12.4 Obtain Written Documents

When conducting an investigation, it is important that all written documents relating to the transfer be obtained and made a part of the TWC record. Such documents include, but are not limited to: sale or purchase agreements, inventory lists, closing documents, franchise or dealership agreements, deeds, lease agreements, licenses, or any other written documents that relate to the business transfer, plus the attachments to those documents. A verbal description of a document or a written "summary" of any agreement is unacceptable. Obtain a signed copy of the document. Such written documents can usually be obtained from either the predecessor employer (seller) or the successor employer (purchaser).

If the agreement is conditional upon an event to happen in the future, that agreement is generally not effective unless and until the event has actually occurred. For example, a business might be turned over to an individual on the condition that business must be profitable within six months, at which time a formal written lease will be assigned to him. In this example, there can be no acquisition by the designated individual until the condition has been met and the lease has actually been assigned. A future condition that does not relate to the acquisition itself usually has no bearing on the application of the mandatory transfer provision, however.

3.3.13 Factors Used in a Total Acquisition

In determining whether there has been a total acquisition of the predecessor employer's organization, trade, or business, the factors to be considered include, but are not limited to, the following:

1. Is the same type of business being conducted?
2. Is the business conducted in the same location?
3. Did the successor acquire the furniture, fixtures, or equipment used in the predecessor's business?
4. Did the successor acquire the inventory on hand as of the acquisition date?
5. Is the business being conducted under the same trade name? Do the same signs appear on the business premises?
6. Were the doors of the place of business closed at the time of the change in ownership?
7. Did the successor acquire the franchise or dealership agreements from either the predecessor or the manufacturer or franchise holder?
8. Does the successor sell or distribute the same or a similar line of products as the predecessor?
9. Does the successor use the same advertisements, signs, letterhead, telephone directory listings, phone number, or post office box number that the predecessor used?
10. Would the public see any change in the business other than a change of ownership?

Note that not every one of the listed criteria need be shown in every case. Moreover, a particular case may include criteria in addition to those listed above. For example, certain unique types of business may include, as an essential part of the trade or business, specific items not included on the above list.

3.3.13.1 Predecessor Owns Multiple Operations

Difficult questions sometimes arise when the predecessor employer has, or is alleged to have, multiple business operations. First, of course, it must be determined whether there are multiple business operations, and, if so, whether those businesses were in operation, with individuals in employment, on the date of acquisition. Again, referring back to the language of the mandatory transfer provision, Section 204.083 of the Act, we see that the successor employing unit must have acquired all of the "organization, trade, or business of an employer ..." to trigger application of the statute. If the predecessor had multiple business locations, each of which was an employer on the

acquisition date, and if the successor acquired only one but not all of those several business locations, then the mandatory transfer provision probably would not apply. Instead, this would normally be considered a partial transfer under Section 204.084 of the Act, assuming all of the conditions of that statute have been met. However, there are several important factors to consider in a multiple business location situation. These include, among others, the following:

1. Was each business an "employer" under the Act?

   Where there are multiple business locations, each must have been a recognized "employer" under the Texas Unemployment Compensation Act, with individuals in employment on or before the date of acquisition. If not, the business is simply an "asset" or a non-covered business activity and is not relevant to the determination whether 204.083 applies.

2. Were the multiple business operations each located in Texas?

   Out-of-state business operations are not considered in applying the mandatory transfer provision, because the laws of the state where their activities are localized govern those out-of-state operations. With a few exceptions not relevant here, the Texas Unemployment Compensation Act is concerned only with Texas employers.

3. Were the multiple business operations each separately incorporated?

   Under the Texas Unemployment Compensation Act, each corporation is treated as a separate "employer", and is assigned a separate TWC account number, because each corporation is a separate legal entity. Thus, a successor's failure to acquire every one of several corporations that are owned by one individual will not defeat application of the mandatory transfer provisions. Essentially, each corporation stands on its own as to Section 204.083.

3.3.14 Continued Operation of the Business

As noted above, the mandatory transfer provision only applies where the employing unit that acquired the organization, trade, or business also continued the operation of that organization, trade, or business. In order to determine whether there was such a continuation of the organization, trade, or business, one should ask, first, whether there was any cessation of business activity on or after the date of acquisition. Second, determine whether the nature of the business changed to such an extent that the successor no longer operates the same type of business.

3.3.14.1 Business Operations Ceased

Be aware that a short-term interruption in the business activity will not be sufficient to avoid application of the mandatory transfer provision, particularly where the reason why the business activity ceased is directly related to the transfer or the continuation of the business. For example, closing the business for a week or two to clean and restock it in

preparation for reopening under the new ownership does not amount to a discontinuation of the business under the mandatory transfer provision. When investigating whether the business operation was continued, the following are among the factors that should be considered:

1. What was the date of acquisition?
2. Were the doors of the business closed at the time of the acquisition?
3. What was the total length of time, if any, that the business was closed to the public? What were the exact dates that the business was closed?
4. What were the reason(s) or circumstances why the business activities ceased? Do those reasons suggest an intent to continue the business in the future? How?
5. Are there any other factors that suggest an intent to continue the business? For example, do the terms of the transfer agreement, if any, show or imply an intent that the business was to be continued?
6. Was notice given to the public that the business was closed? If so, in what manner was notice of the closing given?
7. Did the notice say or imply that the closing was temporary or permanent?

3.3.14.2 Continuation of Same Type of Business

Another situation that often arises in the context of a mandatory transfer case concerns changes made to the business following the acquisition. That is, it is sometimes contended that the second requirement of the mandatory transfer provision -- that the operation of the organization, trade, or business was continued -- has not been met because the successor has altered the business significantly from the way it was operated by the predecessor.

In general, any minor change in the business operation is not sufficient to avoid application of the mandatory transfer provision. For example, if the predecessor operated a restaurant and the successor continues to operate the same restaurant, but with a different menu, the Commission has held that the predecessor's compensation experience will be transferred under Section 204.083 of the Act. Similarly, where the successor changes some of the product lines or inventory from what was sold by the predecessor, the successor is nevertheless held to have continued the operation of the predecessor's organization, trade, or business, and the mandatory transfer provision does apply.

3.3.14.3 Transfer of Customers of the Business

This same analysis applies to the acquisition of the customers of the predecessor's business. That is, the successor's assertion that he/she did not continue the operation

of the business because some or all of the predecessor's customers were not retained, and the successor had to build his/her own customer base, ordinarily will not defeat application of the mandatory transfer provision. As a practical matter, it is the customers themselves and not the predecessor or successor who determines where they will do business.

3.3.14.4 Third Party Approval of the Transfer

In some cases, the continuation of the business is conditional upon some action to be taken by a third party, or a party unrelated to either the predecessor or the successor. For example, certain businesses can only operate if a license has been granted by a private or governmental regulatory agency. Another example would be a franchise or dealership business, where the franchise holder or manufacturer is a third party unrelated to the predecessor or successor. In these cases the successor might argue that there was no continuation of the business until the license or franchise was granted by the third party. However, if the successor is in fact operating the business it should be obvious that either the license or franchise was granted (either provisionally or permanently) or that the license or franchise is not actually required to continue to operate the business. Again, this is a situation where it would be wise to examine the written documents with care. Rarely will a third party's actions bar application of the mandatory transfer provision.

3.3.14.5 Contract States No Successor Liability

Sometimes the written purchase agreement between the predecessor and the successor states, in effect, that the successor assumes no liability for the predecessor's debts. The written contract may even specify the types of predecessor debts, such as unemployment compensation contributions, that the successor is not obligated to pay. If the purchase contract contains this language, the successor may argue that TWC can neither assign the predecessor's unemployment compensation contributions experience to it under the mandatory transfer provision, nor collect from it any past due taxes that the predecessor owed to the TWC. Neither of these arguments is persuasive.

The first argument -- that the written contract prevents the successor from having to assume the predecessor's unemployment compensation contributions experience -- is invalid because unemployment compensation contributions experience is not a "debt" of the predecessor. Rather, it is simply information used to compute the unemployment compensation contributions experience rate, based on the formulas set forth in the Act. Therefore, the written contract provision that purports to protect the successor from payment of the predecessor's "debts" cannot be used to defeat application of the mandatory transfer provision of the Act.

The second argument -- that the written contract provision protects the successor against the TWC's attempts to collect from the successor any debts the predecessor may have owed to TWC -- is also invalid. Because the TWC is not a party to the written

contract between the predecessor and the successor, it cannot be bound by the terms of that contract. Moreover, the TWC is alone responsible for administering Texas' laws relating to unemployment compensation. Therefore, two private parties cannot make an agreement which would effectively alter the statutory provisions of the Texas Unemployment Compensation Act, which expressly require the TWC to collect from the successor any taxes, penalty, or interest owed but not paid by the predecessor to the acquisition. See generally, Section 207.071, Waiver, Release, or Commutation Agreement Invalid, and Section 204.086 of the Act, Collection of Contributions.

3.4 501(c)(3) EMPLOYER

This section discusses the aspects of the law that specifically apply to 501(c)(3) employers.

3.4.1 Tax-Exempt Nonprofit Organization

Under Section 201.023:

In this subtitle, “employer” also means an employing unit that:

1. is a nonprofit organization under Section 501(c)(3), Internal Revenue Code;
2. is exempt from income tax under Section 501(a), Internal Revenue Code; and
3. employed at least four individuals in employment for a portion of at least one day during 20 or more different calendar weeks during the current year or during the preceding calendar year.

COMMENT: Amendments to the Federal Unemployment tax act required extension of coverage by the states to certain nonprofit organizations -- those described in Section 501(c)(3) of the Internal Revenue Code -- to the same extent as other covered employers, with these exceptions:

1. Churches and religious organizations are still exempt. (See Sec. 201.066 and Tax Supplement 17-78 and its attached comments.)
2. The coverage criteria is "four employees for 20 weeks" rather than "one employee for 20 weeks" and there is no monetary criteria as in Section 201.021.
3. These nonprofit organizations may elect to be reimbursing employers.
4. "Nonprofit" organizations exempt from income taxes, but not described in Section 501(c)(3) of the Internal Revenue Code are subject to the provisions of Section 201.021.

3.4.1.1 Field Responsibility

Almost all phases of administration of the Act with respect to reimbursing employers are functions of the State Office. Field participation usually consists of the following:

1. Familiarity with the provisions of Chapter 205 - Reimbursements.
2. Recognition of the type of employing unit to which Section 201.023 is applicable.
3. Assistance in preparing a Status Report.
4. Obtaining delinquent wage reports if so requested by the State Office.

5. Ability to explain the difference between reimbursement to the Commission of benefits paid out as distinguished from taxes incurred under Chapter 204 - Contributions of the Act.
6. Knowledge that no bonds have yet been required of any reimbursing employer; that inquiries should be addressed to the State Office.
7. Observance of prohibition against advising an eligible employer as to whether or not the organization should elect to be a reimbursing employer.

3.5 EMPLOYING UNIT HAS FILED AN ELECTION

This section discusses the aspects of the law that specifically apply to an employing unit that has filed an election for coverage.

3.5.1 Section 201.024

"Employer" means:

> An employing unit that has elected to become an employer under Section 205.001, 205.002, 206.002 or 206.003.

3.5.2 Section 206.001

An employing unit that is or becomes an employer in a calendar year is subject to this subtitle during that entire calendar year.

3.5.3 Section 206.002

a) An employing unit that is not otherwise subject to this subtitle may elect coverage as an employer for not less than two calendar years.

b) Subsection (a) does not apply to an employing unit to which Section 205.001 or 205.002 applies.

c) On written approval by the commission of an election under Subsection (a), the employing unit making the election becomes an employer to the same extent as all other employers beginning on the date stated in the approval.

COMMENT: An employing unit may not be an employer under any of the provisions of Subchapter C - Definition of Employer and yet may desire, for some reason, to be an employer subject to the Act. The provisions of Section 206.002 are available to any such employing unit. The written election must be for a period of not less than two calendar years. The employing unit becomes an employer with the written approval of such election by the Commission. When the election is approved, the employing unit becomes an employer as of the date of the approval, and thereafter is subject to all of the provisions of the Act to the same extent as other employers. The written election must be made on the Voluntary Election Section of the Status Report. The election is for an indefinite period of not less than two full calendar years and the employing unit will continue to be an employer until such time as an Application for Termination of Coverage is filed and approved.

NOTE: The Tax Department has routinely denied coverage to those organizations with specific exclusions (such as churches) except when the employer might be required to pay higher FUTA taxes.

3.5.4 Beginning Date for Election Coverage

The Commission will approve an election for years prior to the year in which an election is filed; however, periods in prior years for which the employer pays tax cannot be a part of the four (4) calendar quarters of chargeability with benefits necessary before an employer is eligible for an experience tax rate, because an employer cannot be chargeable before the election is filed and approved.

An employing unit may become chargeable with benefits as of April 1 (and be eligible for an experience tax rate one year later) of a year if they:

1. voluntarily elect coverage in the first quarter of that year,
2. the election is with respect to service performed subsequent to January 1 of the preceding year, and
3. the employing unit had employment and paid wages in the preceding year.

3.5.5 Advisability of Electing Coverage

An Accounts Examiner should never recommend or urge voluntary election of coverage. Whether or not an election will be beneficial to an employing unit is a matter of judgment and is a decision, which should be made by the employer. If it appears to the examiner that election is advisable, mention the matter to the employer, explain the necessary procedure, and let the employer make the decision based on the following factors:

1. The probability of becoming mandatorily subject in the current year.
2. The loss in taxes if employer elects and discontinues employment prior to a mandatory subject date.
3. Comparison of taxes to be saved by qualifying earlier for an experience tax rate and the amount of taxes unnecessarily paid in the event the employer would not otherwise become subject.
4. Desire to provide unemployment insurance to employees.
5. Probability of shutdowns which would result in numerous claims.
6. Inability to withdraw elections.
7. Voluntary coverage is for a period not less than two calendar years.

An examiner should never say or imply that the experience tax rate will be the minimum rate when an electing employing unit becomes eligible and the examiner should use other possible rates, as well as the minimum rate in making hypothetical calculations.

In the past, the Commission has had some collection problems arise with employers who volunteered coverage and then went out of business before filing all quarterly reports or paying all taxes. For this reason, field personnel are to transmit all quarterly reports and taxes due at the time they send a Status Report and Application for Voluntary Election of Coverage to the State Office.

Any exception to this must be fully explained at the time the election is transmitted. If any unusual difficulty in securing all reports and taxes is encountered, a full explanation will be given and a recommendation for disapproval of the election will be made. Avoid excessive delay in transmitting a voluntary election to the State Office and be sure to explain why a delay was necessary or was incurred.

3.5.6 Withdrawal of Election

A voluntary election of coverage may be withdrawn at the employer's written request on or before the final due date of the first contribution and wage report due as a result of the election. For example, an employer who voluntarily elects coverage in December of a year may withdraw the election on or before January 31 of the following year.

3.5.7 Election for Non-Employment Services

Under Section 206.003 - Election of Coverage Regarding Services Not Constituting Employment:

a) An employing unit may elect for not less than two calendar years that all services that do not constitute employment and that are performed by individuals in its employ in one or more distinct establishments or places of business are to be considered employment for all purposes of this subtitle.

b) An election under Subsection (a) must be in writing and filed with the commission.

c) On written approval by the commission of an election under Subsection (a), the services constitute employment during the period elected, beginning on the date stated in the approval.

COMMENT: Under this subsection, services which do not constitute "employment" may be deemed to be employment by the approval of a written election filed by an employing unit or an employer. The election cannot be filed to cover a period less than two years. Even though the subsection permits the Commission to approve election covering services performed in one or more establishments or places of business, the Commission will only approve an election covering services which do not constitute employment in all of the employing unit's establishments or places of business.

3.5.8 Election by Nonprofit Organizations

This section discusses the aspects of the law that specifically apply to nonprofit organizations.

3.5.8.1 Pay Reimbursements

Under Section 205.002

a) A nonprofit organization that is described by Section 201.023 or a group of those organizations subject to this subtitle may elect to pay reimbursements for benefits instead of contributions.

b) An election under this section must be made not later than the 45th day after the date on which notice that the employer is subject to the subtitle is mailed to the employer.

c) The election is effective January 1 of the year in which the employer becomes subject to this subtitle.

d) The election is effective for at least two calendar years and may not be terminated before the expiration of that period, except as provided is Sections 205.003 and 205.031.

e) An election may be withdrawn by written application by the employer filed with the commission not later than December 1 before the year for which the employer wishes to change the employer's method of payment. The method of payment may be changed again if a timely application is filed after a minimum of two calendar years.

f) An election to pay reimbursements terminates at any time coverage terminates under this subtitle. An employer whose election terminates because of termination of coverage, on again becoming an employer subject to this subtitle, may reelect to pay reimbursements.

COMMENT: Coverage is mandatory if Section 201.023 is applicable. The election authorized under Section 205.002 pertains to the right to elect to be a reimbursing employer. If such right is not exercised after due notice of such right is given to the employer, the employer is a taxed employer.

3.5.8.2 Termination of Election

Under Section 205.003:

a) The commission may terminate an employer's election to make reimbursement if the employer is delinquent in making reimbursements under this chapter.

b) A termination under this section takes effect at the beginning of the next tax year and remains in effect for that tax year and the following tax year.

3.6 EMPLOYING UNIT LIABLE UNDER FUTA

This section discusses the aspects of the law that specifically apply to employing units liable under FUTA.

3.6.1 Subsection 201.025(1)

"Employer" means: an employing unit that is liable for the payment of taxes under the Federal Unemployment Tax Act (26 U.S.C. Section 3301 et seq.) for the current calendar year;

COMMENT: The reference to "current calendar year" in Section 201.025 means the year being examined for tax liability. For example, if the status of the employer is being examined with respect to 1996, the employer is subject if it is found that the employer was liable under the Federal Unemployment Tax Act for 1996 and is an employing unit in Texas with respect to that year. The subject date is the later of the two dates. That is, the date the employer became subject under the Federal Unemployment Tax Act and the date he became an employing unit in Texas.

Prior to 1970 an employer subject under Section 201.021 for a given year was liable under the state law for the following year even though he did not have qualifying experience in the second year for the reason that he had to complete the second year without qualifying experience in order to be eligible to terminate coverage. This was not true with respect to liability under the Federal Unemployment Tax Act since under that law each year was examined separately with respect to tax liability. Beginning with 1970, the Federal law was changed and a taxpayer is described as one who has qualifying experience in either the current or the preceding calendar year. For example, an employer subject under the Federal Unemployment Tax Act by reason of qualifying experience in 1996 is subject to the provisions of the Federal law with respect to 1997 even though he may not have qualifying experience in 1997.

3.6.2 Section 201.025(2)

"Employer" means: an employing unit that the Federal Unemployment Tax Act (26 U.S.C. Section 3301 et seq.) requires to be an employer under this subtitle as a condition for approval of this subtitle for full tax credit against the tax imposed by the Federal Unemployment Tax Act.

COMMENT: This subsection covers employing units not otherwise liable who must be covered under the FUTA. For example, an employer is liable in Oklahoma under FUTA but does meet Texas criteria. The employer would be liable under the TUCA by virtue of being liable under FUTA.

3.7 POLITICAL SUBDIVISION EMPLOYERS

Under Subsection 201.026:

In this subtitle, “employer” also means a state, a political subdivision of a state, or an instrumentality of a state or political subdivision of a state that is wholly owned by one or more states or political subdivisions of one or more states.

COMMENT: All persons performing services for the State or political subdivision thereof are in covered employment except those specifically exempted by Section 201.063 of the Act.

Examples of political subdivisions are county, city, water district, conservation district, irrigation district, school district, etc. Mental health and mental retardation services centers may be either a part of the state government or a political subdivision of the state. The services performed for political subdivisions of the state were excluded from the definition of employment until January 1, 1978.

Federal law mandated that all states extend unemployment insurance coverage to virtually all employees of the states and their political subdivisions and instrumentality’s.

3.7.1 Election by the State of Texas

Section 205.001

NOTE: Section 205.001 was amended effective January 1, 1978, by the 65th Legislature and is included here only for background concerning the election of coverage by the State of Texas:

> “The State of Texas, a branch or department thereof, or an instrumentality thereof may voluntarily elect (except with respect to a State hospital or a State institution of higher education) coverage as a subject employer for a period of not less than two (2) calendar years and shall for the same period file an election to pay reimbursements for benefits paid as provided in Section 7-A of this Act or to pay contributions as provided in Section 7 of this Act.”

Section 205.001(a) now reads:

> "A State, a political subdivision of a state, or an instrumentality of a state or a political subdivision of a state may elect to pay reimbursements for benefits instead of contributions."

COMMENT: The State of Texas exercised this right to become a reimbursing employer (and also waived the exclusion from the definition of employment then provided in Section 201.063) by enactment of Section 29 of the Act, effective January 1, 1972, which provides:

> "The State of Texas hereby elects, with respect to all services performed in the employ of this State or any branch or department thereof or any instrumentality

thereof which is not otherwise an employer subject to this Act, to become a reimbursing employer subject to this Act, and all services performed in the employ of this State or of any branch or department or instrumentality thereof shall be deemed to constitute employment. This election does not apply to political subdivisions of this State."

Note that coverage applies to all State departments and branches, including instrumentalities of the State, but does not include political subdivisions of the State under Section 29 of the Act.

3.8 DOMESTIC EMPLOYERS

This section discusses the aspects of the law that specifically apply to domestic employers.

3.8.1 Section 201.027

a) In this subtitle, “employer” means an employing unit that paid cash wages of $1,000 or more during a calendar quarter in the current or preceding calendar year for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

b) An employer subject to this section who is not otherwise considered an employer under this subtitle, annually, may report quarterly wages and pay contributions. An employer who elects to report wages and pay contributions under this section must make the election not later than December 31 of the year before the first calendar year reported.

c) Contributions paid as provided by Subsection (b) become due and are required to be reported and paid by each employer not later than January 31 with respect to wages for employment paid in the preceding calendar year. For a rate taking effect under Section 204.041(c) during the preceding calendar year, the commission shall estimate the rate, subject to a correction when a final computation is made as provided by Section 204.047(c).

d) An employer who elects to report wages and pay contributions annually shall file, on the request of the commission, reports at other times as necessary to adjudicate a claim or to establish wage credits.

e) With respect to an employer who reports wages and pays contributions annually under this section, any penalty or interest imposed on the employer shall be computed in the same manner as for other types of employment.

f) An election by an employer under this section is not revocable by the employer before the second anniversary of the date of the election.

g) An employer under this section is not an employer for wages paid for a service other than domestic service unless the employer is treated as an employer for that service under another provision of this subtitle.

COMMENT: Unless the above conditions are met, employers already subject under some other provision of the Act would not be required to report their domestic service employees. Even though liable employers should report wages for regular and domestic service under one account number, liability under Section 201.027 should be determined independently.

In general, services of a household nature, in or about a private home, a local college club, or local chapter of a college fraternity or sorority, include services rendered by cooks, maids, butlers, valets, gardeners, and chauffeurs of automobiles for family use.

Tax Letter 8-97, effective January 1, 1998, broadened the definition of domestic services to:

Work performed in a private home by a baby sitter, butler, caretaker, chauffeur, companion, cook, footman, furnaceman, gardener, governess, groom, handyman, housekeeper, houseman, janitor, laundress, maid, nursemaid, seamstress, sitter, waiter, watchman, or valet.

3.9 FARM AND RANCH

This section discusses the aspects of the law that specifically apply to farm and ranch employers.

3.9.1 Section 201.028

a) In this subtitle, “employer” means an employing unit that paid wages for, or employed individuals in, farm and ranch labor in accordance with this section, Section 201.047, or Section 204.009.

b) In this section, an employer shall not be treated as an employer for wages paid for a service other than service performed by:

   1) a seasonal worker employed on a truck farm, orchard, or vineyard;

   2) a farm and ranch laborer who is a migrant worker; or

   3) a seasonal worker who:

      A) who works for a farmer, ranch operator, or labor agent who employs migrant workers; and

      B) does the same work at the same time and location as migrants workers.

      C) Subsection (b) does not apply if the employer is an employer with respect to farm and ranch labor performed under Section 201.047(a)(4).

COMMENT: Discussion of Section 201.047 may be found in the Field Tax Law Manual, Subsection 2.1.14, Farm and Ranch Labor as Employment.

Discussion of Section 204.009 may be found in Chapter 3 - Application to Labor Agent in this manual.

Unless the above conditions of liability have been met, employers already subject under some other provision of the Act would not be required to report their workers. Even though liable employers should report wages for regular and farm and ranch employees under one account number, liability under Section 201.028 should be determined independently.

3.9.2 Definitions:

The definitions which will be used in administration of Section 201.028, 201.047 and 204.009 are:

1. Farm and ranch labor: All services performed:

   a. On a farm or ranch in the employ of any person in connection with cultivating the soil or in connection with raising or harvesting any agricultural or horticultural

commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur bearing wildlife; or,

b. In the employ of the owner or tenant or other operator of a farm or ranch, in connection with the operation, management, conservation, improvement, or maintenance of such farm or ranch and its tools and equipment, if the major part of such service is performed on a farm or ranch."

2. Truck farm: A farm on which fruits, garden vegetables for human consumption, potatoes, sugar beets, or vegetable seeds are produced for market.
3. Orchard: A farm devoted primarily to the planting, cultivating, growing or harvesting of fruits or nuts.
4. Vineyard: A farm devoted primarily to the planting, cultivating, growing or harvesting of grapes.
5. Seasonal Worker: An individual who is employed in farm or ranch labor of a seasonal or temporary nature and is not required to be absent over night from his or her permanent place of residence.
6. Migrant Worker: An individual who is employed in farm or ranch labor of a seasonal or temporary nature and who is required to be absent overnight from his or her permanent place of residence.
7. Other farm or ranch laborer: An individual employed in farm or ranch lab or who is not a seasonal worker nor a migrant worker.
8. Labor Agent: - Any person in Texas who, for a fee offers or attempts to procure, or procures employment for employees, or without a fee offers or attempts to procure or procures employment for common or agricultural workers; or any person who for a fee attempts to procure, or procures employees for an employer, or without a fee offers or attempts to procure common or agricultural workers for employers, or any person, regardless whether a fee is received or due, offers or attempts to supply or supplies the services of common or agricultural workers to any person. The term "Labor Agent" includes any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for such workers; supervises, times, checks, counts, weights, or otherwise directs or measures the work; or disburses wage payments to the workers. For further details, see the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. Section 1801 et seq.).
9. Farm Labor Contractor: Any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

10. Farm Labor Contracting Activity: Recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

3.9.3 Application to Labor Agent

Under Section 204.009:

a) A labor agent who furnishes a farm and ranch laborer is liable for the payment of a tax under this subtitle as if the labor agent were the employer of the laborer, without regard to any factor used to determine an employer-employee relationship, including the right of control.

b) If a labor agent does not pay the tax in accordance with this subtitle, a person who contracts with the labor agent for the services of a farm and ranch laborer is jointly and severally liable with the labor agent for payment of the tax under this subtitle as an employer.

c) A labor agent shall notify each person with whom the labor agent contracts whether the labor agent pays the tax under this subtitle.

d) A labor agent who pays the tax shall present evidence of payment to each person with whom the labor agent contracts.

e) In this section, “labor agent” means a person who is a farm labor contractor under the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. Section 1801 et seq.).

3.10 Professional Employer Organization (PEO)

This section discusses the aspects of the law that specifically apply to Professional Employer Organization (PEO).

3.10.1 PEO Concept

"Staff Leasing" is a term used by the Tax Department to denote a relationship whereby one legal entity supplies labor to another legal entity on a continuing basis for a fee. Legislative changes in 2013 changed the term "staff leasing" to "professional organization services."

PEO services in Texas are governed by the Professional Employer Organization Act. This Act governs Professional Employer Organizations in Texas and is the basis of how the Commission handles Professional Employer Organizations. The Texas Department of Licensing and Regulation (TDLR) administer the Act including the licensing of Professional Employer Organizations.

The Professional Employer Organization Act defines professional employer services as, "the services provided through coemployment relationships in which all or a majority of the employees providing services to a client or to a division or work unit of a client are covered employees."

The term does not include:

a. Temporary help;

b. An independent contractor;

c. The provision of services that otherwise meet the definition of "professional employer services" by one person solely to other persons who are related to the service provider by common ownership; (see unemployment tax procedure below for tax department requirements); or

d. A temporary common worker employer as defined by Chapter 92, link below:

   http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.92.htm#92.002

In the case of Item C: If the Professional Employer Organization is related to the client refer to the Status Manual, Chapter 6 – "Common Paymaster and Payroll". The Professional Employer Organization in question will not be considered the employer unless it obtains a PEO license and, even then, will be considered the employer as of the effective date of their PEO license.

3.10.2 PEO Historical Perspective

The Commission was at odds with the concept of PEO for many years. The Tax Department maintained that the Client, rather than the Professional Employer Organization, was the employer. The Tax Department required workers' wages to be reported under the client's TWC account number. The PEO industry disagreed. The PEO industry asserted that the Professional Employer Organization was the employer and that workers' wages should be reported under the PEO's TWC account number. The result of the disagreement was years of litigation eventually culminating in legislation creating the Professional Employer Organization Act.

3.10.3 PEO versus Temporary Help

Professional Employer Organizations are not the same as temporary help agencies.

A Professional Employer Organization:

1. Leases covered employees on a long term or continuing basis to a Client.
2. Assigns a covered employee for a long duration.
3. Does not necessarily maintain their own pool of labor. A Professional Employer Organization will approach an existing company and offer to take over their employment responsibilities. The Client will pay the Professional Employer Organization a fee for the covered employees to be leased back to them.
4. Must register with TDLR.

A temporary help agency:

1. Supplies labor on an "as needed" basis.
2. Assigns a worker for a finite duration. Labor is provided for an employee absence, temporary skill shortage, seasonal workload or special project, etc.
3. Maintains their own pool of labor. A temporary help agency does not approach an existing company with an offer to take over their employment responsibilities.
4. Is not required to register with TDLR.

3.10.4 PEO Sharing Information

Interagency Cooperation, Section 91.003 of the Professional Employer Organization Act, requires that the Texas Workforce Commission, Texas Department of Insurance, and the Office of the Attorney General cooperate with each other and TDLR in the implementation of the Act. TWC currently has a sharing agreement with TDLR only. This means that the Tax Department can directly share information with TDLR, but within reason.

Tax Department guidelines for sharing information:

1. All information sent to TLDR must be stamped confidential and pertain only to a PEO issue.

2. If another state agency requests information, refer them to the TWC Office of General Counsel - Open Records Unit.
3. If there is any doubt whether certain information should be released, consult your supervisor.

3.10.5 PEO Background Check

If a Professional Employer Organization applies for a new license or to renew an established license, to operate in Texas, TDLR may in some cases conduct a background investigation of the Professional Employer Organization and its "Controlling Persons". Controlling persons are people or entities associated with the Professional Employer Organization. A controlling person need not be only an individual. Sometimes a controlling person is a corporation. In all circumstances, TDLR will detail who is under investigation.

There are two kinds of background checks, new PEO license applications and license renewals. The purpose of these background checks is to provide TDLR with information about the applicant's tax account and those tax accounts associated with the account and controlling persons. Background checks are our opportunity to inform TDLR about any problems with a particular employer or person. TDLR can delay the approval or renewal of a license until a problem is resolved to TWC's satisfaction.

3.10.6 PEO No License

Under current state law, a Professional Employer Organization must be licensed with TDLR before it is recognized as the employer of covered employees. If the Professional Employer Organization does not have a license, their client is responsible for reporting employees under their own TWC account number.

3.10.7 PEO License

By statute, a Professional Employer Organization which holds a license from TDLR is the employer of covered employees. Because they are legally the employer, the Professional Employer Organization may report covered employees' wages under the Professional Employer Organization’s TWC account.

3.10.8 Acquisition

A Professional Employer Organization should not be treated as the successor (total or partial) to one of their clients. It is permissible, however, for one Professional Employer Organization to acquire another Professional Employer Organization. In this situation, the successor Professional Employer Organization can be considered the successor.

3.10.8.1 Application of Taxable Wages Limit

Effective 9/1/2015 Texas Labor Code 91.044 is amended regarding contributions and withholdings due for employment services rendered **on or after January 1, 2016,** as follows:

"A license holder may, in a calendar year during which an employee becomes a covered employee of the license holder, apply toward the maximum amount of taxable wages established in Section 201.082(1) any wages paid to the employee in that calendar year by:

(1) the client; or

(2) another license holder under a prior professional employer services agreement with that client."

This means that the $9000 taxable wage limit will be applied between the client TWC account and the PEO account or another PEO account(s) used by the client during the calendar year.

An acquisition **will not** be recorded between the PEO and the client.

If assignments are received, such as a B-27, 940's, or audits, the employer will be asked to provide information to verify the taxable wage amount.

3.10.9 PEO Client Lists

A Client List (Form C-3020) is a quarterly form sent to Professional Employer Organizations. The form, which is required by the Professional Employer Organization Act, solicits the name, address, number of covered employees, and total quarterly payroll amount from the Professional Employer Organization for each of their clients.

Status and Labor Market and Career Information (LMCI) use Client Lists to record the activities of Professional Employer Organizations. LMCI sends licensed Professional Employer Organizations Form C-3020 each quarter. Each Professional Employer Organization is required to complete and return the form on or before the end of the month following the close of the quarter. PEO client lists are considered to be proprietary tax documents and therefore not to be released to the public.

Completed forms are returned directly to LMCI.

3.11 TERMINATION OF COVERAGE

This section discusses the aspects of the law that specifically apply to termination of coverage.

3.11.1 Section 206.004

a) An employing unit may cease to be an employer only on January 1 of a year and only if the commission finds that:
   1. the employing unit was not an employer during the preceding year; or
   2. the employing unit has not had any individuals in employment during the preceding three calendar years.

b) The commission may not make a finding under Subsection (a)(1) unless the employing unit files an application of termination of coverage with the commission on or after January 1, but before April 1 of the year for which termination is requested. The commission may make a finding under Subsection (a)(2) without an application having been filed.

COMMENTS: The Act requires two things as prerequisite for the termination of coverage by an employer subject to the Act: filing an application for termination of coverage, and a finding by the Commission of facts which entitle the employer to terminate it. The method prescribed is exclusive and when the status of 'employer' once attaches under the Act it continues until terminated in the manner provided. There was an obviously sound reason for including such a provision in the Act. For without it, the Commission would find it most difficult to keep proper record of employers subject to unemployment contributions. And a construction of the provision which would permit termination of coverage by one appearing on the records of the Commission as an employer subject to the Act in some other manner of 'substantial compliance' could only lead to difficulty and confusion in the administration of the Act.

The subsection requires a written application by the employer. The written application must be in language capable of being clearly interpreted as an application for termination of coverage. The Commission prescribes a Form C-71, "Application for Termination of Coverage," for use in making a written request for termination of coverage; however, the Commission does recognize an application filed in some other written form.

The Commission will recognize an application for termination that covers a specific class of employment and liability. There are three classes of liability:

1. Liability under Sections 201.021, 201.022, 201.023, 201.024 and 201.025
2. Liability under Section 201.027
3. Liability under Section 201.028

An employer who is liable under more than one class as indicated above may file for termination of coverage of a particular class and, if the Commission finds the employing unit was not an employer under that subsection during the preceding year, cease to be a covered employer within that class.

The subsection requires that the written application be filed with the Commission on or before the 31st day of March of the year at the beginning of which termination of coverage is sought. Employers should be instructed to file written applications for termination of coverage between January 1 and March 31. If a written application is filed prior to January 1 of any year, we shall request an application on the specified forms after January 1 and before March 31.

The employing unit filing the application shall cease to be an employer only after the Commission makes its finding as required by the law. It is not necessary that the Commission be able to make its finding exclusively on the basis of information included in the application. If an application has been filed in the proper form and within the proper time, the Commission must make a finding. If sufficient facts are not contained in the written application to enable the Commission to make its finding, additional facts will be secured from the employing unit. The Commission may seek verification of facts stated in the application, and this usually is accomplished through investigation by its own personnel prior to Commission action on the application.

If an Application for Termination of Coverage is filed on or before December 31, there may be occurrences during the remainder of the year which are material to a finding by the Commission. Even though the written application was filed in proper form at the time, no action can be taken on the application until all of the material facts are placed before the Commission. The employing unit does not cease to be an employer until these facts are presented and the Commission makes its finding.

An Application for Termination of Coverage, timely filed on or before March 31 of a calendar year, may be withdrawn at the employer's request in writing on or before April 30 of the same year (i.e., the date on which the current contribution and wage report would be finally due).

3.11.2 Section 206.004(a)(2)

This section states that regardless of whether or not an application for termination of coverage has been filed, an employing unit shall cease to be an employer subject to this Act as of the first day of January of any year if the Commission finds that the employing unit has not had any individuals in employment on any one (1) or more days within the three (3) immediately preceding consecutive calendar years.

COMMENTS: Each year the Status Section of the Tax Department makes status determinations concerning those employers who, according to the Commission's records, have not had any individuals in employment on any one or more days within the three immediately preceding consecutive calendar years.

The employers' accounts which have been on an "inactive" status throughout the three preceding calendar years are recorded as terminated under Section 206.004(a)(2) on the assumption that the employers did not have employment. Notice of Change of Records (Form C-10) is not prepared. Field Tax offices and the employers are not notified of the 206.004(a)(2) terminations. Field examiners will know which accounts are terminated by visual observation of the Employer's Master File on the CRT. If and when it is discovered that an employer whose coverage has been shown to be terminated under Section 206.004(a)(2) actually had employment in the three year period but failed to report it, the account is reopened and we attempt to collect the tax for past due periods.

We also terminate the coverage of employers whose accounts are on an "active" status but who have filed quarterly reports showing "no wages" during each quarter of the three preceding calendar years. However, these employers are notified by letter that their coverage has been terminated under Section 206.004(a)(2) and that no further reports are required unless and until they again become a subject employer.

3.11.3 Witherspoon Oil Co. v. Texas

In the "Witherspoon" situation, the Commission notified Witherspoon Oil Company that it was not a subject employer and refunded taxes paid for 1936. It was later discovered that, as a matter of fact, liability occurred in 1936 and the company was so notified after March 31, 1939. Had Witherspoon been notified before March 31, 1939, the company could have filed an Application for Termination of Coverage as of January 1, 1939, because it did not have the then requisite eight employees in twenty weeks during 1938. The Commission's position that Witherspoon owed taxes for 1939, because an Application for Termination of Coverage was not filed during the period from January 1 to March 31, 1939, was not sustained by the Supreme Court.

The pertinent facts upon which the Court based its decision appear to be:

1. During the period from January 1 to March 31, 1939, the Commission's records reflected that Witherspoon was not a subject employer, and
2. The employer was not guilty of fraud or misrepresentation.

Under similar circumstances, the Commission will terminate an employer's coverage upon request even though a written application was not filed timely.

A request for termination of coverage under the Court's decision in the Witherspoon case (when a written application was not filed timely) cannot be approved if:

1. During the period from January 1 to March 31 the Commission's records reflect that the employer was subject, or
2. The Commission's records do not reflect either coverage or noncoverage (as would be the situation if a current Status Report had not been filed), or

3. The Commission's records reflect noncoverage as a result of fraud or misrepresentation by the employer.

Obviously, this literal interpretation of the Court's decision in the Witherspoon case will practically eliminate situations in which coverage can be terminated even though a written Application for Termination of Coverage was not timely filed.

3.12 ALTERNATE SUBJECT DATES

This section discusses the aspects of the law that specifically apply to alternate subject dates.

3.12.1 Liability Under Two or More Sections

At the time liability of an employer is investigated or examined, if liability is found under the provisions of two or more sections for the same calendar year, liability will be established as of the earlier subject date, unless such liability as of the earlier date is difficult to prove and liability as of the later date is clear and uncontested.

EXAMPLE: If it appears that an employing unit might have become an employer under Section 201.022 on July 2, 1989, but proof of such liability is difficult and is contested, whereas liability as of September 30, 1989, under Section 201.021 is clear and uncontested, the Commission will establish liability under Section 201.021.

4 TAXES

This chapter discusses the aspects of the law that apply to taxes in general.

4.1 LIABILITY FOR TAXES

This section discusses the aspects of the law that specifically apply to liability for taxes.

4.1.1 In General

Although the word ‘contributions’ is used throughout the Act, Commission Rules and this Manual, the courts have said that ‘contributions’ are in reality excise taxes. Since ‘taxes’ is a word universally understood by all employers, it is desirable that ‘taxes’ rather than ‘contributions’ be used in letters to and in conversations with employers.

As defined in Section 201.011, contribution means a tax payment under this subtitle to the compensation fund.

4.1.2 Liability of Employer

As provided in Section 204.002:

a) An employer shall pay a contribution on wages for employment paid during a calendar year or the portion of the calendar year in which the employer is subject to this subtitle.

b) The contribution shall be paid to the commission in accordance with rules adopted by the commission.

The language of this subsection indicates that every ‘employer’ is liable for payment of contributions or taxes.

4.1.3 Period of Liability

Liability for payment of taxes is incurred on all wages paid by an employing unit when it is an ‘employer’ as defined in Chapter 201 Subchapter C.

The wording in Section 204.002 provides that:

> An employer shall pay a contribution on wages for employment paid during a calendar year or the portion of the calendar year....

Section 206.001 provides that:

> An employing unit that is or becomes an employer in a calendar year is subject to this subtitle during that entire calendar year.

Therefore, an employer is liable for taxes on any and all wages for employment, not specifically exempted, paid during any calendar quarter of such calendar year.

EXAMPLE: Mr. A opened a new business on January 1, 2000, and had some temporary employees. He continued business with only occasional employees until December 1, 2000, on which date he acquired the business and all assets of Mr. B, an employer. The employment Mr. A had up through December 1, 2000, was not qualifying under the Act, i.e., Mr. A did not have twenty weeks of employment nor a quarter with $1,500 in wages. Mr. A became an 'employer' under Section 201.022 on December 1, 2000; however, as provided in Section 204.002, Mr. A was an employer throughout 2000. He is liable to prepare reports and pay taxes for all four quarters of 2000. These reports must include wages paid for all four quarters of 2000 even though Mr. A did not qualify as an employer until December 1, 2000.

4.1.4 Liability of Successor

Section 204.086 provides that:

a. An individual or employing unit that acquires the organization, trade, or business or substantially all of the assets of an organization, trade, or business of an employer, who, at the time of the acquisition, is indebted to the commission for a contribution, a penalty, or interest, is liable to the commission for prompt payment of the contribution, penalty, or interest.

b. If not paid, the commission may bring suit for the collection of a contribution, a penalty, or interest as though the contribution, penalty, or interest had been incurred by the successor employer.

4.2 BASIS OF TAX

This section discusses the aspects of the law that specifically apply to the basis of tax.

4.2.1 Employment

The tax is based on wages paid for employment. Although an employer pays wages for services performed for him, no tax is payable on those wages unless the services constitute 'employment'.

4.2.2 Payments Included as Wages Paid

This section discusses the aspects of the law that specifically apply to payments included as wages paid.

4.2.2.1 Wages - Section 201.081

Wages means all remuneration for personal services, including:

1. the cash value of remuneration paid in any medium other than cash (See Chapter 4 – Wages Paid in A Medium Other Than Cash); and
2. a gratuity received by an employee in the course of employment to the extent that the gratuity is considered wages in the computation of taxes under the Federal Unemployment Tax Act (26 U.S.C. Section 3301 et seq).
3. gifts, including cash, to an individual who is under contract of hire.

4.2.2.2 Discussion

This discussion of wages relates only to wages for personal services in employment, as the term is defined in the Act. Wages, as used in this section, may be:

1. Wages paid in cash.
2. Wages constructively paid in cash.
3. Wages paid in a medium other than cash.
4. Wages paid by or through the employer in the form of a gratuity.

4.2.2.3 Payments Actually Received

Wages paid are payments **actually received** by an individual. This means the payment has been delivered into the hands of the individual. The general rule is that wages shall be reported for the period in which they were actually paid unless they were constructively paid.

4.2.2.4 Wages Constructively Paid

Wages constructively paid are wages, which have not yet been delivered into the hands of the employee but are available. Such constructive payments are treated the same as wages paid as of the date they are credited, set apart or are otherwise available to the employee.

EXAMPLE 1: Employer A customarily pays the employees monthly on the last working day of the month. On December 31, 2000, all employees were handed their paychecks except Mrs. Z who was absent from work due to illness. Mrs. Z was handed her December paycheck when she returned to work on January 2, 2001; however, it was available to her on December 31, 2000. Since her 'wages' were available to her on December 31, 2000, they are considered paid on that date.

EXAMPLE 2: Employer B customarily pays the employees monthly on the last working day of the month. On December 31, 2000, employees in the headquarters office were handed their paychecks, and Employer B mailed paychecks to employees working in the branch offices. Since the employer has done everything within the employer's power to pay all wages on that date, all wages are considered to be paid on that date.

EXAMPLE 3: Employee Smith's sales commissions vary considerably from month to month due to the seasonal product he is selling. Although Smith can receive payment on his commissions at the time they are credited to his account, he customarily withdraws approximately $2,000.00 per month from his account for living expenses and "leaves the rest on the books." During the first quarter of 2000, commissions were credited to his account in the amount of $12,000.00. His withdrawals during the quarter amounted to $6,000. Since Smith's commissions may be withdrawn on the date they are credited to his account, they are deemed to be paid on those dates. His wages for the first quarter of 2000 amount to $12,000.00.

4.2.2.5 Wages Paid In A Medium Other Than Cash

Wages paid in a medium other than cash include living quarters, meals, or anything else received by an individual in a medium other than cash. Commission Rule 815.4 titled Remuneration Other than Cash states:

(a) If an individual receives any part of his wages in any medium other than cash, the reasonable cash value of such remuneration other than cash shall be deemed for all purposes of the Act to be either:

(1) the amount which is agreed upon between the employing unit and such individual if:

(A) the terms of such agreement are reported to the commission; and

(B) the commission determines that such agreed value or amount is reasonable; or

(2) the cash value as shown to the satisfaction of the commission.

(b) If the commission determines that the amount agreed upon is unreasonable, or if the employing unit and such individual fail to agree upon an amount, or if the employing unit fails to report the terms of an agreement to the commission and if the employing unit fails to show the cash value of such noncash remuneration prior to the due date of contributions with respect to such wages, the commission shall fix an amount or value after considering all available information and evidence; and such amount fixed by the commission shall be deemed for all purposes of the Act to be the cash value of such wages received in any medium other than cash.

The Commission has established that the value shall be the amount agreed upon between the employing unit and the employee. This agreement may be made either at the time of hiring or at a later time, which could even be at the time the question of value is raised by the Commission. The agreement may be written or oral; however, the Commission must have evidence of the agreement. This evidence can be more satisfactorily furnished through a written statement signed by the employer and the employee. It would appear difficult for the Commission to claim taxes on a value arising through such an agreement unless it is able to prove existence of an agreement. In the absence of something in the hands of the Commission field representative to prove the agreement, the Commission could support its claim in court only on the basis that the value for wages used is reasonable as determined by its own investigation.

In the absence of an agreement between the employer and the employee, a claim for taxes will be made by use of a value determined through investigation and found to be reasonable by the Commission. The burden of finding the facts on which a reasonable value can be based rests with the Commission until such time as it may become necessary for the Commission to make the finding through a coverage hearing. The representative's decision as to the value will have full Commission support provided there are facts to show that the determined value is reasonable.

In general, the Commission will be guided and will often rely on federal unemployment tax rulings and regulations when ruling on what constitutes wages paid in a medium other than cash.

Noncash wages in domestic employment are taxable under Section 201.081 of the TUCA even though only cash wages determine tax liability under Section 201.027.

COMMENTS: The U.S. Supreme Court in the case of Rowan Companies, Incorporated vs. U.S.S.Ct., Number 80-780, decided on June 8, 1981, that the value of meals and lodging provided employees for the convenience of the employer were not taxable for F.I.C.A. and F.U.T.A. No changes were made to the T.U.C.A. as a result of the Rowan case.

Employers who have employees that are furnished meals and/or lodging in connection with their work should report the value of these items as wages to the Texas Workforce Commission. (See Tax Supplement 16-81).

4.2.2.6 Tips

All tip income, including charged tips reported by an employee to his or her employer, are wages.

EXAMPLE 1: The customer arranges with hotel for banquet and makes lump-sum payment to waiter in charge of banquet with instructions to distribute amount among employees serving banquet, leaving amount each employee gets solely to discretion of head waiter. The employer has no knowledge of the amount of their tips, and the amount is not a factor in fixing the pay of the employee. In this situation, tips to the headwaiter are not wages for FUTA purposes.

Tips voluntarily given directly to a waiter or waitress (or left on a table as a gratuity by a patron), which are accounted for in writing by an employee to the employer and are taken into account by the employer to the extent permitted in determining the employee's compensation under the state or federal minimum wage laws, are interpreted as ‘Wages.’ Tips accounted for and determined as ‘Wages’ should be reported and combined with any other wages paid. This figure is entered as a single item on the Wages List part of the quarterly report.

A charge for services (commonly called a gratuity) added to a patron's bill for later distribution to the waiters, waitresses, busboys, etc., by the employer constitutes ‘Wages.’ Accordingly, these charged ‘Wages’ should be entered on the Form C-3 and Wages List.

EXAMPLE 2: A restaurant prohibited tipping but added a 10 percent service charge to customers checks which was distributed to employees along with salary. In this situation the 10 percent added is an arbitrary charge fixed by the restaurant that the customer must pay and is clearly not a gratuity. Moreover, it isn't paid by the patron directly to the employee, but to the restaurant and becomes part of the restaurant's funds. Therefore, this service charge is taxable wages subject to both employer and

employee taxes under Social Security, FUTA, and income tax withholding, as well as Texas Unemployment Compensation Taxes.

ADDITIONAL INFORMATION

The Texas Unemployment Compensation Act defines wages in part as gratuities considered wages in the computation of taxes under the Federal Unemployment Tax. Accordingly, tips taxable under F.U.T.A. will also be taxable under T.U.C.A. The effective date of this change was January 1, 1986.

FUTA Definition of Tips in section 3306 (s) Tips Treated as Wages

For purposes of this chapter, the term wages includes tips which are: (1) received while performing services which constitute employment, and (2) included in a written statement furnished to the employer.

4.2.2.7 Back Payments Under FLSA

Payments of unpaid minimum wages and unpaid overtime compensation pursuant to the Federal Fair Labor Standards Act constitute wages because such payments are back payments for personal services performed. Although back pay awards are wages and taxable when paid, amounts paid as 'liquidated damages' are not wages. Liquidated damages are not remuneration for personal services.

Liquidated damages is defined as: the sum which the party to the contract agrees to pay if he breaks some promise and, which having been arrived at by good faith effort to estimate actual damage that will probably ensue from breach is recoverable as agree damages if breach occurs.

4.2.2.8 NLRB Back Payment Awards

A payment made by an employer to an employee who has been reinstated and granted back pay for time lost, pursuant to an order issued by the National Labor Relations Board, constitutes wages for federal employment tax purposes. A payment to an employee under an order of the Board which makes the employer and a labor organization jointly and severally liable will be treated as wages paid by the employer regardless of whether the actual payment is made by the employer or the labor organization. However, where the order of the Board is directed exclusively to a labor organization, the payment of the back pay award will not be treated as wages. The commission adopted the principles stated above in a Legal Department opinion dated April 15, 1966.

When back pay is awarded by the National Labor Relations Board, the payments constitute wages for the quarter in which they should have been paid rather than the quarter(s) in which they are received.

COMMENT: Prior to September 1, 1985, when a back pay award was reduced due to the receipt, by the claimant, of unemployment compensation benefits, the resulting

overpayment was the responsibility of the claimant. Subsequent to September 1, 1985, that overpayment is due from the employer. The employer is required to notify the Commission of the award and reimburse the Trust Fund for the amount of benefits paid equaling the amount of the reduction in the back pay award.

4.2.2.9 Guaranteed Annual Wages

The Commission agrees with a federal ruling that amounts paid to an employee under a collective bargaining agreement in which employees are guaranteed an annual minimum wage constitutes taxable wages. (Reference: Tax Supplement 144-74 quoting Revenue Ruling 73-22; Revenue Ruling 61-68; and Attorney General's Opinion H-404.)

4.2.2.10 Dismissal Payment

A dismissal payment, which is any payment made by an employer on account of involuntary separation of the employee from the service of the employer, will constitute wages irrespective of whether the employer is, or is not, legally required to make such payment.

4.2.2.11 Payrolling or Common Paymaster

The Internal Revenue Service permits employers to file consolidated payroll reports for related or subsidiary corporations under a Reporting Agent Agreement.

Under this arrangement, one entity (usually a corporation) reports all wages paid to its employees as well as the employees of related entities under one Federal Identification Number. Often, the "payrolling" corporation processes the payroll information and issues paychecks to all employees. However, it is customarily reimbursed by the related or subsidiary corporations not only for the wages, but also for the employer share of federal and state payroll tax expenses. The Payrolling Corporation may also receive a processing fee.

A related term, Common Paymaster, describes an arrangement in which individuals are employed, at the same time, by two or more related corporations, but receive their combined wages from only one of those employers, i.e. the Common Paymaster.

In 1977 the Federal Social Security and Unemployment Tax Acts were amended to provide that beginning January 1, 1979 a related group of corporations, employing an individual jointly, would not be required to pay dual FICA and FUTA taxes if the individual in question is compensated through a Common Paymaster which is one of the corporations. Under federal law prior to January 1, 1979 and under present state law and practice, in such a situation, both corporations would be liable for taxes on the individual's wages up to the statutory limit. Although some of the states have

indicated that they will follow the federal law, the majority, some thirty-three, have indicated that they will not.

The issue of payrolling is not precisely addressed in the TUCA, however, the Commission does not allow one employer to report another employer's employees. The Commission requires each separate legal entity to report its employees under its own account number. Employers often believe that payrolling by related corporations is acceptable for state reporting since the IRS permits it for federal tax reporting.

Reference: Status Manual Chapter 6 – Payrolling for additional information.

4.2.3 Payments Excluded From Wages

If there is any doubt whether payments should be excluded under Section 201.082, a complete description of such payments should be submitted to the State Office Status Section for a determination.

4.2.3.1 Excess Wages

Under Section 201.082(1):

Wages does not include--

> "..that part of the remuneration paid by an employer to an individual for employment during a calendar year that exceeds remuneration to the individual, excluding remuneration under another subdivision of this section, by the employer of... $9,000 for a calendar year after calendar year 1988;..."

COMMENT: The limitation is applicable individually to each employer from whom wages are received and not to the aggregated amount paid to an employee by all of his employers.

EXAMPLE: In 2000, an employee is paid $7,500 by Employer A and $9,000 by Employer B. Both Employer A and Employer B must pay tax on $9,000. Wages of $7,500 must be reported for the employee by Employer A and wages of $9,000 must be reported for the employee by Employer B.

An approved successor employer may take into consideration wages paid to an employee during a calendar year by the predecessor employer in arriving at the $9,000 annual taxable wage limit, provided a transfer of compensation experience is made.

4.2.3.2 Exempt Employer Payment Plan (Cafeteria Plan)

Under Section 201.082(2):

'Wages' does not include:

> a payment, including an amount the employer pays for insurance or an annuity or pays into a fund for the payment of insurance or an annuity, that is made to or for an

employee or the employee's dependent under a plan the employer established for employees generally, or a class of employees, including or excluding the employee's dependents, for:

A) Retirement;

B) Sickness or accident disability; except as indicated in attachment A below.

C) Medical or hospitalization expenses in connection with sickness or accident disability; or

D) expenses related to death.

COMMENT 1: This exclusion is similar to the exclusion from the definition of 'wages' in Subsection 3306(b) of the Internal Revenue Code. It should be noted that Subsection 3306(b) of the Code does not exclude payments on account of retirement from wages. Also, payments for sickness or accident disability under this section 'excludes from the term 'wages' only payments which are received under a workmen's compensation law'.

COMMENT 2: Effective January 1, 1982, Public Law 97-123 eliminated the exclusion from F.I.C.A. of sick pay, made under a plan or system, including third-party payments, for the first six months of illness. No changes were made to the T.U.C.A. as a result of this Law change affecting F.I.C.A. reporting. Sick pay is still an exclusion from the definition of wages for T.W.C. under 201.082.

FROM A TAX DEPARTMENT MEMO OF DECEMBER 21, 1995 (BY STEVE RILEY):

We frequently receive inquiries regarding the reportability of sick pay. As a general rule, we use the same guidelines as the Internal Revenue Service in determining the reportability of sick pay.

Employer payments, under a sick pay plan described in attachment A, are exempt, and should not be reported. However, employer payment, in the absence of a sick pay plan, are taxable through the first full six months following the beginning of the sickness. Thereafter, the payments are not considered wages and should not be reported.

Employer payments, under a 'paid sick time' plan described in attachment A, are taxable.

Payment, on account of sickness from a third party, e.g., an insurance carrier, to the employee are not considered wages and should not be reported.

ATTACHMENT A:

Characteristics of a Sick Pay Plan

The following characteristics are typical of a legitimate sick pay plan:

- The employer or third-party insurance provider bears an 'insurance risk'.
- The plan is in writing or otherwise made know to employees.
- Reference is made to the plan in the employment contract.
- The employer contributes to the cost of the plan.

- There is a special fund from which sickness or disability payments are made.
- Definite standards exist for determining eligibility, such as length of service, occupation or job classification.
- An established formula is used to determine the minimum and maximum amounts that are payable to an eligible employee.

Paid Sick Time

Paid sick time is the practice of allowing employees to accrue a limited number of hours or days of paid time off for illness. Payments for these periods are made directly from the payroll account and are not provided for under an insurance plan. Employees are paid their regular rate of pay for each hour or day of sick leave. TWC and other state agencies utilize a 'paid sick time' plan. These payments are treated as regular wage payment and are taxable.

COMMENT 3: When the employer expends funds to provide benefits under a cafeteria plan, the payments would not be taxable as long as they are used to fund the four categories listed above which are exempt from unemployment taxation under Section 201.082. However, if such funds were used to purchase benefits not exempted by Subdivisions A, B, C, or D, (for example: day care, profit sharing, deferred compensation) they would be taxable. The Internal Revenue Code defines a 'cafeteria plan' as a written plan under which all participants are employees, and the participants may choose among two or more benefits consisting of cash and statutory nontaxable benefits.

COMMENT 4: Benefits funded by salary reduction or deduction from the employees' base pay would be taxable, regardless of what they are used to purchase or provide.

4.2.3.2.1 Non-Subscriber/ERISA Plan

Non-subscription programs are an alternative solution to workers' compensation insurance. Texas Employers who elect not to purchase workers' compensation insurance are referred to as non-subscribers.

You can become a responsible non-subscriber by providing a comprehensive injury benefit plan to cover occupational injuries and illnesses and provide for legal liability defense and damage payments.

If all the contributions to this plan are from the employer and none are from the workers and if those payments are for sickness, injuries, medical and/or death then the payments would be exempt for TUCA purposes under 201.082.

4.2.3.3 Retirement Payments

Under Section 201.082(3):

Wages does not include:

a payment made to an individual employee for retirement, including an amount an employer pays for insurance or an annuity or pays into a fund for the payment of insurance or an annuity;

4.2.3.4 Sick Pay

Sickness or accident payments after six months

Under Section 201.082(4):

'Wages' does not include:

a payment for sickness or accident disability, or medical or hospitalization expenses for sickness or accident disability, an employer makes to or for an individual employee after the expiration of six calendar months after the last calendar month the employee worked for the employer;

COMMENT: This exclusion is the same as the exclusion from the definition of 'wages' in Subsection 3306(b)(4) of the IRS Code.

4.2.3.5 Certain Exempt Funds

Exempt funds, annuity plans and bond purchases

Under Section 201.082(5):

'Wages' does not include:

a payment made to or for an employee or the employee's beneficiary:

A) from or to a trust fund described in Section 401(a), Internal Revenue Code (26 U.S.C. Section 401(a)), that is exempt from tax under Section 501(a), Internal Revenue Code (26 U.S.C. Section 501(a)), at the time of payment, unless the payment is made to an employee of the trust as remuneration for service as an employee and not as a beneficiary of the trust;

B) under or to an annuity plan that, at the time of the payment, is a plan described by Section 403(a), Internal Revenue Code (26 U.S.C. Section 403(a)); or

COMMENT: Previously wages paid under or to a bond purchase plan that, at the time of the payment, was a qualified bond purchase plan under section 405(a), Internal Revenue Code (26 U.S.C. Section 405(a). This exclusion is similar to the exclusion from the definition of 'wages' in Subsection 3306(b) (5) of the Internal Revenue Code of

1954. It should be noted that in addition to (A), (B) and (C) above, Subsection 3306(b)(5) of the Code also excludes payments under or to an annuity contract described in Section 403(b), under or to an exempt governmental deferred compensation plan or to supplement pension benefits.

House Bill 567 deleted (C) from the TUCA effective September 1, 1997. On or after September 1, 1997, payments made under, or to, a bond purchase plan are wages and subject to unemployment tax. Since this bond provision applied to 'war bonds', it has not been applicable for many years.

4.2.3.6 Employer Paid Taxes

Under Section 201.082(6):

'Wages' does not include:

> "a tax an employer pays, without deduction from the remuneration of the employee, that is imposed on the employee under Section 3101, Internal Revenue Code of 1986 (26 U.S.C. Section 3101);"

COMMENT: This section provides for exclusion from wages of payments made by an employer of tax imposed upon employees under Section 3101 of the Internal Revenue Code of 1954. This means that if the employer does not deduct Social Security taxes from an employee's wages but pays the full tax himself, the amount of the employee's tax paid by the employer does not become wages subject to tax under the Texas Unemployment Compensation Act.

4.2.3.7 Non-cash Payments Not for Business

Under Section 201.082(7):

'Wages' does not include:

> "noncash remuneration paid to an employee for service not in the course of the employer's business;"

COMMENT: Note that this exclusion is for non-cash payments. This subsection makes a distinction between cash and non-cash payments. A cash payment for service is taxable regardless of whether or not the service is in the employer's trade or business.

4.2.3.8 Payment Without Work Performed - Over 65

Under Section 201.082(8):

'Wages' does not include:

> "a payment, except vacation or sick pay, made to an employee after the month the employee is 65 years of age, if the employee did not work for the employer in the period for which the payment is made;"

4.2.3.9 Excess Wages for Multi-State Employee

Under Section 201.082(9):

'Wages' does not include:

> "the part of remuneration from a single employer for services in a calendar year that exceeds the amount applicable to the year under Subdivision (1) for which contributions have been paid under a state unemployment law;"

COMMENT: An employer may take into consideration wages paid to an employee for service in another state in determining the amount of taxable wages under the Texas law.

4.2.3.10 Supplemental Unemployment Benefits

The Commission agrees that payments made by an employer (or from a trust created by an employer) to a FORMER EMPLOYEE as a supplement to public agency unemployment benefits do not constitute taxable wages. (References: Tax Supplement 144-74, citing Revenue Ruling 73-22.

4.2.4 Requirements for Employer Payments

This section discusses the aspects of the law that specifically apply to the requirements for employer payments.

4.2.4.1 No Deduction from Employee's Wages

Under Section 204.003:

> An employer may not deduct any part of a contribution from the wages of an individual in the employer's employ.

4.2.4.2 No Voluntary Waiver of Coverage

Under Section 207.072:

> An employer may not require or accept a waiver of a right of an individual employed by the employer under this subtitle.

4.2.4.3 Employee Cannot Pay

Under Section 207.073:

An employer may not, directly or indirectly, make, require, or accept a deduction from wages to finance a contribution or reimbursement required to be paid by the employer under this subtitle.

4.2.4.4 Fines for Violations

Under Section 207.074:

An employer, or officer or agent of an employer commits an offense if the person violates Section 207.072 or 207.073. An offense under this section is punishable by:

1) a fine of not less than $100 and not more than $1,000;

2) imprisonment for not more than six months; or

3) both a fine and imprisonment.

COMMENT: Violation of these provisions of the Act should be reported immediately to the Director of Tax.

4.3 RATE OF TAXES

This section discusses the aspects of the law that specifically apply to the rate of taxes.

4.3.1 History of Rates

YEAR	BASED ON	TAX RATE
1936	Wages payable	0.9%
1937	Wages payable	1.8%
1938	Wages payable	2.7%
1939	Wages payable	2.7%
1940	Wages payable	2.7%
1-1-41 to 6-30-43, incl.	Wages payable	2.7% or experience rate, if eligible
7-1-43 to 1-1-86	Wages paid	2.7% or experience rate, if eligible
1-1-86 to 12-31-94	Wages paid	Applicable entrance rate, or experience rate, if eligible
1-1-95 to present	Wages paid	2.7 or experience rate, if eligible

4.3.2 Standard Rates

This section discusses the aspects of the law that specifically apply to standard rates.

4.3.2.1 Tax Rate (Entry Level)

Under Section 204.006:

a) A person's contribution rate for the calendar year in which the person becomes an employer is the greater of:
   1) the rate established for that year for the major group to which the employer is assigned under Section 204.004; or
   2) two and seven-tenth percent.

b) A rate established under Subsection (a) applies to the employer until the date the experience rate computed under Section 204.041 takes effect for the employer.

COMMENT: Section 204.006 prescribes the ‘entrance’ rate for new employers will be the greater of 2.7 percent or the average rate assigned to their applicable standard industrial classification (S.I.C.). The 2.7% rate is applicable until the employer qualifies for an experience rate based upon his own compensation experience or through rate transfer due to an acquisition under of the provisions of Section 204.083.

Under Section 204.065:
“Notwithstanding Section 204.006, on and after January 1, 1994, a person's contribution rate shall be two and six-tenths percent until the date the experience rate computed under Section 204.041 takes effect for the employer. “

Comment: Effective January 1, 1994 the entry-level rate was reduced to two an six-tenths percent. At the same time an employment and training (ETA) assessment tax of one-tenth percent was added to all tax rates. This left the effective entry tax rate for all new employers at two and seven-tenths percent.

4.3.2.2 In General

Overview of Sections 204.004, 204.005, 204.006 and 204.041:
As of October 1 of each year, the Commission shall establish by industry an average contribution rate for the immediately succeeding calendar year for each Major Group listed in the Standard Industrial Classification Manual published by the United States Office of Management and Budget. The Commission shall establish the annual contribution rates paid by employers in that industry over the preceding year ending September 30, based on the employment records maintained by the Commission. The Commission shall assign each employer to a Major Group in accordance with the definitions contained in the manual. An employer shall pay contributions at the rate established for that year for the Major Group to which the employer is assigned, or at two and six-tenths percent (2.6%) plus one-tenth (.1%) smart job assessment, of the taxable wages paid by that employer, whichever is greater, until his account has been chargeable with benefits throughout each calendar month of the four (4) consecutive calendar quarters immediately preceding the date as of which such employer's rate is determined. The contribution rate of each employer who has had at least four (4) such calendar quarters of compensation shall be determined as indicated in Sections 204.042 and 204.043 of the Texas Unemployment Compensation Act.

4.3.2.3 Employment and Training (ETA) Assessment

Legislature, Workforce Development Incentive Program; Section 7 and Section 9-E of the TUCA established a separate one-tenth (0.10%) assessment to fund the Employment and Training (ETA) Assessment. The Employment and Training (ETA) Assessment provides grant funds to employers for training new employees. All regular taxed employers have received a one-tenth (0.10%) reduction in their unemployment insurance tax rate to offset this assessment. Note: This law applies to all regular taxed employers beginning with the first quarter of 1995.

The collected assessment will be maintained in a holding, separate from the Trust Fund, until it is determined if, on October 1, the Unemployment Insurance Trust Fund is above the statutory floor. If it is, all of the collected assessments will be used to fund the Employment and Training (ETA) Assessment training grants. If the Trust Fund is below the floor, the collected Employment and Training (ETA) Assessment will be transferred to the Trust Fund to the extent necessary to bring the balance up to the statutory floor.

4.3.3 Eligibility for an Experience Rate

1. In General

A thorough knowledge of Chapter 204 and the relationship of one section to another must be taken into consideration when computing an employer's tax rate.

An employer is not eligible for an experience rate, effective January 1, 1984, referred to as 'General Tax Rate,' except as provided in Sections 204.083 and 204.084, until the account has been chargeable with benefits throughout each calendar month of the four consecutive calendar quarters immediately preceding the date as of which such employer's rate is determined.

An employer's account is first chargeable when wages can be charged as benefit wages to the account. This cannot occur until the employer becomes subject to the Act as an 'employer.' Also, it cannot occur until wages which the employer has paid (or which were transferred to him as a result of transfer of compensation experience) can be used in a claimant's base period. It is not necessary that a claim be filed and produce an actual charge; only that it be possible for the employer's account to be charged.

2. Computation Dates for Experience Rates

Under Section 204.047:

a). The computation date for the tax rate for the contribution under Section 204.041 is October 1 of the year preceding the calendar year for which the rate takes effect, except as provided by Subsection (b).

b). The computation date for the tax rate for the contribution under Section 204.041(a) for an employer who becomes subject to that tax rate for the first time is the date on which the rate takes effect under Section 204.041(c).

Under Section 204.041:

c) The rate for an employer who becomes subject to contributions... for the first time at the close of a calendar quarter takes effect on the first day of the next calendar quarter and continues in effect until the January 1 of the next calendar year.

COMMENT: An employer who has waived all compensation experience or whose coverage is terminated (Section 206.004) and who again becomes subject is eligible for another 'interim' tax rate computation. Waiver of all compensation experience has the same experience rating effects as termination in that in either event the employer must begin anew to accumulate compensation experience.

1) October 1 Computation Date for Rates Effective the Following January 1:

The annual computation date for experience tax rates is October 1 of the year preceding the calendar year for which the rates are to be effective. The rates are effective on January 1 following the computation date. This annual October 1 computation date for rates to be effective the following January 1, includes computations for those employers for whom an interim experience tax rate was

computed for the first time on January 1, April 1, July 1, or October 1 of the same calendar year. In other words, the computation date for the 2001 experience tax rate for the employer who first became eligible for an experience rate computation on January 1, 2000, April 1, 2000, July 1, 2000, or October 1, 2000, will be October 1, 2000.

2) January 1 Computation Date:

Experience rates are computed on January 1 for those employers who, for the first time, complete four consecutive calendar quarters of chargeability after December and before April 1. January 1 is the first time these employers accumulated their fourth consecutive calendar quarters throughout which their accounts were chargeable with benefits.

3) April 1, Computation Date:

The most common fact situation which will produce an experience tax rate computation effective April 1 involves voluntary election of coverage during the first quarter of a year with respect to employment in the preceding year.

EXAMPLE: Employing unit first had employment and paid wages in the fourth quarter of 2000. Employer files an Application for Voluntary Election of Coverage during the first quarter of 2001 requesting coverage beginning January 1, 2001. The Application is approved by the Commission before April 1, 2001, and the employer files reports and pays the tax due for 2000.

In this fact situation the employer's account could be charged with benefit wages resulting from a claim filed on April 1, 2001, because wages paid in the fourth quarter of 2000 would be in the claimant's base period. Four consecutive calendar quarters of chargeability will be completed March 31, 2002, and the employer will be eligible for an experience tax rate effective April 1, 2002.

Paragraph 3.2.7, ‘Subject Date’, is a fact situation which would also result in an April 1 computation date. In that example, the corporation paid no wages until December 2000. These wages would be chargeable on April 1, 2001. Four consecutive calendar quarters of chargeability would be completed on March 31, 2000, and the corporation would be eligible for an experience tax rate effective April 1, 2000.

4) July 1, Computation Date:

Experience rates are computed on July 1 for those employers who for the first time complete four consecutive calendar quarters of chargeability after March and before July 1. For example, an employing unit becoming subject on May 19, 2001 is eligible for an experience rate computation as of July 1, 2002, provided the employer paid wages during the first quarter of 2001.

EXAMPLE: Employer ‘Y’ became a subject employer on March 23, 2000, and paid wages in March 2000. The employer is chargeable throughout each month of four consecutive calendar quarters immediately preceding July 1, 2001, and thus, is eligible for an experience rate computation effective July 1, 2001. The rate will be effective July 1, 2001, through December 31, 2001, will be computed on the basis of his experience during the period from March 1, 2000, through June 30, 2001.

EXAMPLE: Employer Y became a subject employer on May 25, 1998. The employer sold the business and transferred the compensation experience on August 10, 1998. Employer 'Y' reacquired the business on June 10, 1999, and transfer of compensation experience is in order. Since Y reacquired the compensation experience when reacquired the business, is eligible for an experience tax rate effective July 1, 1999, because that is the first date on which the account has been chargeable with benefit wages for the required four consecutive calendar quarters.

An employing unit which becomes an employer under the twenty-week provisions of Sections 201.021, 201.023 or 201.047 is shown on the Commission's records as having become an employer on the last day in the calendar week during which the employer completed the twenty (20) weeks of employment with the requisite number of employees. An employer who is shown as having become subject at the end of a calendar week which includes June 30 will be eligible for a rate computation the following July 1 even though the subject date is shown as being on or after July 1 of the preceding year. For example, June 30, 1991, is a Sunday, which is within the calendar week ended July 6. Employing units who are recorded as having become employers on July 6, 1991, may actually have become employers on any day from June 30 to July 6. As of July 1, 1992, experience rates are computed for all employers who became subject under either Sections 204.021, 201.023 or 201.047 on July 6, 1991.

5) October 1, Computation Date for Employers Who, for the First Time, Are Eligible for Rate Computation on October 1:

Experience rates are computed on October 1 for those employers who, for the first time, complete four consecutive calendar quarters of chargeability after June and before October 1. An employer who is shown on TWC records as having become subject under Sections 201.021, 201.023 or 201.027 and 201.047 at the end of a calendar week, which includes September 30, will be eligible for a rate computation the following October 1. This is true even though the subject date on Commission records is shown as being on or after October 1 of the preceding year.

EXAMPLE: Employer 'Z' became a subject employer on September 1, 1996 (or any date during the period from July 1 through September 30, 1996). If 'Z' paid wages during the period from January 1 through June 30, 1996, 'Z' has been 'chargeable' throughout each month of the four consecutive calendar quarters immediately preceding October 1, 1997. 'Z' is eligible for the first time for an interim experience rate computation effective October 1, and it is computed on the basis of the experience during the period from January 1, 1996 through September 30, 1997, using the 1997 State Replenishment Ratio. The 1998 experience tax rate for this employer Z will be computed during the last quarter of 1997. The 1998 rate will be computed on the basis of his experience during the period from January 1, 1996 through September 30, 1997 (the same experience which was used in computing his interim rate applicable for the period from October 1 through December 31, 1996) and uses the 1998 State Replenishment Ratio. This could possibly produce a different rate for 1998 than he had in 1997.

4.3.4 Computation of Experience Rates

The formula for computing experience tax rates is found in Chapter 204 of the TUC Act:

1. Benefit Ratio System: Experience tax rates for employers are in accordance with the Benefit Ratio system. Rates are based upon (1) the employer's 'benefit ratio' and (2) the 'replenishment ratio.'

   1) Benefit Ratio:

      Section 204.044 provides:

   a). The benefit ratio for an employer is equal to the total amounts of the employer's chargebacks for the 36 consecutive months preceding the tax rate computation date divided by the total of the employer's taxable wages for the same months.

   b). The benefit ratio of an employer whose account has been chargeable with benefits for less than 36 consecutive months but throughout each month of at least four calendar quarters is equal to the total amount of the employer's chargebacks for those months preceding the tax rate computation date divided by the total of the employer's taxable wages for those months.

   c). In computing the benefit ratio, only taxable wages on which contributions have been paid to the commission not later than the last day of the month in which the computation date occurs may be used.

   d). The benefit ratio is expressed as a percentage.

The following is an example of the computation of an employer's 'Benefit Ratio':

$$\frac{\$\ 10{,}000}{\$\ 100{,}000} = \frac{\text{Benefit Payments (Chargebacks) for not less than 4 quarters nor more than 12 quarters}}{\text{Payroll for not less than 4 quarters nor more than 12 quarters on which tax has been paid}} = 10\%\ \text{Benefit Ratio}$$

Only wages on which tax has been paid by the due date of the last quarter will be used in computation of an employer's 'Benefit Ratio.' The following illustrations show the various periods used in computing a Benefit Ratio and the dates on which the tax must be paid in order to be used in the computation.

EMPLOYER'S COMPUTATION DATE:	PERIODS USED:	TAX MUST BE PAID ON OR BEFORE
October 1, 1996 Rate Effective 10-1-96	Four or more consecutive calendar quarters ending 9-30-96	10/31/96
October 1, 1996 Rate Effective 1-1-97	10-1-93 through 9-30-96**	10/31/96
January 1, 1997	Four or more consecutive calendar quarters ending 12-31/96	1/31/97
April 1, 1997	Four or more consecutive calendar quarters ending 3-31-97	4-30-97
July 1, 1997	Four or more consecutive calendar quarters ending 6-30-97	7-31-97

** The period used in the computation of the benefit ratio on October 1 to be effective the following January 1 will vary according to the situation. The period will never be less than the four consecutive calendar quarters immediately preceding October 1 and will never be more than the twelve calendar quarters immediately preceding October 1.

All compensation experience from four calendar quarters up to twelve calendar quarters is used in computing a rate. It is not necessary that the account be chargeable throughout a quarter in order to use the compensation experience of that quarter.

2) Replenishment Ratio

Section 204.045 provides:

The replenishment ratio is the result obtained by dividing the total effectively charged benefits paid during the 12 month period preceding the October 1 rate computation date plus one half of the ineffectively charged benefits for the same period by the total amount of benefits paid for the same period that are effectively charged. Cancelled benefit warrants, repaid benefits which were overpaid, and benefits paid which are repayable from reimbursing employers, the Federal Government, or any other governmental entity are excluded from this computation.

The replenishment ratio is computed yearly and applies to all taxed employers except for governmental entities.

Following is an example of the computation of employer's experience tax rate or general rate:

Total amount of benefits paid to former employees of a taxed employer and charged to his account for the period from October 1, 1993, through September 30, 1996 = $400

Total taxable wages paid by an employer during above period on which the tax was paid = $40,000

The employer's Benefit Ratio is, therefore, $400 divided by $40,000 = 1.00%

Assume that the state wide Replenishment Ratio for Texas for 1997 tax rates = 1.31

Then, the employer's general tax rate will be 1.00% x 1.31 = 1.31%

The Texas Unemployment Compensation Act contains a table in Section 204.042 which provides an easy method to determine the computed experience tax rate or general rate. The table shows the various computed experience tax rates depending upon the replenishment ratios and the employer's benefit ratio. These rates vary from 0.0 percent to 0.9 percent. An employer's maximum experience rate or general rate is 6 percent with the exception of employers with SIC Code 0724, cotton ginners, whose maximum rate is 5.4 percent.

3. Statewide Blanket Increases and Credits:

In addition to the general tax rate computed under the benefit ratio system, an employer's experience rating is also composed of statewide blanket increases. An employer may also receive a credit against contributions.

Sec. 204.062. Replenishment Tax

All employers entitled to an experience rate shall pay a replenishment tax.

The numerator in the replenishment tax formula is the amount equal to one-half of the amount of benefits paid by all employers during the 12 months ending the preceding September 30 that are not effectively charged.

The denominator is the amount equal to the taxable wages paid by all employers during the four quarters ending the proceeding June 30.

The replenishment tax is calculated by dividing the numerator by the denominator, multiplying that result by 100 to obtain a percentage, and rounding that result to the nearest hundredth.

The replenishment tax rate is the minimum rate an experience rated employer will be charged if their general tax rate is -0-.

Sec. 204.061. Ceiling and Floor of Compensation Fund

Computation of the deficit tax or surplus credit is dependent on the balance of the Unemployment Compensation Fund and whether the balance in the fund on the rate computation date is above the ceiling or below the floor of the fund.

1. The ceiling of the compensation fund is two percent of the total taxable wages for the four calendar quarters ending the preceding June 30; and
2. the floor of the compensation fund is equal to the greater of:
   A) $400 million; or
   B) one percent of the total taxable wages for the four calendar quarters ending the preceding June 30.

If on the rate computation date the trust fund balance is above the ceiling of the compensation fund, a blanket credit will be issued to experience rated employers. If on the rate computation date the trust fund balance is below the floor of the compensation fund, a blanket tax rate increase will be charged to experience rated employers.

Sec. 204.063. Deficit Tax

A deficit tax is added to the general tax rate of each employer entitled to an experience rate for that year if the balance in the compensation fund is less than the floor of the fund.

The deficit tax for a calendar year is the lesser of:

1. the rate computed by multiplying the deficit ratio, as computed under Section 204.064, by the sum of the employer's general tax rate, the replenishment tax rate, and the deficit tax rate for the previous calendar year; or
2. two percent.

Sec. 204.064. Deficit Ratio

a). The deficit ratio is computed by dividing the numerator by the denominator and rounding that result to the nearest hundredth.

b). The 'numerator' in the deficit ratio formula 'is computed by subtracting the balance of the compensation fund, considering any federal advance or other liability of the fund, from the floor of the compensation fund'.

c). The denominator is the amount of contributions due under the general tax rate and the replenishment rate for the four calendar quarters ending the preceding September 30 from employers entitled to an experience rate on the tax rate computation date.

Sec. 204.065 Surplus Credit.

If on the rate computation date the compensation fund balance is above the ceiling of the fund, an experience rated employer is entitled to a surplus credit to be applied to contributions beginning with the first quarter of the following year.

The surplus credit is not used in calculating the tax rate, but is directly applied to future taxes due.

The amount of the credit is computed by multiplying the surplus ratio by the employer's contributions due for the four calendar quarters ending the preceding September 30.

An employer may not apply a credit against delinquent contributions. A credit may not be applied until the employer has paid any delinquent contributions.

Effective 9/1/2015: 204.0652(d) is amended as follows:

(d) "An employer may not receive a surplus credit rate if any delinquent contributions are due on the computation date, but is eligible for a surplus credit rate beginning on the calendar quarter following the quarter in which the delinquent contributions are paid."

Any employer may not receive a surplus credit rate, if on October 1 of any year; the employer is delinquent on taxes or reports.

Once all delinquent contributions are paid, the employer is eligible for a surplus credit rate at the beginning of the next calendar quarter after payment is submitted. (Possible for an account to have 2 different rates in the same year.)

CALCULATION OF SURPLUS TAX CREDIT: Each eligible employer's credit will be calculated by adding the contributions due for the preceding fourth, first, second and third quarters and multiplying the total by the surplus ratio. For example: An employer's contributions of

4-x1 of $1,000
1-x2 of $4,000
2-x2 of $3,000
3-x2 of $2,000

and the surplus ratio would be $3,500 ($10,000 contributions due x 0.35).

Sec. 204.066 Surplus Ratio

The numerator used in calculating the surplus ratio is computed by subtracting the ceiling of the compensation fund from the balance of the compensation fund.

The denominator is the amount of contributions due for the four calendar quarters ending the preceding September 30 from employers entitled to an experience rate on the tax rate computation date.

The surplus ratio is computed by dividing the numerator by the denominator and rounding that result to the nearest hundredth.

Sec. 204.062 Replenishment Tax

A Replenishment Tax is assessed against all experience rated employers. The replenishment tax rate is a percentage obtained by using one-half of the ineffectively charged benefits paid during the twelve months preceding the calculation date as the numerator and total taxable wages during this same period as the denominator.

Sec. 203.105 Interest Tax Rate

An Interest tax may be levied against each experience rated employer to be deposited in an advance interest trust fund that may be used by the Governor solely to pay advances from the Federal Unemployment Trust Fund. In the event the amounts collected under the assigned interest tax rate are inadequate to pay interest on advances from the Federal Unemployment Trust Fund, the Governor may, by proclamation, increase the rate. The interest tax is due at the same time as the employer's unemployment tax payment for the second quarter, is to be collected in the same manner as the employer's unemployment tax and is subject to the same penalty for late payment.

The last interest tax was levied in 1984, 1985, 1986 and 1988. In 1984 and 1985, this tax was levied against each employer who was entitled to an experience rate for the

previous year and who was liable for unemployment taxes for the first quarter of 1984 or 1985. In 1984, the tax rate was twenty-five percent (25%), and in 1985, the tax rate was ten percent (10%), applied to the amount of taxes due from the employer for the portion of the previous calendar year for which the employer was entitled to an experience rate.

In 1986, the rate was one-tenth of one percent (0.1%) of each experience rated employer's taxable wages for that year. In 1988, it was two-tenths of one percent (0.2%) of each experience rated employer's taxable wages for that year. The rate could not exceed thirty percent (30%) in 1984 or twelve percent (12%) in 1985.

COMMENT: When the wages and tax data from Form C-3 were entered in the EMF, it appeared as a regular (1/86) quarter without the interest assessment. The computation of the tax liability was based on the tax rate shown on the CRT that did not include the 0.10 percent interest tax. A separate posting was made to the account for the interest tax similar to the special interest assessments for the fourth quarter of 1982 and the first quarter of 1983 for employers having an experience tax rate.

For the first quarter of 1986, a 0.10 percent interest tax appeared on the CRT as the fifth quarter of 1986 (5/86). For the second quarter the interest tax was accounted for as a (6/86) quarter, the third quarter was identified as (7/86) and the fourth quarter was identified as (8/86). The same method applied for 1988 data.

4. Experience Rate if Benefit Ratio is Indeterminable

If an employer is eligible for an experience rate but has no chargebacks and no taxable payroll on which taxes were timely paid for the twelve (or fewer) quarters used as a basis for computing an experience tax rate, his benefit ratio is zero divided by zero, i.e., mathematically impossible. The rate table in the Act not being applicable, the standard rate of 2.6 + .10 (smart job assessment) percent is assigned in accordance with Section 204.006, and an account that was given an industry average rate for an entry level rate, will keep the average rate as a general rate.

COMMENT: In this situation, to the experience rate or ‘General Tax Rate’ will be added 1) Replenishment Tax Rate, 2) Solvency Tax Rate, 3) Deficit Tax Rate, and 4) Interest Tax Rate.

4.3.5 Loss of Experience Rate

Under Section 206.005:
When an employing unit that ceased to be an employer subsequently becomes an employer, the employing unit is considered to be a new employer without regard to the rights that employing unit acquired when previously an employer.

COMMENT: Under the wording of Section 206.005, an employing unit who ceases to be an employer and who again becomes an employer loses all rights acquired during the previous period of being an employer. This provision is extremely important in

connection with the experience rating sections of the Act.

4.3.6 Transfer of Compensation Experience

1. Acquisition of All The Organization, Trade, or Business:

   Section 204.083 mandates that transfer of compensation experience occurs only if, as of the date of the acquisition, a shareholder, officer, or other owner of a *legal* or *equitable interest* in the predecessor or the spouse or a person within the first degree of consanguinity or affinity of such an individual, is a shareholder, officer, or other owner of a legal or equitable interest in the successor, or holds an option to purchase such an interest.

   Legal Interest – Black's law defines this as "interest in property or in claim cognizable (capable of being "know") at law in contrast to equitable interest."

   Equitable Interest – Black's law defines this as "the interest of a beneficiary under a trust is considered equitable as contrasted with the interest of the trustee which is a legal trust."

2. Compensation Experience:
   The law does not provide for the transfer of an experience tax rate, but it provides for the compensation experience of one employer being treated as compensation experience of another employer under certain circumstances, and experience tax rates are computed on the basis of compensation experience. Compensation experience includes:
   a. Duration of chargeability with benefits, that is, the length of time an employer has been chargeable with benefit wages;
   b. Employer's charged benefits, that is, chargebacks;
   c. Total taxable payroll on which taxes have been paid.
3. Continuation of Organization, Trade or Business:
   Section 204.084(c)(1) requires that immediately after the acquisition the successor-employing unit continues operation of substantially the same part of the organization, trade or business or part thereof acquired
   a. Immediately:

      The term 'immediately' is not defined in the law, but is thought to mean the day after the acquisition.

   b. Continued Operation:

      The fact that the doors of a business are open or closed on the day following the acquisition may be indicative of whether operation of the business was continued, but this fact is not conclusive evidence. The doors of a business may be open to the public but the owner may be in the process of closing down or liquidating the business. Thus, a joint application for total or partial transfer of

compensation experience cannot be approved where the successor acquired assets used in operating all or a part of a business for the purpose of liquidating the business and with no idea of continuation of the business. On the other hand, the doors of a business may be closed for a period of time after the acquisition for repairs or remodeling, etc., in preparation for continuation of the business at a later date. In this type of case, the cleaning and remodeling operation does not preclude a finding that the business was continued immediately after the acquisition. All of the facts are needed in order to make a decision if there is a question with regard to the continuation of a business.

c. Substantially the Same Business:

The word 'substantially' is not defined in the Act, and it is difficult to lay down ironclad rules, which can be used in interpreting the meaning of the word as it is used in this subsection. In most cases, it is obvious whether or not the successor has continued substantially the same business. In cases where there appears to be some question as to whether this requirement has been met, all of the facts should be obtained with regard to any change in the business or in the operation of the business by the successor. Information with regard to the following factors will, in most cases, develop the type of evidence which is needed in order to determine the question of whether or not the organization, trade or business was acquired and continued:

1. Type or nature of business before and after acquisition;
2. Location of the business before and after acquisition;
3. Trade name of the business before and after acquisition;
4. Details with regard to any periods of inactivity of the business before and after acquisition;
5. Details with regard to use of a franchise before and after acquisition;
6. Information with regard to advertisements, letterheads, or any other media by which the public was notified that the previously existing business was continued without change other than a change in ownership.

4. Acquisition of a Part of the Organization, Trade or Business:
If a Joint Application is filed in a case where the successor acquired only a part of the business the predecessor owned at the time of acquisition, such Joint Application is referred to as an application for partial transfer of compensation experience. A partial transfer is permissible even though the successor acquires the only business being operated (currently at the point in time of the acquisition) by the predecessor if the predecessor and successor elect to file a partial transfer application rather than a total transfer application.

5. Joint Application:
Section 204.084 makes the filing of a Partial Application for Transfer of Compensation Experience optional. The law requires that when an Application for Transfer of Compensation Experience is filed, such application must be filed jointly

by the predecessor and the successor, and the application must be in writing as required under Rule 815.111.

a) Waiver of Partial Compensation Experience by Predecessor
A joint application for partial transfer of experience rate cannot be approved unless the predecessor employer has waived, in writing, all rights to an experience rating based on the compensation experience attributable to that part of the organization, trade or business acquired by the successor employing unit. The waiver (C-82) which is a Commission form, when properly signed and notarized, and when submitted with properly completed supplemental forms, meets the requirements that the employer has waived his rights.

1. Effect of Waiver When Application is Approved:
By signing the 'waiver,' the predecessor-employing unit gives up rights to an experience rating based upon the compensation experience, which has been waived. The compensation experience, which is waived by the predecessor, is transferred to the successor provided that the joint application is approved.

2. Effect of Waiver in Cases of Partial Transfer:

In the case of a partial transfer, the predecessor waives only rights with respect to the compensation experience attributable to the part of the business which was acquired and continued by the successor. The Wage Distribution Section of Joint Application for Partial Transfer of Compensation Experience (C-83) which is attached to and made a part of this type of joint application should show what compensation experience is waived and transferred to the successor and what compensation experience is not waived and is retained by the predecessor.

b). Identifiable and Segregable Part of Predecessor's Compensation

Experience:

Section 204.084(c)(3) requires that the part of the organization, trade or business acquired be a part to which a definitely identifiable and segregable part of the predecessor's compensation experience was and is attributable. Section 204.084(c)(3) only applies to a joint application where a partial transfer of compensation experience is requested.

1. Wages Identifiable and segregable in the Records:

The records of the predecessor must show that the wages paid for the services performed in the operation of the part of the business acquired are identifiable and segregable. This statement means that identification and segregation must be something of record over the past periods during which compensation experience can be segregated for rate purposes. Payrolls for employees who have been performing services in two parts of a predecessor's business, only one part of which has been transferred, may have been identified and segregated during past periods in any one of several ways. The record of segregation in the past could have been by actual time

reports or by some basis of estimating the time spent in performing service in each part of the business. If the segregation in the past has been made by estimation throughout the past periods and the records show this fact, the reasonableness and accuracy of the records maintained throughout the past periods will not be questioned. A Joint Application for a partial transfer of compensation experience based upon this recorded identification and segregation of wages could be approved. On the other hand, a Joint Application for a partial transfer of compensation experience would be denied for failure to meet the requirements of Section 204.084(c)(3) if identification and segregation was not a matter of record during past periods but had been attempted for all past periods at a time subsequent to the transfer of the business. Even though the reasonableness or accuracy of segregations which have been made for the purposes of the predecessor's records during past periods is not questioned, it is believed that, on its face, segregation attempted at a date after the transfer of the business cannot have a definiteness in the absence of records to support the basis of the segregation. Following are examples involving Section 204.084(c)(3):

Example 1 Predecessor A, an individual who became a liable employer in 1981, owned a gasoline refinery and certain properties on which producing oil wells were located and new wells were being drilled. The refinery was not operated by the predecessor but was operated by a corporation under a lease agreement. Certain individuals under operating contracts operated the producing wells and the new wells were drilled by drilling contractors. Predecessor A's business consisted of two parts, watching over his refinery property and ownership management of the oil producing properties. He employed several petroleum engineers, geologists and an office force in his business. On January 1, 1994, Corporation X acquired and continued that part of the predecessor's business consisting of ownership and management of the refinery property. On the same date Corporation Y acquired and continued the other part of Predecessor A's business. Corporations X and Y each elected coverage and filed a joint application for a partial transfer of compensation experience. An investigation revealed that all of Predecessor A's employees had performed some service in connection with both parts of the business during past periods. However, his records had been maintained in the past so that they showed the percentage of service performed for him in each part of the business. After this record of segregation was found, the Joint Applications were approved without a detailed examination of the records to determine the reasonableness or accuracy of the segregation, which had been made.

EXAMPLE 2: Employer A owned and operated two retail furniture stores in the same town but at different locations for several years prior to July 1, 1993. A had been an employer since 1977 and had an experience rate on July 1, 1993. Prior to July 1, 1993, Employer A had transferred employees from one store to the other without maintaining any record of where the employees

performed service. In fact, an employee might perform service in both stores during one working day. The employer's records were maintained just as if the employer operated only one establishment. The employer could not segregate or identify wages paid for services performed in either store.

On July 1, 1993, Employer A conveyed one store to son X and one store to son Y. Each son continued operation of the store he acquired. Each son filed a joint application with the father (Employer A, the predecessor) for partial transfer of compensation experience. The compensation experience was not identifiable and segregable in the records and the applications were denied.

2. Business Must Consist of Parts

In some cases there may be a transfer of employees from one employing unit to another with the representation that 'organization' was acquired and continued by the successor or with the representation that a part of the business was acquired. However, it must be found that the function transferred was a part of the business. The business must have distinct parts and it must be found that a distinct and separate part of the business was transferred before the question of whether or not the compensation experience is identifiable and segregable becomes important.

EXAMPLE 1: Corporation X, an employer since January 1, 1936, was engaged in the general construction business. The employer was engaged in the construction of large buildings. The corporation contended that its business consisted of two parts; namely, an executive or supervisory department and a field department.

The corporation also contended that the executive or supervisory department included accounting personnel, superintendents, and the corporation's executives, and that the field department consisted of skilled and unskilled laborers who actually performed services on the buildings being constructed. It was stated that, on a certain date, the field personnel were transferred to the payroll of a subsidiary corporation. This subsidiary corporation voluntarily elected coverage and filed a joint application with the predecessor for a transfer of the compensation experience attributable to the service performed by the field personnel.

Careful investigation of the case revealed that, even though the employees in the field department were transferred to the payroll of the subsidiary corporation, the predecessor, or Parent Corporation, continued to supervise, direct and control the service performed by the field personnel. Investigation also revealed that the Parent Corporation planned to hire other employees and open another field department.

The joint application was denied. It was held that the successor did not acquire a part of the business of the predecessor. It is true that some employees were transferred from the payroll of the predecessor to that of the

successor but this did not constitute acquisition of a part of a business. The predecessor retained a field department and could have resumed operations of such department at any time. The successor did not acquire a part of a business, which could be continued independently from the business of the predecessor. The type of transfer attempted in this case was not contemplated in the provisions of Section 204.084.

'Overhead Service' is that service performed by general office employees, including clerical, accounting, and planning personnel and the executive personnel concerned with the operation of the whole business and not devoting all efforts to the operation of just one part of the business. In certain types of cases, the existence of 'overhead service,' even though not segregable, will not prevent approval of a joint application for partial transfer of compensation experience.

EXAMPLE 2: Individual A has owned and operated three grocery stores (Store Number 1, Store Number 2, and Store Number 3) since 1936, and has been an 'employer' since that time. On July 1, 1993, Store Number 1 was acquired by Corporation X; Store Number 2 was acquired by Corporation Y, and Store Number 3 was acquired by Corporation Z. Each corporation continued operation of the store acquired, and each corporation filed a joint application with the predecessor for transfer of compensation experience attributable to the store acquired and continued. The service performed in the operation of each store during periods prior to July 1, 1993, was definitely identifiable and segregable, with the exception of service performed by three office employees and two executives who assisted the owner in conducting the whole business. These employees performed service in connection with the operation of each store or each part of the business. However, it is impossible to determine the exact amount of service performed by these individuals in connection with the operation of each store. Under such circumstances, it is permissible to segregate this 'overhead service' experience on an estimated basis. This estimate should be made on the most logical or the most nearly accurate basis applicable to the facts in the particular case. In this example, each store was about the same size and had about the same number of employees and did about the same amount of business. Therefore, the 'overhead service' experience should be divided equally, or one-third to each successor corporation. The joint application for partial transfer of compensation experience filed by Corporation X, Y, and Z would be approved, and the compensation experience definitely identifiable and segregable, as well as the estimated 'overhead service' experience attributable to each part of the business acquired by each corporation, would be treated as compensation experience of such corporation.

The application of this 'overhead service' theory must not be abused. It cannot be used as a basis for approval of an application in which the facts show that all, or a majority of the compensation experience, is not identifiable and segregable.

c) Election of Coverage by Successor:

Section 204.084(4) requires that the successor must have been an employer at the time of the acquisition, or elected to become an employer as of the date of the acquisition, or otherwise become an employer during the year in which the acquisition took place.

1. Cases in Which Voluntary Election of Coverage is Necessary:
The employing unit (not subject) which acquires and continues a part of an employer's business and files a joint application for a partial transfer of compensation experience must file a Voluntary Election of Coverage on the appropriate Commission form (C-1/C-1FR) and must elect coverage for the year in which the acquisition occurred; otherwise, the joint application cannot be approved. If the employing unit has become an employer under any subsection of 201.021 during the year in which the acquisition occurred, at the time the joint application is filed, the Voluntary Election of Coverage is not necessary. This provision of Section 204.084 has not caused a change of policy with regard to the date to use in computing penalties in voluntary compliance cases. The date of the approval of the Voluntary Election of Coverage will continue to be used in computing penalties, regardless of the date of coverage listed in the Election.

2. Application for Voluntary Election Can be Withdrawn:

An Application for Voluntary Election of Coverage filed in connection with a Joint Application for Transfer of Compensation Experience is not a part of the joint application, but the voluntary election is made for the specific purpose of meeting one of the requirements of Section 204.084. Therefore, a denial of a Joint Application for Transfer of Compensation Experience will cause action to be withheld with respect to an Application for Voluntary Election of Coverage. The applicant can withdraw the Voluntary Election of Coverage by notifying the State Office Status Section of his desire to do so in cases where the Joint Application for Transfer of Compensation Experience has been denied.

6. Applicable Rates When Transfer Of Compensation Experience Applies:

a. Successor was an Experienced Rated Employer Prior to Acquisition:
If the application for transfer of compensation experience is approved and the successor employing unit was an experience rated employer on the date of the acquisition, such successor shall usually pay contributions from the day of the acquisition until the end of the calendar year in which the acquisition occurred at the rate applicable to the successor on the date of the acquisition. However, a successor employer may possibly become eligible for an interim rate computation during the year.

b. Successor Employing Unit Was Not an Experience Rated Employer Prior to Date of Acquisition

If an application is approved and the successor employing unit was not an experience rated employer on the date of acquisition such successor shall pay contributions from the date of acquisition until the end of the calendar year in which the acquisition occurred at the highest rate applicable at the time of the acquisition to any predecessor employer who was a party to the acquisition with respect to which the joint application was made. However, a successor employer may become eligible for an interim rate computation during the year.

EXAMPLE 1: Successor 'A', an individual who was not an employer immediately prior to July 15, 1993, succeeded Predecessor B who became a subject employer in 1980. Successor 'A' became subject on July 15, 1993, under Section 201.022 and there was a mandatory total transfer of the compensation experience of Predecessor B. Predecessor B's rate on July 15, 1993, the date of the acquisition, was 0.55 percent. Therefore, Successor A is assigned the 0.55 percent rate for the entire year of 1993.

EXAMPLE 2: Assume that Successor 'A', in Example Number 1, operated a small business with two employees during the period from January 1, 1999, to July 15, 1999, the date on which 'A' succeeded, Predecessor B. Since 'A' became an employer on July 15, 1999, 'A' was liable under Section 206.001 for tax covering wages paid during the entire year of 1999. The new employer rate of 2.70% (2.60% + 0.10% Smart Jobs) is assigned until July 1, 1999. Since 'A' was not experience rated, successor A was assigned the rate of the predecessor for July 1, 1999 forward.

EXAMPLE 3: Successor A acquired Grocery Store Y from Predecessor B on July 18, 1999. Predecessor B became an employer in May 1975, under Section 201.021. At the time B became a subject employer, 'B' owned and operated only one store, which was Store X, and this was all of 'B' business until February 1, 1993, on which date 'B' opened Store Y which was acquired by Successor A on July 18, 1999. Successor A was joined by Predecessor B in filing a joint application for partial transfer of compensation experience. This joint application was approved and the compensation experience attributable to Grocery Store Y was transferred to Successor A. Predecessor B retained in the account the compensation experience attributable to Grocery Store X. Predecessor B's experience rate on July 18, 1999, was 0.35 percent. Therefore, Successor A was assigned the 0.35 percent rate for the year 1999, and Predecessor B continued to use the 0.35 percent rate for the remainder of the year 1999. Successor A acquired only the compensation experience attributable to Grocery Store Y, which was first opened on February 1, 1999. Successor A will be assigned the 2.7 percent (2.60% + 0.10% Smart Jobs) rate on January 1, 1999, and will not be eligible for an experience rate until July 1, 1999, even though 'A' was assigned the 0.35 percent rate of the predecessor for the year 1999, the year in which the acquisition occurred. For the purpose of determining when Successor A will become eligible for an experience rate, the date of first payment of wages in the store acquired by Successor A (February 1, 1999, in this case) is considered just as if 'A' had become a subject employer on that date.

Predecessor B will still be eligible for an experience rate on January 1, 1999. The rate will be computed on the basis of the experience, which 'B' retained and which was attributable to the operation of Store X.

EXAMPLE 4: Assume the same facts as those discussed in Example Number 3 with the exception that Successor A acquired Store X instead of Store Y. Under such circumstances, Successor A would be assigned the 0.35 percent rate for the year 1998, and Predecessor B would also use the 0.35 percent rate for the entire year 1998. However, Successor A would be eligible for an experience rate on January 1, 1999, which would be computed on the basis of the compensation experience which 'A' acquired from 'B' for the period from October 1, 1996 through July 18, 1998, combined with 'A' own experience for the period from July 18, 1993 through September 30, 1998. Predecessor B would be assigned the 2.70 percent rate on January 1, 1999, and would not become eligible for an experience rate again until July 1, 1999. For the purpose of determining when Predecessor B would again become eligible for an experience rate, the date of first payment of wages in the store retained (February 1, 1998, in this case) is considered just as if he had become a subject employer on that date.

EXAMPLE 5: Successor A succeeded Employer B on August 24, 1998. Successor A became subject under Section 201.022, and there was a mandatory total transfer of compensation experience from Predecessor B. Predecessor B became a subject employer on May 22, 1998, by twenty weeks under Section 201.021, and B's rate on August 24, 1998, the date of acquisition, was 2.70 percent. Therefore, Successor A was assigned the 2.70 percent (2.60% + 0.10% Smart Jobs) rate for the year 1998. Successor A would be assigned the 2.70 percent (2.60% + 0.10% Smart Jobs) rate on January 1, 1999; however, 'A' would be assigned an experience rate on July 1, 1999, the date on which Predecessor B would have become eligible for an experience rate.

EXAMPLE 6: Employer X became subject in May 1998 on the basis of twenty weeks of employment which the employer had in the operation of Grocery Store Number 1. The employer opened Grocery Store Number 2 on September 1, 1998. Employer X filed reports and paid tax on services performed in both stores until June 1, 1999, on which date he sold Store Number 1 to Corporation Y, and sold Store Number 2 to Corporation Z. Neither successor became subject under Section 201.022. However, each successor corporation voluntarily elected coverage and filed a joint application for partial transfer, which was approved. Predecessor X's rate on June 1, 1999, was 2.70 percent (2.60% + 0.10% Smart Jobs). Therefore, both successor corporations were assigned the 2.70 percent (2.60% + 0.10% Smart Jobs) rate. However, Corporation Y became eligible for an experience rate on July 1, 1999, because Corporation Y acquired the store, which was in existence at the time Predecessor X became a subject employer. In other words, Corporation Y became eligible for an experience rate on the same date that Employer X would have become eligible for an experience rate had continued operation of the stores. Corporation Z was assigned the 2.70 percent (2.60% + 0.10% Smart Jobs) rate for the entire year of 1993, and this

corporation did not become eligible for an experience rate prior to January 1, 2000. This is because Store Number 2, which was acquired by Corporation Z, first paid wages in September 1998. Therefore, Corporation Z became eligible for an experience rate on January 1, 2000, just as if the corporation had become an employer in September 1999.

EXAMPLE 7: Predecessor X became an employer in May, 1996, on the basis of twenty weeks of employment experience which he had in Store Number 1. Predecessor X opened Store Number 2 on May 15, 1997, and continued to operate both stores until June 1, 2000, on which date Store Number 2 was sold to Successor Y. Successor Y did not become subject under Section 201.022. However, he filed a voluntary election and a partial transfer application, which were approved. Predecessor X's rate on June 1, 2000, the date of the acquisition, was 0.30 percent. Therefore, Successor Y was assigned the 0.30 percent rate of the predecessor for the period from June 1, 2000 to December 31, 2000. The rate which was computed for Successor Y on January 1, 2001, was based upon the compensation experience which he acquired from Predecessor X, which was attributable to Store Number 2, and his own experience from June 1, 2000 through September 30, 2000.

EXAMPLE 8: Mr. B acquired on April 1, 2000, one of two establishments previously operated by Mr. A, a subject employer since 1985. The establishment acquired first had employment on February 9, 1992.

Mr. B filed an application for voluntary election of coverage on August 25, 2000, for the period beginning January 1, 2000, and Mr. A and Mr. B filed a joint application for partial transfer of compensation experience. The voluntary election of coverage was approved October 7, 2000, and the joint application was approved effective April 1, 2000.

Mr. B was assigned the predecessor's tax rate for the period beginning January 1, 2000. A new experience tax rate was computed for Mr. B effective July 1, 2000, because the transferred experience was of sufficient duration for an ‘interim’ rate computation based on four quarters of chargeability.

7. Effect of Termination of Coverage by Predecessor in Section 204.083 Cases:
If an acquisition occurs between January 1 and March 31 of a calendar year, and the predecessor terminates coverage after the acquisition and on or before March 31 of such year, a joint application with respect to such acquisition can be approved. As of the date of the acquisition by the successor, the predecessor was an employer and did not lose that status until the Application for Termination of Coverage was filed and approved by the Commission. Therefore, any rights which the predecessor and successor acquired under the provisions of Section 204.083, by reason of the acquisition, are not impaired by any change in status of the predecessor occurring after the date of the acquisition. If a predecessor terminates coverage before the acquisition by a successor, the predecessor was not an employer on the date of the acquisition and no compensation experience can be transferred to the successor for

the reason that Section 204.083 is only applicable to acquisitions from employers subject to the Texas Unemployment Compensation Act.

EXAMPLE: Employing unit 'B' on January 25, 2000 succeeds 'A'. Successor B became subject under Section 201.022. Predecessor A had a 0.35 percent rate on January 25, 2000, the date of the acquisition. On February 25, 2000, Predecessor A filed an application to terminate coverage as of January 1, 2000, which was approved on February 27, 2000. Successor B would be assigned the 0.35 percent rate of Predecessor A for the year 1993, even though Predecessor A terminated his coverage as of January 1, 2000. We believe that this method of handling this type of case is correct because of the fact that Predecessor A was an employer on January 25, 2000, the date of the acquisition. Had Predecessor A filed an application to terminate coverage, and had his account been closed under the provisions of Section 206.004 prior to January 25, 2000, the date of the acquisition, the total transfer could not have been approved because of the fact that Predecessor A would not have been an employer on the date of the acquisition.

4.3.7 Acquisition Prior to Eligibility

A subject employer who is not yet eligible for an experience tax rate on the date the business of another employer is acquired does not lose the right to a rate computation on the date that the employer would have become eligible. Compensation experience transferred from the predecessor, combined with the employer's own experience, will be used in the rate computation at that time, provided there is a relationship as described in section 204.083 effective September 1989.

EXAMPLE 1: Mr. A became a subject employer under Section 201.021 in the first quarter of 1998. He was therefore eligible for an experience tax rate computation effective July 1, 1999. On February 1, 1999, he acquired under Section 204.083 the business of Mr. B, a subject employer eligible for an experience rate computation effective October 1,1999.

Since A is not an experience rated employer on February 1, 1999, the 2.70 percent (2.60% + 0.10% Smart Jobs) rate of B is assigned to A effective January 1, 1999. Since the compensation experience of B does not produce an earlier first chargeable quarter, an experience tax rate is computed for Mr. A effective July 1, 1999. The experience used in the computation was Mr. A's own experience during the period from January 1, 1998, to June 30, 1999, including all compensation experience transferred to him from Mr. B.

NOTE: Prior to 1989 a Joint Application for Total Transfer of Compensation Experience (C-96) was used when a non-experienced rated employer completed a total acquisition of an experienced rated employer and both parties consented to the transfer.

EXAMPLE 2: Employer A became subject in August 1998, under Section 201.021(a)(2). Employer B became subject in March 1992, under 201.021(a)(1). On

February 1, 1999, Ms. B sold her business to Ms. A (note: Ms. B and Ms. A are related as required by section 204.083 of the TUCA) with mandatory Transfer of Compensation Experience. Since 'A' was not an experience rated employer on February 1, 1999, the 2.70 percent (2.60% + 0.10% Smart Jobs) rate of 'B' is assigned to 'A' effective January 1, 1999. Since the compensation experience of 'B' lowers the first chargeable quarter from 4/98 to 3/99, an experience tax rate is computed for 'A' effective July 1, 1999.

4.3.8 Acquisition in Computation Quarter

Mr. A became a subject employer under Section 201.021(a)(1) in March 1999. Mr. B became a subject employer under Section 201.021(a)(1) in March 1999. On August 1, 2000, Mr. A sold his business to Mr. B and the mandatory Transfer of Compensation Experience applies. An experience tax rate was computed for Mr. B effective July 1, 2000. The computation included both his own compensation experience and the experience transferred to him from Mr. A.

Mr. B finished four quarters of chargeability on June 30, 2000, making him eligible for an experience tax rate on July 1, 2000. Under Section 204.082, all acquisitions are effective the first day of the acquisition quarter for rate purposes. The compensation experience of a predecessor belongs to the successor on the acquisition date so Mr. B gets a July 1, 2000 interim rate using combined experience.

4.3.9 Resumption of Employment After Waiver

This discussion pertains to an employer who resumes employment (other than by acquisition of another business from a predecessor) subsequent to selling the business and waiving compensation experience to another employer. Likewise pertinent to the discussion is the failure to file an Application for Termination of Coverage.

If a subject employer waives compensation experience and does not file an Application for Termination of Coverage, if eligible to do so, the employer retains the employer's status as a subject employer. This means that in order to have an experience tax rate, the employer must again have sufficient compensation experience subsequent to the transfer to requalify for an experience tax rate. The date which determines when the employer has had the required four consecutive calendar quarters of chargeability with benefit wages is the date on which the employer resumes employment subsequent to the date as of which the employer waived his compensation experience. The date which determines the date on which the employer is eligible for an experience tax rate is not the day following the date on which the employer waived his experience. For example, an employer waives his compensation experience as of April 4, 1997, and resumes employment November 4, 1997. The date that determines his eligibility date is November 4, 1997, which means that the employer becomes chargeable with benefit

wages as of April 1, 1998. A claim filed on or after that date will include the fourth quarter of 1997 in its base period. The employer will again be eligible for an experience rate effective April 1, 1999.

4.3.10 Finality of Transfer

A joint application (partial) may be withdrawn by either or both parties prior to approval of the application by the Commission. After approval by the Commission, an application may not be withdrawn and the approval may not be rescinded.

4.3.11 Application of Section 204.082

Section 204.082, as amended effective June 10, 1985, states:

". . for the purposes of this subchapter, an acquisition is effective on the first day of the calendar quarter in which the acquisition occurs."

The acquisition date will be treated as the first day of the quarter only for the purpose of determining the correct tax rates.

4.3.12 Governmental Employers/Section 204.103

Each governmental employer paid contributions equal to one percent (1%) of wages paid by the employer with respect to employment during each quarter for calendar years 1978 and 1979. The contribution rate for 1980 was a percentage adjusted to the next higher one-tenth of one percent (1/10 of 1%) based on a numerator including all benefits paid during the preceding two (2) calendar years based on wage credits earned from taxed governmental employers, and a denominator of the total wages (as defined in Section 201.081), paid by all taxed governmental employers for the same period. The contribution rate for calendar year 1981 and each calendar year thereafter has been determined in a like manner as for 1980, except the numerator and denominator have been based on one calendar year prior to the calendar year for which the rate is computed.

If the total benefits paid during the period used for determining the tax rate are greater than the contributions paid by these employers for the same period the difference will be added to the numerator in determining the contribution rate. If the contributions paid are greater than the total benefits paid during the period, that amount is subtracted from the numerator. The minimum tax rate for taxed governmental employers is 0.1 percent.

4.3.13 Voluntary Contributions/Section 204.048

(a) Notwithstanding any other provision of this subtitle, an employer for whom the commission has computed an experience rate as of October 1 of a calendar year

that is effective for the succeeding calendar year, as provided by Section 204.047(a), may elect to make a voluntary payment of contributions to the commission.

(b) The amount of a voluntary contribution may be equal to all or part of the employer's chargebacks during the period ending September 30 that are used in computing the employer's experience rate for the succeeding calendar year. The commission shall allocate a voluntary contribution of less than the full amount of the employer's chargebacks first to the employer's most recent chargebacks.

(c) On receipt of a voluntary contribution during the period prescribed by Subsection (d), the commission shall reduce the employer's chargebacks by an amount equal to the contribution and shall recompute the experience rate applicable to that employer for the succeeding calendar year.

(d) An employer who elects to make a voluntary contribution for the recomputation of the employer's experience rate must make the contribution no later than the 60th day after the date on which the commission mails to the employer the annual notice of the employer's experience rate. (Ref: TWC Rules 815.119) NOTE: This notice is generally mailed on or about December 15th. The employer may not revoke the contribution after the date on which the commission uses the contribution to recompute the employer's experience rate.

(e) Notwithstanding Subsection (a), the commission may not compute a new experience rate for an employer or reduce an employer's experience rate based on a voluntary contribution made by the employer after the expiration of the 120th day of the calendar year for which the rate is effective.

(f) The commission shall deposit a voluntary contribution made under this section to the credit of the compensation fund.

This section of the law will allow employers who receive an annual tax rate computation to make voluntary contributions against chargebacks on their account. The chargeback total is reduced by the amount of the voluntary contribution. If the employer contributes only part of the chargebacks, the voluntary contribution applies first to the most recent quarter used in the rate computation. A voluntary contribution applied against a quarter reduces the chargeback total for all future tax rates using that quarter. The employer must submit the voluntary contribution by the 60th day after the mailing of the tax rate notice and may not make a voluntary contribution to reduce the chargeback amount after the 120th day (approximately April 30) of the calendar year for which the rate is effective. This law started with the annual 1998 tax rates.

4.4 FEDERAL CERTIFICATIONS

In General:

'Federal Certifications' is a term in general use to describe certifications by the Commission to the U. S. Treasury Department on Treasury Form 940. Each year the Commission certifies as to the taxable payroll, the tax rate and the amount of taxes paid by an employer into the Texas Fund. Our certification is used by the Treasury Department to verify credits claimed by the employer against taxes due under the Federal Unemployment Tax Act.

Certifications are made when the Treasury Department makes a request or when an employer requests that a certification be sent. Certifications will be requested by using the Federal Certification Screen (AFC). If special mailing instructions are required or the field tax office needs to deliver the certification, call the Accounts Sections, Customer Service Unit to arrange special handing.

NOTE: Federal Certifications are also used in 940 assignments.

See Procedures Manual, Chapter 7 – 940 – IRS Form 940 Assignments for additional details on 940 Assignments.

See Procedures Manual, Chapter 5 – AFC (Federal Certification) Screen for additional details on the AFC Screen.

4.5 DUE DATES

This section discusses the aspects of the law that specifically apply to due dates for reports and remittances.

4.5.1 Tax Payment Requirement

Under Section 204.002:

a) An employer shall pay a contribution on wages for employment paid during a calendar year or the portion of the calendar year in which the employer is subject to this subtitle.

b) The contribution shall be paid to the commission in accordance with the rules adopted by the commission.

4.5.2 Due Dates of Taxes and Reimbursements

In accordance with the authority granted in Section 204.002 to prescribe the due dates of taxes and reimbursements, Commission Rule 815.109 was adopted and provides, in part:

(a) When, in any calendar year, an individual or employing unit becomes an employer (other than a reimbursing employer) subject to this Act, the employer shall, on or before the last day of the month following the month during which the employer became a subject employer, file a report as specified in §815.107 and pay contributions with respect to all completed calendar quarters in the calendar year. Contributions for the quarter during which the employer becomes a subject employer shall be due on the first day of the month immediately following the quarter and shall be paid on or before the last day of the month. Contributions shall accrue quarterly and shall become due on the first day of the month immediately following the calendar quarter. They shall be paid to the Agency on or before the last day of the month. The provisions in subsection (a) of this section shall apply unless otherwise provided in §201.027 of the Act.

(b) Reimbursements shall become due on the last day of the month following the end of each quarter and shall be paid to the Agency on or before the last day of the next month.

COMMENT: The Rule, in effect, provides, a ‘grace period’ to the last day of the month next following the due date, as tax and reimbursements do not become delinquent until after that day.

4.5.3 Extension of Due Dates

Commission Rule Number 815.109 authorizes the extension of the due date for payment of contributions or reimbursements, and Rule Number 815.107 authorizes the extension of the due date for filing a report 'for good cause shown.'

Rule Number 815.109 (e) provides, in part:

> When good cause is shown, the Agency may extend the due date for the payment of contributions or reimbursements, however, the extension may not exceed 60 days and shall not be effective unless such extension is authorized in writing by the Agency. In the event the Agency for good cause shown extends the due date for payment of contributions or reimbursements the payments shall be made to the Agency on or before the 30th day following the extended due date.

Rule Number 815.107 (b)(3) provides, in part:

> Good Cause for Extending Deadlines. When good cause is shown, the Agency may extend the due date for filing of a report required under this section; however, the extension shall only be effective if authorized in writing by an Agency representative.

An extension, as provided in the Rules, must be 'in writing' and must be authorized by the Agency or its duly authorized representative.

As previously stated, under Rule 815.109 the due date may be extended 60 days beyond the original due date for a quarter. Reports may be made and taxes may be paid during an additional thirty days following this extended due date. For example, if the commission -- in writing -- extends the due date of the fourth quarter of 1996 to March 1, 1997 (60 days past the original due date of January 1, 1997). The quarterly report may be made and taxes paid on or before the 30th day following such extended due date, or until April 1, 1997. It should be noted that the extended due date that is shown on the Detail Quarter (ADT) screen for the account for the fourth quarter of 1996 would show the April 1, 1997 date, since that is the final due date that the report and taxes may be received by the commission without assessment of penalties under Sections 213.021 and 213.022. However, the extension of the due date will not automatically cancel a service charge for search assessed under Rule 815.107. In this fourth quarter of 1996 due date extension example, the Section 213.022 penalty is applicable on March 17, 1997, and will increase on April 1, 1997, April 17, 1997, and May 17, 1997. Section 213.021 penalty is applicable on March 17, 1997, and will increase on the seventeenth day of each successive month until the penalty reaches 37.5 percent or until the tax is paid in full.

It is far more common for the commission to extend the due date for the report without extending the date for payment of the tax. Using the previous example, if the report due date for the fourth quarter of 1996 was extended to March 1, 1997 (with a final due date of March 16, 1997), but the date to pay the tax was not extended, and the employer submitted their report and remittance on March 16, 1997, they would not have been assessed a report penalty. However, interest penalty would have been assessed on

February 1, 1997, and March 1, 1997, because the payment of the tax was required on or before January 31, 1997, to have been considered timely.

The actual date of payment is used for experience rating and FUTA credit purposes as they are not affected by a due date extension. The employer may lose some FUTA credit since the payment was made after the January 31,1997 deadline.

4.5.4 Date of Receipt

The receipt date is the date the report or payment is actually received by a Commission representative if delivered in person or the date shown by the postmark date on the envelope containing the report or payment.

4.5.5 Due Date on Weekend or Legal Holiday

If the due date for a report or tax payment falls on Saturday, Sunday or a legal holiday on which Commission offices are closed, reports and payments are considered timely if they are hand delivered (or the envelope is postmarked) the following business day.

EXAMPLE: If October 31 falls on Sunday a third quarter report and tax are considered timely received if they are mailed in an envelope which is postmarked November 1. This applies only to current quarterly reports and payment and their original due dates. Once the due date has passed, the Saturday, Sunday or holiday rule no longer applies.

NOTE: Current quarterly reports are defined as the report due for the current quarter.

Example: A new employer is granted ***a report*** extended due date of October 31st which falls on a Sunday ***for all reports that are considered due***. The employer owes the first, second and third ***quarter*** reports. The reports are received on Monday November 1st. Only the current quarterly report (***third quarter***) is considered timely.

4.6 INTEREST

This section discusses the aspects of the law that specifically apply to interest.

4.6.1 On Judgment Entered After August 31, 1989

Section 213.025 was amended effective September 1, 1989, to provide, in part as follows:

> For a judgment that grants recovery of the amount of a contribution and the amount of interest computed at the maximum rate permitted under Section 213.021(a), the part of the judgment for the amount of the contribution earns interest at the rate of one percent for each month or part of a month it remains unpaid.

NOTE: Debt owed under an assessment if not contested by the employer is granted/treated the same as a judgment.

4.6.2 On Judgment Entered October 1, 1967 through August 31, 1989

Subsection 14(a) (now 213.025) was amended effective October 1, 1967, to provide, in part as follows:

> In addition to the penalties provided above, whenever the maximum penalty of twenty-five percent (25%) shall accrue or shall have accrued as provided above in cases in which the liability of the employer is reduced to judgment, thereafter in addition to the judgment shall bear interest at the rate of one-half of one percent (0.005%) per month or part of a month.

4.7 PENALTIES

This section discusses the aspects of the law that specifically apply to penalties.

4.7.1 Interest on Past Due Contributions

Section 213.021 was amended effective September 31, 1989, and provided, in part:

a) An employer who does not pay a contribution on or before the date prescribed by the commission is liable to the state for interest of one and one-half percent of the contribution for each month or portion of a month that the contribution is not paid in full. The total interest applied may not exceed 37.5 percent of the amount of contribution due at the due date.

b) Liability for interest under Subsection (a) does not apply to an employer who:

   1) failed to pay a contribution because of the bona fide belief that all or some of its employees were covered under the unemployment insurance law of another state; and

   2) paid when due a contribution on all wages of those employees under that law.

4.7.1.1 Interest If Tax Not Timely Paid

Penalties attach to unpaid taxes as a matter of law (State v. Mauritz-Wells Co., 175 S.W. 2nd 238) rather than being assessed under any administrative authority of the Commission. Failure to pay taxes when due causes penalties to accrue by operation of law (Quick Pay Insurance Company v. The State of Texas, et al).

If an employer does not pay taxes when due, even though the failure to do so is in good faith, interest will be assessed on the original taxes due, from the original due date. Unless the Commission has made an error of such a nature that it prevented taxes from being timely paid or unless the Commission--in writing--has granted an extension of the due date as authorized in Rules 815.107 and 815.109. (See Chapter 4 - ‘Extension of Due Dates’, and Chapter 5 - ‘Filed By Whom and When’).

A change of ruling by the Commission (or one of its representatives) which finds taxes to be due, unless there is a material change in facts, is an example of action which would prevent timely payment of taxes. A ruling based on inaccurate or incomplete facts furnished by the employer is not action by the Commission, which prevents taxes from being paid.

Timely payment of taxes at an incorrect lower rate will not relieve an employer of liability for penalty on additional taxes computed at correct rate.

As provided in Section 213.021, penalty accrues at the rate of 1 1/2 percent of the amount of unpaid delinquent taxes for each month or fraction of a month the employer

fails to remit payment after expiration of the 'grace period' in which payment may be submitted without penalty.

4.7.1.2 Maximum Interest Rate

The maximum interest is 37.5 percent and interest on judgments for the same liability period will be charged at 1.0 percent per month.

EXAMPLE: A liable employer does not pay taxes for second quarter of 1993 until December 5, 1994. Since the employer did not submit payment on or before July 31, 1993, the employer incurred a 1.5 percent interest on August 1, 1993, and an additional 1.5 percent interest for each subsequent month until taxes were paid. From August 1, 1993, to December 5, 1994, is 17 months. The employer would owe a penalty of 25.5 percent of the tax due on December 5, 1994.

4.7.1.3 Interest & Penalty in Bankruptcy Cases

Currently we are operating under the United States Bankruptcy Code Title II as amended by the Bankruptcy Reform Act of 1994. Under this amended Act, interest & penalties are allowable under certain circumstances:

In straight liquidation cases under Chapter 7, Chapter 11, Proceedings in Arrangement, or Chapter 13, Wage Earner Proceedings, interest accrued prior to petition date for bankruptcy proceedings may be claimed as priority. If the indebtedness has been secured, that is, a tax lien and/or abstract of judgment has been recorded in the county records prior to the petition date, then the penalties can be claimed as priority also.

Whenever a claim for pre-petition penalties is appropriate, only the interest and penalty amount accrued to the petition date is permitted. As in the past, the current Act permits any interest or other amounts incurred subsequent to the petition date to be claimed, thus all post-petition interest and penalties may be included in our claim to the bankruptcy court.

4.7.1.4 Penalty in State Receivership/Assignment

In a state receivership or an assignment for benefit of creditors, penalties are due for periods both before and after the court or fiduciary takes possession.

4.7.1.5 Waiver of Interest

Section 213.021 charges the Commission with assessing late payment interest when an employer becomes delinquent in his tax payments. An Attorney General's opinion, dated April 12, 1937, holds that these interest penalties cannot be waived. However,

the Commission does have the authority to grant extensions under certain circumstances.

When an employer has actually tendered payment of the tax to the Commission and such payment has been rejected or refunded, a subsequent assessment of this tax is without interest.

If the final due date on which taxes for a quarter may be paid without interest falls on a Saturday, Sunday, or a holiday, interest will not be assessed on a payment mailed on the next 'working day' following such final date.

Subsequent to July 1, 1965, if taxes due under the Act were timely paid in error into the unemployment compensation fund of another state and were subsequently paid to Texas upon discovery of the error, the Commission took the position that the taxes were paid to Texas as of the date they were actually paid to the other state.

As provided in Subsection 213.021, the interest penalty will not apply if payment was made timely to another state due to the belief that taxes were due to such other state.

No waiver of the interest penalty applies to payments mistakenly made to any agency of the Federal Government.

4.7.2 Section 213.022 Penalties

4.7.2.1 Section 213.022 Penalties

An employer who does not file a report of wages paid or contributions due as required by this subtitle or commission rule shall pay to the commission a penalty in the amount equal to:

1) $15, if the completed report is filed not later than the 15th day after the report's due date;
2) $30 plus one-twentieth of one percent of wages that the employer failed to report, if the completed report is filed after the 15th day after the report's due date but during the first month after the report's due date;
3) the sum of the amount computed under Subdivision (2) and the amount equal to $30 plus one-tenth of one percent of wages that the employer failed to report, if the completed report is filed during the second month after the report's due date; or
4) the sum of the amount computed under Subdivision (3) and the amount equal to $30 plus one-fifth of one percent of wages that the employer failed to report, if the completed report is filed during the third month after the report's due date.

EXAMPLE: Employer A, subject since 1990, failed to file his second quarter 1999 report until October 17, 1999. Taxable wages in the amount of $10,000.00 were paid by Employer A in the second quarter of 1996.

PENALTIES ACCURED	PENALTY RATE	TOTAL AMOUNT 213.022 PENALTY
August 1-5	$15.00	$ 15.00
August 16-31	$ 30.00 + 0.05% Taxable Wages (.0005)	$ 35.00
September	$ 60.00 + 0.15% Taxable Wages (.0015)	$ 75.00
October	$ 90.00 + 0.35% Taxable Wages (.0035)	$125.00

4.7.2.2 Penalties on 'New' Accounts

Ordinarily, newly established accounts are allowed ten (10) days from the date of Form C-198, Employer's Liability Notice, to file reports without the penalty. If the reports are not filed within this ten (10) day period, the penalty for late filing will be assessed. The following is an example of the application of Section 213.022 penalties on a 'new' account:

EXAMPLE: Employer A paid taxable wages of $10,000 in the third quarter of 1999. The employer was mailed an Employer's Liability Notice, Form C-198, on (and dated) November 8, 1999, yet the employer did not file the report until March 1, 2000. Section 213.022 penalties had accrued as follows:

11-19-96	Failed to file within 10 days	$ 15.00
12-04-96	Failed to file in next 15 days - $15.00 plus .05% of taxable wages (.0005)	$ 35.00
12-19-96	Penalty applicable to 2nd successive month - $60.00 plus .15% of taxable wages (.0015)	$ 75.00
01-19-97	Penalty applicable to 3rd successive month - $90 plus .35% of taxable wages (.0035)	$ 125.00

Maximum report penalty is reached at the third month. Interest penalty continues to accrue at the rate of 1.5 percent per month to the maximum of 37.5 percent.

4.7.2.3 Abatement of Section 213.022 Penalties

Commission Rule Number 815.107 (b)(3), provides in part:

> Good Cause for Extending Deadlines. When good cause is shown, the Agency may extend the due date for filing of a report required under this section; however, the extension shall only be effective if authorized in writing by an Agency representative.

If the employer alleges that filing the report was impossible, or failure to file the report was due to a valid, factual and reasonable cause, the examiner may suggest that the employer write a letter to the Commission setting forth the circumstances. The letter should accompany the late report and remittance. See Procedures Manual, Chapter 2 – Abatement for specific guidelines.

4.7.3 Section 214.008 Misclassification of Certain Workers

The 83rd legislature amended the Texas Unemployment Compensation Act, Chapter 214, adding a new section called "Misclassification of Certain Workers," which states:

> "(a) A person who contracts with a governmental entity to provide a service as defined by Section 2155.001, Government Code, shall properly classify, as an employee or independent contractor in accordance with Chapter 201, any individual the person directly retains and compensates for services performed in connection with the contract.
>
> (b) In this subsection, "subcontractor" means a person directly retained and compensated by a person who contracts with a governmental entity to provide a service as defined by Section 2155.001, Government Code. A subcontractor shall properly classify, as an employee or independent contractor in accordance with Chapter 201, any individual the subcontractor directly retains and compensates for services performed in connection with the contract for which the subcontractor is retained.
>
> (c) A person who fails to properly classify an individual as required by Subsection (a) or (b) shall pay to the commission a penalty equal to $200 for each individual that the person has not properly classified.
>
> (d) The commission may not take action to collect a penalty under this section from a person after the third anniversary of the date on which the violation occurred."

Reference: Audit Manual, Chapter 4 –Misclassification of Certain Workers for additional details.

4.7.4 Effect of Previous Determination

Section 213.011 of the TUCA states in part:

> "(b) The commission shall relieve an employer that reasonably relies on a ruling or determination described by Subsection (a) from penalties, interest, or sanctions under this chapter or Chapter 214 that result from a subsequent ruling or determination that the service in question is employment. An employer who receives relief under this subsection is not indebted to the state for the penalties, interest, or sanctions from which the employer is relieved and may not be considered delinquent on the payment of taxes, to the extent of the amount from which the employer is relieved."

These requests will be handled by the Regional Tax Manager and documented on FTC.

The request for abatement action under this provision shall be forward via e-mail to Tax Abatements.

4.8 FREEZE & LEVY

Section 213.059 of the Texas Unemployment Compensation Act, effective September 1, 1999 authorizes the Texas Workforce Commission to freeze assets of debtor employers and then levy on those assets.

This revision is made to expand the use of Freeze and Levy procedures through seizure of assets held in banks, credit unions, and savings and loan institutions by promptly identifying delinquent accounts and initiating appropriate legal remedies.

See Procedures Manual, Chapter 4 – Notice of Freeze/Levy for additional information.

4.9 COLLECTION OF CONTRIBUTION BY CIVIL SUIT OR NOTICE OF ASSESSMENT

In 1989, House Bill 1941 passed in the 71st Legislative session provided for collection of delinquent contributions, penalties or interest by serving a notice of assessment on the defaulting employer. This notice of assessment states the amount of contribution, penalties or interest outstanding. If the employer does not seek judicial review, the assessment is final and is recorded as a judgment against the employer. If the employer initiates judicial review, the account is referred to the Attorney General for collection action.

NOTE: Chapter 213 Subchapter C of the Texas Unemployment Compensation Act outlines the collection methods.

See Procedures Manual, Chapter 4 – Collection of Contribution by Civil Suit or Notice of Assessment for additional information.

4.10 REFUNDS

This section discusses the aspects of the law that specifically apply to refunds.

4.10.1 In General

Sections 213.071 and 213.072 authorize refunds, to an employer, of taxes and/or penalties erroneously collected and provide a time limit on applications for refund. Further details are set forth in Rule Number 815.12.

The Commission is prohibited from paying interest on taxes or penalties resulting from overpayments or adjustments.

All refunds for tax and penalties are payable from the Clearing Fund (#936).

Requests for refunds will be verified by the State Comptroller to determine if additional tax liabilities or indebtedness is owed to the state. (Vendor Hold)

COMMENT: If the amount of the refund is $1,000.00 or greater, the employer must have a Payee Identification Number, consisting of fourteen (14) digits, issued by the State Comptroller. If a Payee Identification Number is not located for the employer, the Refunds Unit will attempt to obtain one for the employer. If, for any reason, a Payee Identification Number cannot be obtained for the employer, the refund will be denied and a letter will be sent informing the employer. It is then the employer's responsibility to communicate directly with the State Comptroller before reapplying for the refund.

If the amount of refund is $999.99 or less, Payee Identification Number is not required.

See Procedures Manual, Chapter 4 – Credit or Refund of Overpayment for additional information.

4.11 ELECTRIC COOPERATIVES, INC.

This section discusses the aspects of the law that specifically apply to electric cooperatives.

4.11.1 In General

Corporations with the words 'Electric Cooperatives, Inc.' in their names are created under a special statute, Article 1528-b, Revised Civil Statutes of Texas. Section 30 of this article reads as follows:

Corporations formed hereunder shall pay annually on or before May 1, to the Secretary of State, a license fee of Ten Dollars ($10.00) and such corporations shall be exempt from all other excise taxes of whatsoever kind or nature.

Services performed for this type of corporation are deemed to be 'employment,' but we cannot require these corporations to pay taxes.

4.11.2 Voluntary Election of Electric Coops

The Commission will accept contributions from electric cooperative corporations if they volunteer to pay taxes. The standard 'Application for Voluntary Election of Coverage' form is not appropriate for this purpose.

See Procedures Manual, Chapter 1 – Voluntary Election Section (C-1 and C-1FR) for additional information.

4.12 FEDERAL CREDIT UNIONS

Federal credit unions are organized and operate under the provisions of the Federal Credit Union Act. The federal statute governing federal credit unions requires that the word 'Federal' appear in the name of the credit union immediately preceding the words 'Credit Union.' The Federal Credit Union Act states that these entities will be exempt from all taxes imposed by the United States or by any state, and they are recognized as instrumentalities of the United States which are neither wholly nor partially owned by the United States. The credit unions are exempt from federal income taxes under Section 501(a) of the IRS code; however, they are not exempt from federal unemployment taxes unless they are granted a specific exemption. Section 3308 of the Federal Unemployment Tax Act provides that, notwithstanding any other provisions of the law which grants exemption from taxation to any instrumentality of the United States, the instrumentality shall not be exempt from Federal unemployment taxes unless the other provision of law grants a specific exemption by referring to Section 3301 of the Federal Unemployment Tax Act. The law which granted exemption to Federal Credit Unions did not specify exemption from Section 3301 of the Federal Unemployment Tax Act. Therefore, service for a Federal Credit Union is not excluded in the definition of 'employment.'

4.13 PHONE COOPERATIVES

Telephone cooperatives organized and operating under the Telephone Cooperative Act (Article 1528 (c), V.C.S.) are exempt from the payment of 'all other excise taxes.' Courts have held that the tax levied by the Texas Unemployment Compensation Act is an excise tax and therefore the Telephone Cooperative Act exempts these telephone cooperatives from payment of state unemployment taxes. While there is no specific exemption for telephone cooperatives in the Texas Unemployment Compensation Act, the Commission honors the provisions of the other State statute.

4.13.1 Acceptance of Taxes

The Commission will accept taxes from telephone cooperatives if they wish to waive their exemption and voluntarily elect coverage under the Texas Unemployment Compensation Act.

4.14 Labor Agent

Section 204.009 states:

a) A labor agent who furnishes a farm and ranch laborer is liable for the payment of a tax under this subtitle as if the labor agent were the employer of the laborer, without regard to any factor used to determine an employer-employee relationship, including the right of control.

b) If a labor agent does not pay the tax in accordance with this subtitle, a person who contracts with the labor agent for the services of a farm and ranch laborer is jointly and severally liable with the labor agent for payment of the tax under this subtitle as an employer.

c) A labor agent shall notify each person with whom the labor agent contracts whether the labor agent pays the tax under this subtitle.

d) A labor agent who pays the tax shall present evidence of payment to each person with whom the labor agent contracts.

e) In this section, ‘labor agent’ means a person who is a farm labor contractor under the Migrant and Seasonal Agricultural Worker Protection Act (29. U.S.C. Section 1801 et seq.).

COMMENT: The labor agent is the employer, regardless of who has direction and control. However, if the labor agent does not pay the tax due, the farmer is liable for payment of the tax due on the wages paid by the labor agent while contracting with the farmer. If the labor agent pays the tax due, the labor agent must present evidence of the payment to the farmer.

4.15 Special Rate – Cotton Ginners / Post Harvest Crop Activities

Section 204.007 states:

An employer identified by the commission as classified in U.S. NAICS manual as Number 115111, cotton ginning or Number 115114, postharvest crop activities* will receive a contribution rate of the lowest of:

1 five and four-tenths percent rate cap; or

2 the general tax rate applicable to that employer, with the deficit tax rate and replenishment tax rate; or

3 any other tax rate applicable to that employer under this subtitle.

* Postharvest crop activities include, crop cleaning, sun drying, shelling, fumigating, curing, sorting, grading, packing (packing sheds) and cooling. Reference NAICS 1997, Code 115114.

4.16 Rulings

Subject	Tax Supplement Number
Experience Rating	59-74
Guaranteed Annual Wages	144-74 (See also Paragraph 4.2.2.9, 'Guaranteed Annual Wages')
Supplemental Unemployment	144.74
Benefits or Insurance	4.2.3.10, 'Supplemental Unemployment Benefits'
Wages	2-74; 53-74; 64-74; 72-74; 72-74; 82-74; 86-74; 87-74; 89-74; 106-74; 108-74; 109-74; 111-74; 131-74; 144-74; 147-74

5 REPORTS AND RECORDS

This chapter discusses the aspects of the law that apply to reports and records.

5.1 REQUIRED REPORTS

This section discusses the aspects of the law that apply to required reports.

5.1.1 Authority to Require Reports

Under Section 301.061(c) of the TUCA:

Both the commission and the executive director may require reports, conduct investigations, and take other actions the commission or the executive director considers necessary or suitable to fulfill the duties imposed under this title.

Under Section 301.081(b) of the TUCA:

The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.

5.1.2 Required Reports or Forms

Under Rule Number 815.107:

Rule 815.107 lists specific requirements for filing of status reports and employer's quarterly reports.

(a) All reports and forms required by the Agency or the Act shall be filed with the Agency in one of the following formats unless a different format is approved in writing by the Agency, a hardship exemption is requested from and granted by the Agency, or as specified in this chapter.

(1) General Format of Reports and Forms and Methods of Submission. The reports and forms referenced in this section shall be filed using:

(A) forms printed by the Agency;

(B) electronic media in a format prescribed by the Agency; or

(C) any other manner approved and prescribed by the Agency in writing.

(2) Content. The reports and forms shall contain all facts and information necessary to a determination of the amounts due by the employing unit. The Agency may require the furnishing of additional information as it deems necessary for the proper administration of the Act.

(3) Electronic Media Reporting.

(A) Required Electronic Media. All employers and their agents shall file employers' reports, including both summary and detail wage information, as described in §207.004 of the Act, on electronic media using a format prescribed by the Agency.

(B) An electronic media transmission of an employer's quarterly report may contain information from more than one employer.

(C) An employer's quarterly report filed in an approved medium shall contain both a wage credit report and a summary report.

(b) General Deadlines for Filing Reports and Forms.

(1) Unless otherwise provided in this subchapter, any report or form shall be completed and filed with the Agency within 10 days after the requested report or form is:

(A) mailed to the individual or employing unit at the address on record with the Agency; or

(B) personally delivered to the individual or employing unit by an Agency representative.

(2) Failure to receive notice regarding the reports shall not relieve the individual or employing unit of the responsibility of filing the reports by the date the reports are due.

(3) Good Cause for Extending Deadlines. When good cause is shown, the Agency may extend the due date for filing of a report required under this section; however, the extension shall be effective only if authorized in writing by an Agency representative.

(c) Status Reports.

(1) Status Reports in General. Each employing unit shall file with the Agency a status report within 10 days from the date upon which the employing unit becomes subject to the Act.

(2) Status Reports for New Acquisitions. Any employing unit in the state of Texas that acquires another business or substantially all of the assets of another business shall file a new status report with the Agency within 10 days of the date on which the employing unit made the acquisition.

(3) Status Reports for Additional Information. Each employing unit shall file additional status reports at any time upon the request of the Agency.

(4) Evidence in Support of Status Reports. Employing units filing status reports with the Agency shall:

(A) file with the Agency all facts necessary to a determination of the taxable status of the employing unit; and

(B) if requested, file with the Agency evidence to establish the correctness of information contained in the employing unit's status reports.

(d) Quarterly Reports from Taxed Employers. Each taxed employer, other than a domestic employer who has elected to report and pay annually under §201.027(b) of the Act, shall file with the Agency, within the month during which contributions for any period become due, and not later than the date on which contributions are required to be paid to the Agency, an employer's quarterly report showing for the preceding calendar quarter:

(1) the total amount of remuneration paid for employment (or showing that no remuneration was paid during the quarter);

(2) the total amount of wages paid for employment (as defined in the Act, §201.081 and §201.082);

(3) the amount of wages for benefit wage credits (as defined in the Act, §207.004) paid to each individual employee;

(4) the name and Social Security number of each individual to whom the wages were paid; and

(5) any other information requested on the employer's quarterly report, including all facts and information necessary to make a determination of the amount of contributions due.

(e) Quarterly Reports from Reimbursing Employers and Group Representatives of a Group Account. Each reimbursing employer and the group representative of a group account shall file an employer's quarterly report, by the end of the month following each calendar quarter, that furnishes the following information for the preceding calendar quarter, information specified in paragraphs (1)–(4) of subsection (d) of this section, and any other information necessary to make a determination of the amount of reimbursements due.

(f) Benefits Financed by the Federal Government. Each employer that has employees whose benefits are to be financed by the federal government shall file a separate quarterly report furnishing the names of the employees, their Social Security numbers, and the wages paid to each. The report shall be filed by the end of the month following each calendar quarter.

(g) Annual Reports from Domestic Employers.

(1) Making the Election. An election to report wages paid and pay contributions on an annual basis must be made in a format or on a form authorized by the Agency by the deadline specified in §201.027 of the Act.

(2) Each domestic employer that qualifies under the Act and who has made an election as referenced in paragraph (1) of this subsection, shall file with the Agency, by January 31 of the year after the wages were paid, in a format consistent with subsection (a) of this section, a domestic employer's annual

report showing the following for the preceding calendar year in which wages were paid.

(A) The information specified in paragraphs (1)–(4) of subsection (d) of this section subtotaled for each quarter; and

(B) Other information called for on the domestic employer's annual report including all facts and information necessary to make a determination of the amount of contributions due.

(3) Penalties and interest incurred under this section shall be the same as applicable to other employer reporting requirements as provided in Chapter 213 of the Act and this subchapter.

5.1.2.1 Contributions

Under Rule Number 815.109:

(a) When, in any calendar year, an individual or employing unit becomes an employer (other than a reimbursing employer) subject to this Act, the employer shall, on or before the last day of the month following the month during which the employer became a subject employer, file a report as specified in §815.107 and pay contributions with respect to all completed calendar quarters in the calendar year. Contributions for the quarter during which the employer becomes a subject employer shall be due on the first day of the month immediately following the quarter and shall be paid on or before the last day of the month. Contributions shall accrue quarterly and shall become due on the first day of the month immediately following the calendar quarter. They shall be paid to the Agency on or before the last day of the month. The provisions in this subsection (a) shall apply unless otherwise provided in §201.027 of the Act.

(b) Reimbursements shall become due on the last day of the month following the end of each quarter and shall be paid to the Agency on or before the last day of the next month.

(c) When the last day for payment of contributions or reimbursements falls on a Saturday, Sunday, or a legal holiday on which the Agency office is closed, the payment may be made on the next regular business day.

(d) An employer or other entity, including agents paying on behalf of multiple employers, is required to transfer payment amounts of contributions by Commission-approved electronic means on or before the date the contributions are due, unless the Agency in writing has approved another method or form of payment. The transfers, shall be subject to the provisions of Texas Government Code §404.095, and to rules adopted by the state comptroller pursuant to that section.

(e) Additional tax resulting from a chargeback adjustment is due on the first day of the second month following the month in which the Agency mailed the statement or letter notifying the employer of the change in tax rate and additional tax due.

Amounts due from such chargeback adjustments shall be paid and must be received by the Agency on or before the last day of this second month.

(f) When good cause is shown, the Agency may extend the due date for the payment of contributions or reimbursements. The extension shall not be effective unless it is authorized in writing by the Agency. In the event the Agency for good cause shown extends the due date for payment of contributions or reimbursements, the payments shall be made to the Agency on or before the thirtieth day following the extended due date.

(g) An agent or other entity making a payment on behalf of employers shall furnish an allocation list on electronic media using a format prescribed by this Agency, unless the Agency has approved another format and method in writing. This list shall be furnished with the remittance, and the remittance shall be allocated to the credit of the employers according to the order in which the employers appear on the list.

5.1.2.2 Out of Statute Report(s)

Occasionally, an employer will have an IRS issue and may attempt to submit report(s) that are outside the statute of limitations.

Section 213.033 states in part:

Sec. 213.033. LIMITATIONS (a) The commission may not begin a civil action in court or make an assessment under this subchapter to collect a contribution, a penalty, or interest from an employer after the third anniversary after the due date of the contribution.

So, if TWC accepts un-paid reports that are older than three years from the due date of the contribution, the Commission cannot collect the money due on those reports, nor will TWC issue an IRS certification since the reports are not paid.

But, should the employer submits fully paid (tax, interest and penalty) reports that are older than three years, the Commission can accept them since there will be no debt created and provide the employer with an IRS certification.

5.2 EMPLOYER PENALTIES

This section discusses the aspects of the law that apply to employer penalties.

5.2.1 Penalty for Failure to File Report

Under Section 213.022:

LATENESS OF REPORT	PENALTY
1-15 days after due date	$15.00
Day 16 thru end of first month after due date	$30.00 + .05% (.0005) of taxable wages not reported
During 2nd month after due date	$60.00 + .15% (.0015) of taxable wages not reported
During 3rd month after due date	$90.00 + .35% (00.35) of taxable wages not reported

COMMENTS: If tax contributions are owed: Monthly interest is charged on all contributions still owed after the tax due date. See Sec. 213.021.

5.2.1.1 Restraining of Certain Violations

Under Section 213.052:

a). If an employing unit violates or threatens to violate this subtitle or any rule or order adopted under this subtitle relating to the collection of a contribution, a penalty, or interest or to the filing of a report relating to employment, the commission may bring suit against an employing unit to restrain the violation. The court may grant a temporary or permanent, prohibitory or mandatory injunction, including a temporary restraining order, as warranted by the facts.

b). A suit under this section is filed by the Attorney General in Travis County.

COMMENT: The decision to seek relief under this provision will be made by the State Office Collection Section after reviewing facts reported by examiners.

5.2.2 False Reports or No Records

The following sections of the Texas Unemployment Compensation Act refer to refusal to keep required records or to making false statements on Status Reports, quarterly reports, and quarterly wage lists.

5.2.2.1 Penalty for Other Violation

Under Section 213.023:

A $30 penalty may be assessed if the employing unit:

1) does not keep required records;
2) makes a false report to the commission; or
3) violates this subtitle or a commission rule adopted under this subtitle.

5.2.2.2 Penalty for Continuing Violation

Under Section 213.024:

a). In addition to the penalty under Section 213.023, an employing unit may be assessed a penalty of $30 for each consecutive day that the violation continues.

b). The penalty is imposed and becomes cumulative on the 10th day after written notice is given or mailed to the employing unit.

5.2.2.3 Fraudulent Benefits or Other Payment

Under Section 214.001:

A person commits a Class A misdemeanor if he knowingly makes a false statement or knowingly fails to disclose a material fact to obtain or increase a benefit or other payment for himself or another person.

5.2.2.4 Avoiding Contributions or Benefits

Under Section 214.004:

a). A person commits a Class A misdemeanor if he knowingly makes a false representation, or knowingly fails to disclose a material fact, to:

1) prevent or reduce the payment of benefits to an individual;
2) avoid becoming or remaining subject; or
3) avoid or reduce any contribution or other payment required from an employing unit.

5.2.2.5 Offenses Regarding Reports and Records

Under Section 214.006:

a). A person commits a Class A misdemeanor if he willfully fails or refuses to:

1) furnish a required report; or

2) produce or permit the inspection or copying of records as required under this subtitle.

5.3 AUTHORITY TO PREPARE REPORTS

This section discusses the aspects of the law that apply to the authority to prepare reports.

5.3.1 Audit of Employer

Under Section 213.055 (a):

The commission may determine the amount of a contribution due and prepare a report for an employer who does not properly pay a contribution or submit a report.

COMMENT: The commission may determine that such action is necessary because of an employer's inability or unwillingness to prepare correct reports or because of a need to quickly obtain certain information.

5.3.2 Estimated Taxable Wages

Under Section 213.056:

a) If an employer does not submit a report, the commission may estimate taxable wages paid by the employer during the period covered by the report. In making this estimate, the commission may use any available source of information.

b) Collection of taxes owed on estimated reports proceeds as if the wages had been properly reported by the employer.

COMMENTS:

1. This section authorizes the commission to estimate taxable wages from any sources of information available to it and to proceed to collect taxes and penalties on the basis of such estimates as if the wages had been reported by the employer.
2. The commission is also given statutory authority to establish a claimant's wages by Section 207.004, which provides, in part.

   If an employer fails to report, when requested by the commission, wages that were paid to an individual during a base period, the commission may determine the amount of benefit wage credits for the individual for the base period from the best information obtained by the commission.
3. For practical purposes the tax department will estimate total and taxable wages at the same time.

Note: The commission currently determines the amount of benefit wage credit, if not forth coming from the employer during the Appeal Process.

5.4 RECEIPT DATE OF REPORTS

This section discusses the aspects of the law that apply to the receipt date of reports.

Reports received through the mail shall be deemed to have been filed as of the date shown by the ***postmark*** on the envelope properly addressed to the commission's office and containing the report.

5.4.1 Rule Number 815.102

Rule 815.102 states how to determine mailing *(postmark)* dates.

(a) Whenever an individual or an employing unit reports or applies to the Agency in writing upon an Agency form, for purposes of determining the date the writing is submitted, the following dates shall control, in the order listed:
  (1) the United States Postal Service postmark date, if legible;
  (2) the postal meter date, if legible;
  (3) a writing received in an envelope without a legible postmark or postal meter date shall be considered to have been sent three business days before receipt by the Agency, or on the date of the writing, if the date of the writing is less than three days earlier than date of receipt; or
  (4) if the mailing envelope is lost after delivery to the Agency, the date on the writing shall control. If the writing is undated, the date the writing was sent shall be three business days before receipt by the Agency, subject to sworn testimony establishing the mailing date.

(b) The date the payment of contributions or reimbursements are received shall be determined in accordance with the provisions of this section.

(c) If the writing was filed in an electronic form approved by the Agency in writing, the date and time stamp the transmission was received by the Agency shall establish the mailing date.

(d) If delivered by a common carrier (i.e., Federal Express, Purolator, or other common carrier) the receipt date shall be the date the writing is delivered to the Common Carrier.

(e) If delivered in person, the date the writing is delivered to the Agency's Central Tax Office in Austin or any Agency Tax Office located throughout the state.

The provisions of 815.102 were adopted to be effective November 6, 2000, replacing section 815.2

5.5 RECORDS

This section discusses the aspects of the law that apply to the records kept by an employing unit.

5.5.1 Employing Unit Shall Keep:

Section 301.081(a) of the TUCA states:

Each employing unit shall keep employment records containing information prescribed by the commission and as necessary for the proper administration of this title.

5.5.2 Inspection of:

Section 301.081(a) of the TUCA states:

The records are open to inspection and may be copied by the commission or authorized representative of the commission at any reasonable time and as often as necessary.

5.5.3 Contents of Employer Records:

Section 815.106 of the Rules lists the details of records for employing units.

(a) Each employing unit shall keep true and accurate employment and payroll records, that shall include, the name and correct address of the employing unit, and the name and address of each branch or division or establishment operated, owned, or maintained by the employing unit at different locations in Texas, and the following information for each and every individual performing services for it:

(1) the individual's name, address, and social security number;

(2) the dates on which the individual performed services for the employing unit and the state or states in which the services were performed;

(3) the amount of wages paid to the individual for each separate payroll period, date of payment of the wages, and amounts or remuneration paid to the individual for each separate payroll period other than "wages," as defined in the Act; and

(4) whether, during any payroll period the individual worked less than full time, and if so, the hours and dates worked.

(b) Each employing unit shall keep, in addition to the records required by subsection (a) of this section, the records that shall establish and reflect the ownership and any changes of ownership of the employing unit, the correct address where the headquarters of the employing unit is located, and the correct mailing address of the employing unit. The records shall also show clearly the address at which the records are available for inspection or audit by representatives of the Agency. The

records shall show the addresses of owners of the employing unit; or in the event the employing unit is a corporation or an unincorporated organization, the records shall show the addresses of directors, officers, and any individuals on whom subpoenas, legal processes, or citations may be served in Texas. In the event the employing unit is a member of a group account, the records shall show the address of the group representative.

(c) Wages paid for services excluded from the definition of "employment" under the Act shall be separately reflected in the employing unit's records so as to show the time of the service and remuneration for the service that is separate from taxable wages. With respect to pay periods in which an individual performs services excluded from the term "employment" as well as service which is "employment," the employing unit's record shall reflect the hours spent in the excluded service and the hours spent in "employment." If any remuneration other than monetary wages is paid to or is received by an individual with respect to services performed by the individual for the employer, the record shall show the total amount of cash wages and the cash value of any other remuneration.

(d) Each reimbursing employer (including the individual component members comprising a group account) shall maintain the records prescribed in this section.

(e) Each governmental employer (including the independent component employers comprising the group account) shall maintain the records prescribed in this section.

(f) Component members of a group account shall furnish payroll and other information necessary to the group representative for the representative to prepare consolidated reports for the group.

(g) All records shall be kept and maintained as to establish clearly the correctness of all reports which the employing unit is required to file with the Agency and shall be readily accessible to authorized representatives of the Agency within the geographical boundaries of the State of Texas; and in the event the records are not maintained or are not available within Texas, the employing unit shall pay to the Agency the expenses and costs incurred when a representative of the Agency is required to go outside the State of Texas to inspect or audit the employing unit's records.

(h) Each employing unit, upon request by the Agency, shall furnish a job description of duties performed by any individual or group of individuals who are performing or have performed services for the employing unit.

(i) The records prescribed by this subchapter and the Act shall be preserved for four years.

The provisions of 815.106 were adopted to be effective November 6, 2000, replacing section 815.6.

5.6 SERVICE CHARGES

This section discusses the aspects of the law that apply to service charges.

5.6.1 Audit of Employer

Section 213.055 - subsection (b) of the Act allows the commission to charge an employer for reasonable expenses in investigating a situation:

b) An employer who has not paid the correct amount or made a correct report shall pay, as an additional penalty, the reasonable expenses incurred in the investigation and preparation of the reports.

COMMENT: Reasonable expenses include the portion of an examiner's salary attributed to the time used in traveling to an employer’s place of business, the amount of time to return from that business, and the time required to examine his records and prepare quarterly reports. It also includes travel expenses. If traveling out-of-state to audit the employer's records, reasonable expenses include food and lodging. In some cases, it may be reasonable and equitable to prorate expenses. Assessment of service charges is left to the discretion of the Accounts Examiner but, as a matter of policy, this additional penalty should be assessed in cases of repeated failure and neglect or refusal to file reports. Service charges will not be assessed against employing units unless they have qualified as liable employers.

5.6.2 Collection of Service Charge

Only one remittance is necessary to cover the service charge plus any other item that may be collected. If the service charge is not paid by the employer, it may be collected by the commission in the same manner prescribed for collection of delinquent taxes and penalties.

5.7 SIGNATURES

This section discusses the aspects of the law that apply to signatures on Agency reports.

5.7.1 Signatures on Reports and Forms

Rule Number 815.108:

(a) A report or form required by the Agency shall, if signature is called for by the report or form or instructions, be signed by:

(1) the individual, if the person required to submit the report or form is an individual;

(2) the president, vice-president, or other principal officer, if the employing unit required to submit the report or form is a corporation;

(3) a partner, if the employing unit required to submit the report or form is a partnership;

(4) a duly authorized member or officer having knowledge of its affairs, if the employing unit required to submit the report or form is an unincorporated organization;

(5) the fiduciary, if the employing unit required to submit the report or form is a trust or estate;

(6) the head of the department (or the department head's designee) having control of the services with respect to which contributions, reimbursements, or other payments are attributable, if the employing unit required to submit the report or form is the State of Texas or a branch, department, instrumentality, or political subdivision thereof;

(7) the group representative, if the report or form is being submitted for a group account; or

(8) any individual who is authorized in writing to sign for each individual or employing unit.

(A) The written authority shall be: filed with the Agency; revocable by either party; and in terms, which explicitly authorize the attorney or agent to transact business between the grantor of said power and the Agency. The written authority shall be filed in a manner prescribed by the Agency.

(B) It shall be duly sworn to before a notary public or other officer authorized to administer oaths.

(C) The written authority shall be in full force and effect until it is revoked in a manner prescribed by the Agency.

(D) The Agency may reject any written authority that does not conform with this section.

(b) Nothing contained in this section shall in any way affect the power and right of any representative of the Agency to prepare and sign any reports or forms required by the Agency upon the failure or refusal of any of the individuals listed in subsection (a) of this section to do so when requested.

The provisions of 815.108 were adopted to be effective November 6, 2000, replacing section 815.8

COMMENT: A written authorization form (C-42) that is properly prepared and filed with the Agency authorizes a specified person to represent the grantor in business with the Agency. Once approved, the written authorization remained in effect until filing an appropriate revocation form with the Agency revokes it.

Employers subject to TUCA may appoint an agent (an individual or service company) to represent that taxpayer in all matters before the Agency, to include signature on reports or forms. This change to the rules concerning service agent agreements provides that once an employer has given a third party written authority (C-42 Written Authorization) to conduct business with the Agency on their behalf, either the employer or the third party may revoke the agreement (C-43 Revocation of Written Authorization). Previously, only the employer could revoke the written authority.

5.8 ADMISSIBILITY OF REPORTS IN COURT

This section discusses the aspects of the law that apply to the admissibility of reports in court.

5.8.1 Certified Copy of Commission Record

Under Section 213.003:
In a civil or criminal proceeding brought under this subtitle, a certified copy of a document from commission records is admissible as evidence instead of the original document.

COMMENT: Even though an employing unit submits a report, which is later found to be incorrect. The report as submitted is the employer's statement and may, at a later date, be introduced as evidence in court. The value of the report as evidence is destroyed or greatly endangered by the presence of changes, corrections, or deletions unless the employer has initialed alterations.

However if a report is sent by an employer and an error or omission is identified the examiner should make the necessary corrections as outlined in the procedures manual. See Procedures Manual Chapter 1 – Changes to a Status Report or Chapter Two - Alterations of C-3/C-4's.

5.8.2 Report or Audit; Prima Facie Evidence

Under Section 213.004:

a) In a judicial proceeding, the following are admissible:
    1) A quarterly report filed by the employer or the employer's representative for which a contribution, a penalty, or interest has not been paid;
    2) A copy of a report described in (1) above which is certified by a member of the commission or by an employee designated for that purpose by the commission; and
    3) An audit prepared from the books of the employer by a commission representative.

b) A report or audit admissible under this section is prima facie evidence.

COMMENT: The words 'prima facie evidence' may be defined in general terms as evidence presumed to present true facts unless and until the evidence is rebutted by the employer. An employer may rebut evidence by introducing counter-evidence. The truth then becomes a question of fact to be resolved or determined by the court or jury and, as a general rule, the burden of proof is on the commission.

5.9 STATEMENT IN CIVIL ACTION

Under Section 213.034:

The employer may deny all or part of the evidence presented by the commission in a civil action suit. The employer must file an affidavit that:

1) Denies that all or part of the contribution, penalty, or interest is due; and
2) States the details relating to any part of the contribution, penalty, or interest claimed not due

5.10 INVESTIGATIVE AND SUBPOENA POWERS

Under Section 301.071:

a) An appeal tribunal, a member of the commission, or a representative authorized by the commission may:

1) administer oaths;

2) take depositions;

3) certify to official acts; and

4) issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records considered necessary as evidence in connection with a disputed claim or the administration of this subtitle.

COMMENT: Examiners performing tax work in the field are representatives of the commission and are duly authorized to administer oaths and affirmations. This section also gives the commission authority to conduct investigations, assemble information or require oral or documented testimony limited to the power necessary to properly administer this section. The commission shall pay the fee of a sheriff, deputy, constable or process server who serves a subpoena under this section. The fee shall be paid from the commission's administrative funds and the comptroller shall issue a warrant for the funds as directed by the commission.

5.11 PENALTY FOR DISCLOSURE OF INFORMATION

Employment information obtained from the employer is not public information. As stated in Section 301.081 of the TUCA:

c. Employment information may not be published and is not open to public inspection, other than to a public employee in the performance of his duties.

d. An employee or member of the commission who violates this provision is subject to a fine of not less than $20 nor more than $200, confinement in jail for not more than 90 days or both fine and confinement.

COMMENT: Each employing unit is required to keep employment records prescribed by the commission. The records are required to be open to inspection and are subject to being copied. Each commission member and employee is responsible for insuring that the information is kept confidential. The law provides for fines and imprisonment of a member or employee who violates any provision of the section. Each Accounts Examiner will insure that no information obtained is published or revealed other than to public employees in the performance of their duties.

5.12 REPORTS - PREPARED BY EMPLOYING UNITS

This section discusses the aspects of the law that apply to the reports which are required to be filed by employing units.

5.12.1 Status Reports

The C-1, C-1FR, C-1P and C-1SA are prepared by either employers or Accounts Examiners to determine the status of the employing unit. The C-1AM is used by both employers and examiners, to update tax files, acknowledge acquisitions, or to reopen or close accounts.

COMMENTS:

1. The commission usually determines whether or not an employing unit is an employer as defined in the Act on the basis of information shown on a Status Report. The determination can be based on other information, such as affidavits, testimony, letters, etc.
2. Employing units may file an amended report as a means of notifying the commission of a change in information previously submitted.
3. Employing units are legally required to file an amended status report if requested to do so by the commission.

5.12.1.1 Filed By Whom

Under Rule Number 815.107:

(a) All reports and forms required by the Agency or the Act shall be filed with the Agency in one of the following formats unless a different format is approved in writing by the Agency, a hardship exemption is requested from and granted by the Agency, or as specified in this chapter.

(1) General Format of Reports and Forms and Methods of Submission. The reports and forms referenced in this section shall be filed using:

(A) forms printed by the Agency;

(B) electronic media in a format prescribed by the Agency; or

(C) any other manner approved and prescribed by the Agency in writing.

(2) Content. The reports and forms shall contain all facts and information necessary to a determination of the amounts due by the employing unit. The Agency may require the furnishing of additional information as it deems necessary for the proper administration of the Act.

(3) Electronic Media Reporting.

(A) Required Electronic Media. All employers and their agents shall file employers' reports, including both summary and detail wage information, as described in §207.004 of the Act, on electronic media using a format prescribed by the Agency.

(B) An electronic media transmission of an employer's quarterly report may contain information from more than one employer.

(C) An employer's quarterly report filed in an approved medium shall contain both a wage credit report and a summary report.

5.12.2 Employer's Quarterly Report

Forms C-3 and C-4 are prepared to report total, taxable and individual wages paid by the employer in each calendar quarter.

5.12.2.1 Filed When and By Whom

Under Rule Number 815.107:

(b) General Deadlines for Filing Reports and Forms.

(1) Unless otherwise provided in this subchapter, any report or form shall be completed and filed with the Agency within 10 days after the requested report or form is:

(A) mailed to the individual or employing unit at the address on record with the Agency; or

(B) personally delivered to the individual or employing unit by an Agency representative.

(2) Failure to receive notice regarding the reports shall not relieve the individual or employing unit of the responsibility of filing the reports by the date the reports are due.

(3) Good Cause for Extending Deadlines. When good cause is shown, the Agency may extend the due date for filing of a report required under this section; however, the extension shall be effective only if authorized in writing by an Agency representative.

(c) Status Reports.

(1) Status Reports in General. Each employing unit shall file with the Agency a status report within 10 days from the date upon which the employing unit becomes subject to the Act.

(2) Status Reports for New Acquisitions. Any employing unit in the state of Texas that acquires another business or substantially all of the assets of another business shall file a new status report with the Agency within 10 days of the date on which the employing unit made the acquisition.

(3) Status Reports for Additional Information. Each employing unit shall file additional status reports at any time upon the request of the Agency.

(4) Evidence in Support of Status Reports. Employing units filing status reports with the Agency shall:

(A) file with the Agency all facts necessary to a determination of the taxable status of the employing unit; and

(B) if requested, file with the Agency evidence to establish the correctness of information contained in the employing unit's status reports.

(d) Quarterly Reports from Taxed Employers. Each taxed employer, other than a domestic employer who has elected to report and pay annually under §201.027(b) of the Act, shall file with the Agency, within the month during which contributions for any period become due, and not later than the date on which contributions are required to be paid to the Agency, an employer's quarterly report showing for the preceding calendar quarter:

(1) the total amount of remuneration paid for employment (or showing that no remuneration was paid during the quarter);

(2) the total amount of wages paid for employment (as defined in the Act, §201.081 and §201.082);

(3) the amount of wages for benefit wage credits (as defined in the Act, §207.004) paid to each individual employee;

(4) the name and Social Security number of each individual to whom the wages were paid; and

(5) any other information requested on the employer's quarterly report, including all facts and information necessary to make a determination of the amount of contributions due.

(e) Quarterly Reports from Reimbursing Employers and Group Representatives of a Group Account. Each reimbursing employer and the group representative of a group account shall file an employer's quarterly report, by the end of the month following each calendar quarter, that furnishes the following information for the preceding calendar quarter, information specified in paragraphs (1)–(4) of subsection (d) of this section, and any other information necessary to make a determination of the amount of reimbursements due.

(f) Benefits Financed by the Federal Government. Each employer that has employees whose benefits are to be financed by the federal government shall file a separate quarterly report furnishing the names of the employees, their Social Security numbers, and the wages paid to each. The report shall be filed by the end of the month following each calendar quarter.

(g) Annual Reports from Domestic Employers.

(1) Making the Election. An election to report wages paid and pay contributions on an annual basis must be made in a format or on a form authorized by the Agency by the deadline specified in §201.027 of the Act.

(2) Each domestic employer that qualifies under the Act and who has made an election as referenced in paragraph (1) of this subsection, shall file with the Agency, by January 31 of the year after the wages were paid, in a format consistent with subsection (a) of this section, a domestic employer's annual report showing the following for the preceding calendar year in which wages were paid.

(A) The information specified in paragraphs (1)–(4) of subsection (d) of this section subtotaled for each quarter; and

(B) Other information called for on the domestic employer's annual report including all facts and information necessary to make a determination of the amount of contributions due.

(3) Penalties and interest incurred under this section shall be the same as applicable to other employer reporting requirements as provided in Chapter 213 of the Act and this subchapter.

COMMENTS:

1. Reimbursing employers and group accounts have the same report due dates as regularly taxed accounts (by the last day in April, July, October and January). Contributions (taxes) for reimbursing employers also become due on those dates, however reimbursing employers have an additional month in which to pay those contributions (by the last day in February, May, August, and November). DO NOT attempt any collection of monetary delinquencies from State Agencies. These accounts appear on the Non-ACAP list, but should NOT be worked. Any inquiries from State Agencies about amount due should be directed to the Revenue and Trust Management Department at (512) 305-8883.
2. An employer's quarterly report consists of a report of total wages, net taxable wages, and a wages list showing the amount of wages paid to each employee. A report must be submitted for each quarter during which an employer remains active on the commission's records. The report for a newly subject employer is due on or before the last day of the month following the month in which he became a subject employer. For an established account, the reports are due quarterly on the first day of the month immediately following the calendar quarter. The commission accepts the postmark date as the date submitted.

EXAMPLE: An employing unit becomes subject August 16, 2000. Reports for the first and second quarters become due immediately. The reports may be submitted any day from August 16, 2000 through September 30, 2000, without incurring a late report penalty. The report for the third quarter of 2000 becomes due October 1, 2000. It may be submitted any day from October 1, 2000 through October 31, 2000, without incurring a late report penalty. The report for the fourth quarter of 2000 becomes due January 1, 2001, and may be submitted on any date from January 1, 2001 through January 31, 2001, without incurring a late report penalty.

5.12.3 Adjustment to Total or Taxable Wages

Form C-5 is filed when an adjustment is required to correct total or taxable wages already posted to an account. Separate reports must be made for each quarterly report to be adjusted. If names, social security numbers, or wages of individual employees need correction, Form C-7 (Wage List Adjustment Schedule) is required.

5.12.3.1 Filed When and By Whom

Under Section 213.072

b) An application for adjustment must be filed before the third anniversary of the date on which the contribution or penalty was allegedly due. The employer, the employer's representative, or a commission representative may file the adjustment.

5.12.4 Wage List Adjustment Schedule

Form C-7 is filed when an adjustment is required to correct wages for workers previously reported in the wages list section of Form C-3 or Form C-4. Separate reports must be made for each quarterly wage list needing adjustment.

5.12.5 Application For Refund

When the commission determines an employer has paid more into the Unemployment Trust Fund than is required by law, the employer may secure a refund of taxes, interest, or penalties which are not owed by filing a Form C-69QCR.

5.12.5.1 Filed When and By Whom

Under Section 213.072:

b) An application for refund must be filed before the third anniversary of the date on which the contribution or penalty was allegedly due. The employer or the employer's representative must file the request.

EXAMPLE: An application for refund of tax paid for the second quarter of 2000 must be filed on or before three years from July 31, 2000, i.e., July 31, 2000.

COMMENT: An extension of the due date, as authorized under Rule 815.109 automatically extends the time for filing a valid application for refund.

5.12.5.2 Appeal of Commission Determination

Under Section 213.073:

a) If a timely application for adjustment or refund is denied by the commission, an employer may file suit in Travis County for review.

b) An action under this section must be filed before the first anniversary of the date on which notice of the denial was mailed to the employing unit.

c) Trial of an action filed under this section is by trial de novo.

d) The employing unit may not bring an action for the refund under any other law.

COMMENT: Section 213.074 does not allow interest to be paid on an adjustment or refund made or a recovery made in a court action.

5.12.5.3 Filed By Whom

Rule No. 815.112

A claim for refund or adjustment shall be made on a form supplied by the Agency or by magnetic or electronic media using a format prescribed by the Agency. All grounds and details and all facts alleged in support of the claim shall be clearly set forth. The claim shall be filed by the employing unit which paid the contributions, interest, or penalty or by a duly authorized representative thereof. In addition, the Agency may require the claim to be filed under oath.

The provisions of 815.112 were adopted to be effective November 6, 2000, replacing section 815.12.

EXAMPLE: An individual, believing himself to be an employing unit and subject to the Act, submits reports and pays taxes to the Agency. An account is established on the basis of the submitted status report. It is later determined that the individual is not an employing unit as defined in Section 201. The individual will be permitted to file an application for refund.

5.12.5.3.1 Commission Initiative

The commission may make an adjustment or refund on its own initiative under Section 213.075 within three years from the end of the reporting quarter.

EXAMPLE: An employing unit which is subsequently determined to be not liable under the TUCA may have its payments returned through the initiative of the commission.

5.12.6 Application For Termination of Coverage

Form C-71 is filed when terminating an employer's coverage and voids all previous compensation experience.

5.12.6.1 Filed When and By Whom

Under Section 206.004:

a) An employing unit may cease to be an employer only on January 1 of a year and only if the commission finds that:

   1) the employing unit was not an employer during the preceding year; or

   2) the employing unit has not had any individuals in employment during the preceding three calendar years.

b) The commission may not make a finding under (1) above unless the employing unit files an application for termination of coverage with the commission on or after January 1 but before April 1 of the year for which termination is requested. The commission may make a finding under (2) above without an application having been filed.

NOTE: See Field Tax Procedures Manual, Chapter 1 – Address Change / Closing Information (SNC) Screen for additional information on termination of accounts having domestic, regular, farm & ranch or 501C3 employment.

5.12.7 Election by Cotton Ginners

Form C-22G is filed to elect the lesser tax rate of 5.4 percent or the effective rate.

5.12.7.1 Filed When and By Whom

Under Section 204.007:

a) An employer identified by the commission as classified in the Standard Industrial Classification Manual as SIC Code Number 0724, cotton ginning, may elect to pay a contribution at a total fixed maximum rate of five and four-tenths percent instead of paying a contribution computed on:

   1) the general tax rate applicable to that employer, with the deficit tax rate and replenishment tax rate; or

   2) any other tax rate applicable to that employer under this subtitle.

b) An employer must notify the commission of an election under this section in writing not later than December 31 preceding the year for which the election is made.

COMMENT: The election must be renewed annually, on or before December 31.

NOTE: As of 1999 the Texas Workforce Commission adopted the North American Industry Classification System (NAICS) Codes. NAICS used a six-digit coding system to identify particular industries and their placement in this hierarchical structure of the classification system. The NAICS code for cotton ginners is 115111.

5.13 REIMBURSING EMPLOYERS

Contributions are paid to the commission in two ways: taxes and reimbursements.

States, political subdivisions, instrumentalities of states or political subdivisions and organizations exempt under section 501(c)(3) of the Internal Revenue Code are the only entities eligible to pay reimbursements in lieu of paying taxes.

The reimbursing option is permitted under Chapter 205 of the Act. When an employer elects to pay reimbursement, the employer is required to repay the commission for any benefits paid to former employees. If no benefits are paid, the employer makes no reimbursements to the unemployment fund. However, because it is not possible to predict what will occur in the future, there is no way for a reimbursing employer to know their potential liability.

Form C-6A must be filed to elect reimbursing status. Specifics regarding the election to become a reimbursing employer are outlined in Section 205.001 and Section 205.002.

5.13.1 Filed When and By Whom

The Act has specific guidelines for electing reimbursing status. Employers eligible for this election are listed above.

According to the Act, election to pay reimbursements must be submitted:

1) Within 45 days of the Employer's Liability Notice (Form C-198); or
2) Not later than December 1 prior to the year in which a change to reimbursing status is desired.

EXAMPLE: A taxed employer receiving a liability letter dated September 5, 2000 would have until October 20, 2000 to notify the commission of their desire to become a reimbursing employer.

EXAMPLE: An employer who wishes to change from taxed to reimbursing effective January 1, 2000 would need to notify the commission in writing on or before December 1, 1999.

A reimbursing employer may request to withdraw its election for reimbursing status and become a taxed employer by filing Form C-6F, Application for Withdrawal of Election to Pay Reimbursements. This will also be effective on the 1st day of the following year.

5.13.2 Group Accounts

Section 205.021(a) of the Act allows two or more reimbursing employers to form a 'Group Account'. The members of the Group Account share the cost of reimbursing the commission for unemployment benefits paid to former employees. Unemployment costs are borne by the entire group rather than an individual employer. Taxed employers are not eligible to form a Group Account.

The formation of a Group Account is treated as an acquisition. The transaction is recorded on commission records as a total acquisition from the predecessors (individual member accounts) to the successor (Group Account). Because all entities comprising a Group Account are reimbursing employers, there is no transfer of experience.

The following forms are filed to establish, add, withdraw, or terminate a group account:

a. Joint Application for Establishment of a Group Account (Form C-6C);
b. Joint Application for Addition of Members to a Group Account (Form C-6D);
c. Joint Application for Withdrawal of Members from a Group Account (FormC-6E);
d. Joint Application for Termination of a Group Account (Form C-6G)

5.13.2.1 Filed When and By Whom

Two or more reimbursing employers requesting to form a group account file Form C-6C. The effective date of the Group Account is the beginning of the calendar quarter in which the application is received. Once established, a Group Account must remain in effect at least two years.

Additional members may be added to a group account. The transaction is recorded on commission records as a total acquisition from the predecessor (individual member account) to the successor (Group Account). Because all entities comprising a Group Account are reimbursing employers, there is no transfer of experience. The addition of the new members is effective the first day of the quarter in which the application, Form C-6D, Joint Application For Addition of Members to a Group Account, is received.

Once a Group Account has been established, some of its members may want to leave the Group Account. The effective date for deletion of members is the end of the quarter in which the application, Form C-6E, Joint Application For Withdrawal of Members From a Group Account, is approved by the commission.

The members of a Group Account may decide to terminate the account. The deadline to apply for termination is December 1 to be effective at the beginning of the next calendar year. Form C-6G, Joint Application for Termination of a Group Account, must be filed.

5.14 TAX DEPARTMENT FORMS IN CURRENT USAGE

This section lists all forms currently in use by the Tax Department.

5.14.1 Forms

Number	Form Title
Form C-1	C-1 Status Report
Form C-1AM	Amended Status Report
Form C-1C	Account Identification Tag (Used by S/O Status ONLY)
Form C-1P	Political Subdivision Status Report

Form C-1FR	Farm and Ranch Status Report
Form C-1FRA	Instructions for C-1FR
Form C-1(SA)	State Agency Reporting Unit Status Report
Form C-3	Employer's Quarterly Report
Form C-3I	Instructions for Form C-3
Form C-3B	Affidavit Attached to Form C-3 (Estimated Report)
Form C-3C	Affidavit Attached to Form C-3 (Wages from Records)
Form C-3GOV	Governmental Unit Employer's Quarterly Report
Form C-3GOVI	Instructions
Form C-3PS	Political Subdivision Employer's Quarterly Report
Form C-3PSI	Instructions
Form C-3RE	Reimbursing Employer's Quarterly Report
Form C-3REI	Instructions
Form C-4	Employer's Quarterly Report Continuation Sheet (Wages List)
Form C-5	Adjustment Report
Form C-5A	Affidavit Attached to Form C-5
Form C-6	Application for Voluntary Election of Coverage
Form C-6A	Election to Pay Reimbursement
Form C-6C	Joint Application for Establishment of a Group Account
Form C-6D	Joint Application for Addition of Members to a Group Account
Form C-6E	Joint Application for Withdrawal of Members From a Group Account
Form C-6F	Application for Withdrawal of Election to Pay Reimbursements

Form C-6G	Joint Application for Termination of Group Account
Form C-7	Wages List Adjustment Schedule
Form C-8	Employment Status – A Comparative Approach
Form C-9	Affidavit (Attached to Form C-1)
Form C-10	Status Action (S/O Status Section ONLY)
Form C-10B	Request for New Cross Index Name
Form C-12	Independent Contractor Questionnaire
Form C-13	Notice that Employment or Business Has Been Discontinued
Form C-15B	Abstract of Judgment
Form C-15C	Second Page of Judgment
Form C-17	Forms Request
Form C-17A	Document Request
Form C-18	Notice of Assessment
Form C-20	Election by a Domestic Employer to Report Quarterly Wages and Pay Taxes on an Annual Basis
Form C-20F	Application by a Domestic Employer for Withdrawal of Election to report Quarterly Wages and Pay Taxes on an Annual Basis
Form C-22	Tax Rate Notice
Form C-22G	Election by Cotton Ginners to Pay Tax at Fixed Rate
Form C-23	Rule 13 Coverage Hearing Issues Worksheet
Form C-24	Voluntary Contribution Election
Form C-25	Statement of Contributions, Penalties and/or Interest Due
Form C-30	Auditor's Report of Service Charges
Form C-33	Abstract of Assessment

Form C-33A	Abstract of Assessment
Form C-34	Magnetic Media Reporting Form
Form C-34A	Continuation Sheet
Form C-34R	Magnetic Media Reporting Form - Reimbursing Employer
Form C-34RA	Continuation Sheet
Form C-38	TUCA Section 204 Sub. E Questionnaire (Acquisition of Experience Rate)
Form C-39	Request for Collection Action
Form C-41	Employer's Property Inventory
Form C-42	Written Authorization (Power of Attorney)
Form C-43	Revocation of Written Authorization
Form C-45	Release of Lien
Form C-45A	Cancellation of Lien
Form C-45B	Release of Lien (Harris County)
Form C-47	Memorandum Notice to Attorney General
Form C-50	Authorization for Redetermination
Form C-51	Field Audit Report
Form C-51B	Field Audit Report (C-51 continuation)
Form C-51C	C-51 Audit Review Form
Form C-51D	Schedule 1
Form C-51-E	Schedule 1 Continuation Sheet
Form C-51F	Schedule 2
Form C-51G	Schedule 3

Form C-53	Employer Master Record
Form C-53A	Employer Master Record Inquiry
Form C-55	Cashier's Field Receipt
Form C-58R	Reimbursable Unemployment Benefits Statement
Form C-58R(NR)	Instructions to Nonprofit Reimbursing Employers
Form C-58R(SA)	Instructions to State Agencies
Form C-59	Specific Industry Questionnaire - Cosmetology
Form C-66A	Quarterly List of Net Chargebacks and/or Chargeback Reversals
Form C-69M	Tax Statement (Daily)
Form C-69QCR	Quarterly Credit Statement
Form C-71	Application for Termination of Coverage
Form C-73R	Temporary Inactive Notice
Form C-74	Excerpts from TUCA – Chapter 204 Subsection E – Acquisition of Experience Rate Employers
Form C-76	Summary of TUCA - Section201,Sub.C Definition of Employer
Form C-77	Release of Judgment
Form C-78	Specific Industry Questionnaires - Truck Drivers
Form C-80	Wages List
Form C-81	Subpoena
Form C-81A	Punishment Notice to Accompany Subpoena
Form C-81B	Note to Sheriff Re Delivering Subpoena
Form C-82	Joint Application for Partial Transfer of Compensation Experience

Form C-83	Wage Distribution Section of Joint Application for Partial Transfer of Compensation Experience
Form C-84	Region VI Interstate Collection Request
Form C-85	Delivery/Courier Service Questionnaire
Form C-86	Summary of Quarterly Wage
Form C-87	Post Audit Employer Survey (Letter with detachable response card)
Form C-92	T.W.C. Services Handout
Form C-94	Writ of Execution
Form C-95	Product Demonstrator Questionnaire
Form C-99	Contact Notice (Doorknob Hanger)
Form C-102	Pre-Audit Questionnaire
Form C-104	Installment Payment Proposal
Form C-105	Real Estate Broker/Salesman/Instructor Questionnaire
Form C-110	Batch Proof Listing
Form C-198	Employer's Liability Notice
Form C-198LR	Employer's Liability Notice
Form C-198R1	Report Due Notice - Accompanies Form C-198LR
Form C-198SR	Employer's Liability Notice
Form PI-5	Texas Unemployment Tax (Employer Responsibilities)
Form PI-5S	Spanish version of PI-5
Form PI-5A	Texas Unemployment Tax (Farm or Ranch Employers)
Form PI-5AS	Spanish version of PI-5A
Form Y-10	Poster (Attention Employees) (English)

Form Y-10S	Poster (Attention Employees) (Spanish)
Form Y-10PS	Poster (Political Subdivisions)
Form Y-10PSS	Spanish version of Y-10PS
Form FL-204	Tax Transmittal
Form FL-22	Payrolling
Form FL-24	Not Liable - 20 weeks
Form FL-92	Post Audit Letter

Index

Index

Index

Index

Index

Index

Index