

EMPLOYER SANCTIONS FOR FAILING TO RESPOND TO REQUESTS FOR INFORMATION

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UWC 35th Annual National UI Issues Conference

Kansas City, Missouri

22 – 24 June 2016



SESSION OVERVIEW

- **LEGISLATIVE HISTORY**
- **CURRENT STATUS OF SEC. 252 / UI INTEGRITY**
- **IMPLEMENTATION CHALLENGES?**
- **TEXAS WORKFORCE COMMISSION PROCESS STUDY**
- **WHAT DOES IT MEAN TO EMPLOYERS? AUTO PERSPECTIVE**
- **BEST PRACTICES**



LEGISLATIVE HISTORY

HOW WE GOT HERE



HISTORY OF SECTION 252

- Response by USDOL to address Integrity Issues
 - Developed language to impose penalties upon employers for non-response
- To promote South Korea and Columbia as “Favored Nation Status” to certain labor organizations, Obama Administration pushed for extension and expansion of Trade Adjustment Assistance Extension Act(TAAEA-2011)
- USDOL Language previously largely ignored until identified as method to “Pay for Provision” (PayGo) by Congress

HISTORY OF SECTION 252

- Without consultation with Employers nor State agencies, Obama Administration and Congressional Leadership put integrity language/provisions into Trade Adjustment Assistance Extension Act.(Section 252)

Timely and Adequate Response

- Section 252 created new requirements that state UI laws must incorporate provisions that employer accounts may be charged for benefit erroneously paid if;
 - The overpayment was caused by the employer's or employer agent's failure to provide timely and/or adequate information in response to a "request related to benefits" and,
 - The employer or employer's agent had a "Pattern of Failing to Respond"
 - This new requirement does not preclude states from prohibiting relief from charges or imposing other sanctions on employers and/or agents for only one failure to respond.
 - Some states have used this provision as basis for imposing penalties beyond Federal minimum requirements.

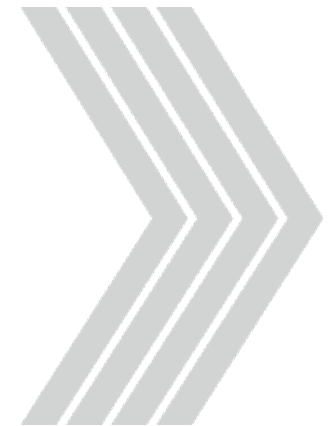


CURRENT STATUS SEC. 252 UI INTEGRITY

James Weant,
Manager, Government Relations



OVERPAYMENT STATISTICS



Fiscal Year Overpayment Rate Comparison 2014 – 2015

2014

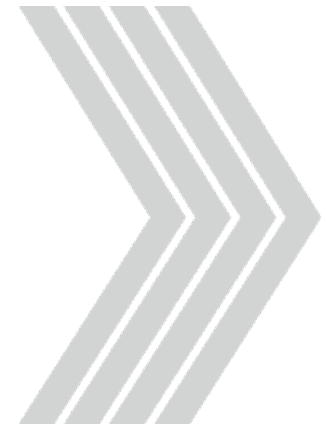
• 13.35%

2015

• 11.13%

<http://www.dol.gov/general/maps/data>

WHERE ARE WE NOW?



Georgia, Ohio, Michigan, South Carolina



3 instances in the prior 12 months

"Adequate" defined by statute



4 or more instances within a calendar year

"Adequate" defined by statute



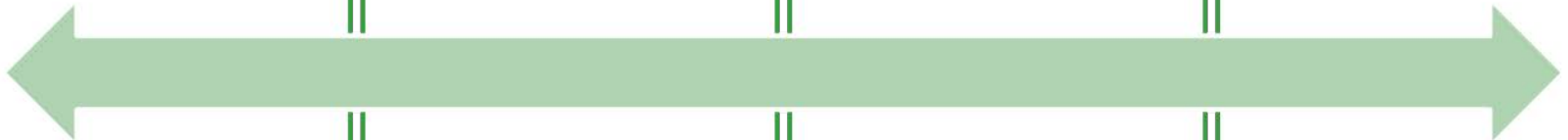
Greater of 4 instances or 2% of total claims within prior calendar year

"Adequate" not defined



3 or more instances within a calendar year

"Adequate" defined by statute



Idaho, New York, Oregon, Pennsylvania



2 or more instances
"Adequate" defined by statute



"Pattern of failure" not defined
"Adequate" not defined



2 or 2% of claims in previous 12 months
"Adequate" not defined



"Pattern of failure" not defined
"Adequate" defined by statute



Arkansas, Texas, Virginia, North Carolina



51% of claims in preceding calendar quarter or 3 if total is ≥ 5

"Adequate" defined by statute



3 or more instances

No timeframe in the statute – once an occurrence is issued, it does not expire

"Adequate" defined by statute



4 or more instances within a rolling 48-month period

\$75 penalty issued after 3rd offense

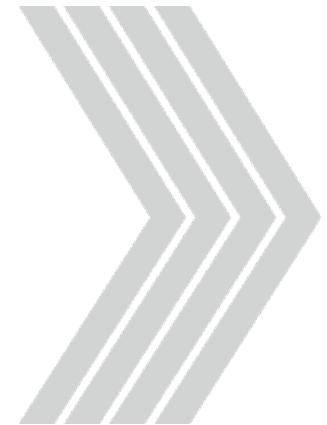
"Adequate" defined by statute



2% or more of total claims in the prior calendar year

"Adequate" defined by statute

WHERE ARE WE HEADED?



What Does the Future Hold?

- › SIDES (State Information Data Exchange System)
 - 48 states / territories are live on SIDES*
 - Addresses “timely” but does not influence “adequacy”

- › All states passed legislation by October 2013, but no indication of other states developing administrative procedures / policies
 - Very labor intensive for already cash- and staff-strapped UI agencies

- › Currently, no additional directive from USDOL to the state UI agencies beyond:
 - Original UIPL No. 02-12 dated December 20, 2011
 - UIPL No. 02-12 Change 1 dated August 7, 2012
 - UIPL No. 02-12 Change 2 dated October 15, 2014

**WHAT CHALLENGES DID YOU FACE
WHEN YOU IMPLEMENTED YOUR
ADMINISTRATIVE PROCEDURES**



Texas Process: Timely/Adequate Employer Response

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Chuck Ross

Deputy Director, Regulatory Integrity Division

Texas Workforce Commission

Texas Process: Timely/Adequate Employer Response

Overview

- Statutory Provisions – Texas Unemployment Compensation Act
- Commission Administrative Rules – What is an Adequate Response?
- Overview of Texas' Adequate Response Process
- Lower Authority Appeals Process
- Higher Authority Appeals Process
- Resources



Texas Process: Timely/Adequate Employer Response

Statutory Provisions – Texas Unemployment Compensation Act

- In response to the Trade Adjustment Assistance Extension Act of 2011, the 83rd Texas Legislature amended State law, conforming to the requirements of Section 252.
- Provisions amended included response to initial claim notice; exceptions to reimbursements; and benefit charging.



Statutory Provisions – Response to Claim Notice

TUCA Sec. 208.004. Notification of Adverse Facts Affecting Claim; Waiver

- (a) A person to whom notice is mailed under Section 208.002 shall notify the commission promptly of any facts known to the person that may:
 - (1) adversely affect the claimant's right to benefits; or
 - (2) affect a charge to the person's account.
- (a-1) A notification provided by a person under Subsection (a), including an initial response to a notice mailed to the person under Section 208.002, **must include sufficient factual information to allow the commission to make a determination regarding the claimant's entitlement to benefits under this subtitle.**
- (b) A person who does not mail or otherwise deliver that notification to the commission within 14 days after the date notice of a claim was mailed to the person by the commission waives all rights in connection with the claim, including rights the person may have under Subchapter B, Chapter 204, other than rights relating to a clerical or machine error as to the amount of the person's chargeback or maximum potential chargeback in connection with the claim for benefits.
- (c) Notwithstanding Subchapter B, Chapter 204, **benefits paid to a claimant that are not in accordance with the final determination or decision under this subtitle shall be charged to the account of a person if:**
 - (1) **the person, or the person's agent, without good cause, fails to provide adequate or timely notification under this section; and**
 - (2) **the commission determines that the person, or the person's agent, has failed to provide timely or adequate notification under this section on at least two prior occasions.**
- (d) For purposes of Subsection (c), **a notification is not adequate if the notification merely alleges that a claimant is not entitled to benefits without providing sufficient factual information, other than a general statement of the law, to support the allegation.**
- (e) For purposes of Subsection (c), **good cause is established only by showing that a person, or the person's agent, was prevented from complying with this section due to compelling circumstances that were beyond the person's control.**
- (f) The commission may adopt rules as necessary to implement this section.

Texas Process: Timely/Adequate Employer Response

Administrative Rules – Definition of Adequate Response

- As allowed for in statute, the Texas Workforce Commission adopted administrative rules speaking to the adequacy of an employer's response to a notice of initial claim.
- The definition of adequate response is a low bar.



Administrative Rule Provisions – Definition of Adequate Notification

TWC Rules §815.1. Definitions.

- (3) Adequate notification--A notification of adverse facts, **including any subsequent notification**, affecting a claim for benefits, as provided in the Act, Chapter 208.
- A. **Notification to the Commission is adequate as long as the employer or its agent gives a reason, supported by facts, directly related to the allegation raised regarding the claimant's right to benefits.**
- B. The employer or its agent may demonstrate good cause for failing to provide adequate notice. **Good cause is established solely by showing that the employer or its agent was prevented from providing adequate notification due to compelling circumstances beyond the control of the employer or its agent.**
- C. Examples of adequate notification of adverse facts include, but are not limited to, the following:
- i. **The claimant was discharged for misconduct connected with his work because he was fighting on the job in violation of written company policy.**
 - ii. **The claimant abandoned her job when she failed to contact her supervisor in violation of written company policy and previous warnings.**
- D. **A notification is not adequate if it provides only a general conclusion without substantiating facts.** A general statement that a worker has been discharged for misconduct connected with the work is inadequate. The allegation may be supported by a summary of the events, which may include facts documenting the specific reason for the worker's discharge, such as, but not limited to:
- i. policies or procedures;
 - ii. warnings;
 - iii. performance reviews;
 - iv. attendance records;
 - v. complaints; and
 - vi. witness statements.

Texas Process: Timely/Adequate Employer Response

Overview of Texas' Adequate Response Process

- Adequacy of an employer response is an issue for the appeals stage, not the initial adjudication by the claims examiner.
- Adequacy issues arise only when each of the following elements are met:
 - A separation on an initial claim for benefits is adjudicated;
 - The employer is the claimant's actual last employer AND is also a base period employer;
 - The employer is subject to charge or reimbursement;
 - The determination is adverse to the employer; and
 - The claimant actually receives benefits (an OP occurs).



Texas Process: Timely/Adequate Employer Response

Overview of Texas' Adequate Response Process

- The adequacy amendments to our response-to-claim statute have been interpreted to have no effect on established “late response” appeal procedures.
- Timeliness is a jurisdictional matter which is addressed prior to the job separation analysis portion of the hearing.
 - If the response is deemed untimely, the employer is not a party of interest and has no appeal rights to an adverse determination. No AR analysis is required.



Texas Process: Timely/Adequate Employer Response

Overview of Texas' Adequate Response Process

- The Texas Legislature adopted a “three strike” pattern.
- The first 2 inadequate responses (strikes), without good cause, carry no penalty.
- The third strike, and following inadequate responses, without good cause, will result in the employer being charged for benefits paid on the claim, even if the claimant is ultimately disqualified based on the job separation.
- Texas law does not provide for strike ‘weighting’ based on employer size, etc.
- Once a pattern is established, an employer is potentially chargeable on claims where inadequate response is found.



Texas Process: Timely/Adequate Employer Response

Lower Authority Appeals Process

- Adequacy issues arise at the lower level as previously noted: the claimant is awarded and receives benefits and the employer is liable for those benefits and appeals the adverse determination.
- The Hearing Notice Packet will include notice that AR *may* be an issue to be considered during the hearing. Many cases will not need an AR ruling; the notice language is *precautionary* in case the issue arises after the hearing.



Texas Process: Timely/Adequate Employer Response

Lower Authority Appeals Process

- The hearing will cover the following:
 - Is the AR issue correctly noticed?
 - Was the employer response timely? If no, this is a jurisdictional issue; the employer may not have appeal rights. If yes, the record is developed on the adequacy of the response.
 - Who submitted information on behalf of the employer? Was the employer represented by an agent? (If the employer is represented by an agent, it is bound by its agent's response.)
 - Were additional documents submitted with the response?



Texas Process: Timely/Adequate Employer Response

Lower Authority Appeals Process

- The hearing will cover the following:
 - Were facts about the job separation included in the response?
 - If not, what prevented the employer from including them? (goes to good cause)
 - How was this out of the employer's control? (goes to good cause)
 - Did the claims examiner request additional information from the employer regarding the job separation? Did the employer respond? If not, why not?
 - Agency records of previous inadequate or untimely responses



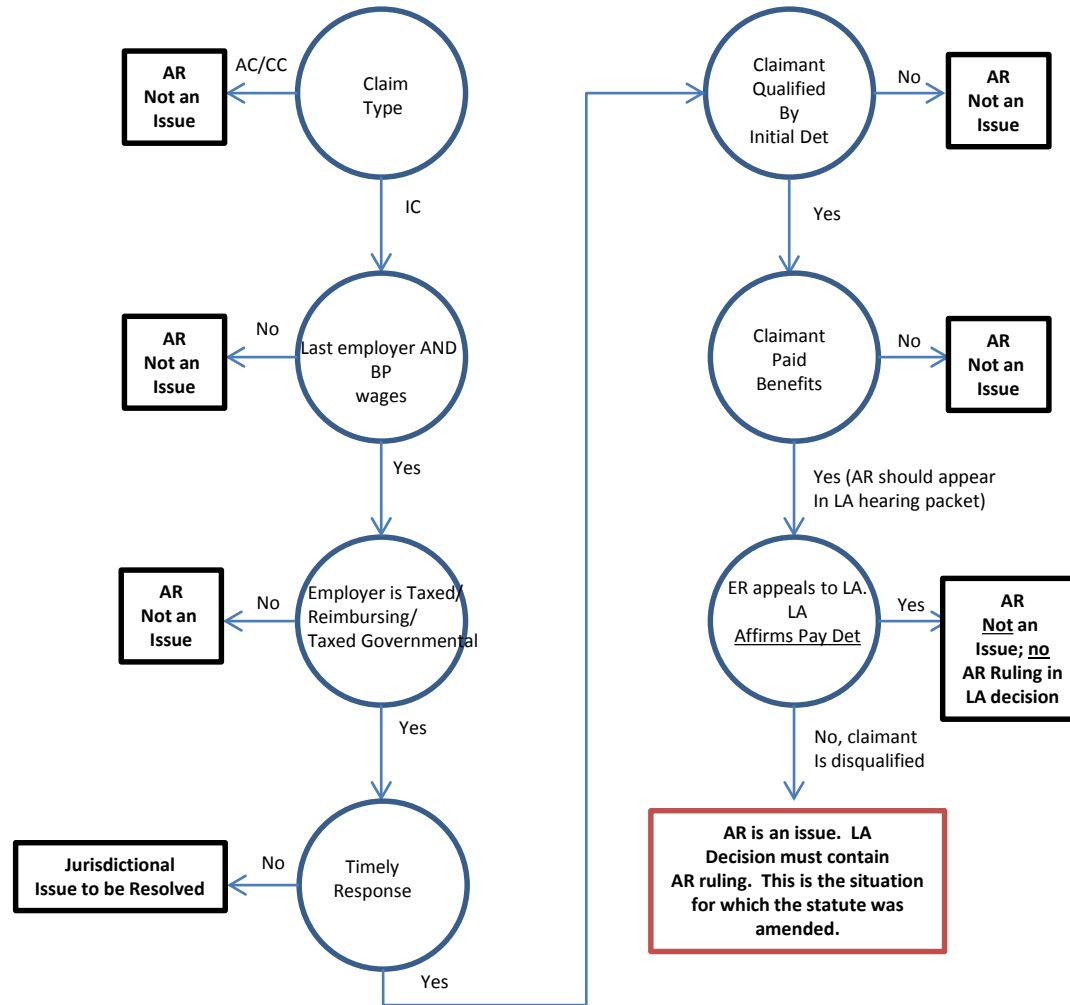
Texas Process: Timely/Adequate Employer Response

Lower Authority Appeals Process

- The hearing officer must look to see if a pattern has been established regarding failure to respond timely, adequately, or both. This will inform whether the employer must be charged if an inadequate response is determined and a pattern is established.
- Finally, the employer may show good cause for an inadequate response.
 - Good cause is established **solely** by a showing that the employer was prevented from providing an adequate response due to compelling circumstances beyond its control.
 - This is good cause regarding response adequacy; not for timeliness of protest.



Lower Authority Appeals Process Flow – Adequate Response



Texas Process: Timely/Adequate Employer Response

Higher Authority Appeals Process

- Adequate response issues may be raised to the higher authority from a lower authority decision or arise anew at this stage based on the circumstances of the case.
- Basic AR applicability continues to apply: claimant was awarded and received benefits and the employer is potentially chargeable for those benefits.



Texas Process: Timely/Adequate Employer Response

Higher Authority Appeals Process

Cases at the higher authority generally follow these patterns:

- Claimant qualified for benefits until disqualified by HA
 - AR arises as an issue at the HA because the disqualification has now resulted in an overpayment to the claimant. May remand to the LA for AR issue.
- Claimant disqualified by LA & HA affirms
 - AR is an issue for the HA because an HA ruling must be made on all LA rulings
- LA reverses initial disqualification; HA reverses the LA decision
 - AR is an issue since the final decision results in an overpayment.



Texas Process: Timely/Adequate Employer Response

Higher Authority Appeals Process

- Claimant qualified at all levels of appeal
 - AR is not an issue because no overpayment is ever created.
- LA disqualifies claimant; HA reverses and qualifies claimant
 - AR is not an issue since no overpayment has been created.
- Claimant disqualified at all levels
 - AR is not an issue since the claimant has never been paid and there is no adverse decision against the employer.
- Claimant disqualified until HA reverses and qualifies
 - AR is not an issue since the final decision does not result in an overpayment.
- LA reverses initial disqualification; HA affirms the LA decision
 - AR is not an issue since the final decision does not result in an overpayment.



Texas Process: Timely/Adequate Employer Response

Resources

- Texas Labor Code

[§205.013 – Reimbursing Employer](#)

[§208.004 – Notice of Initial Claim; Adequacy Requirement; Pattern](#)

[§212.005 – Chargeback Reversal; Exception](#)

- TWC Administrative Rules

[40 TAC §815.1\(3\) – Definitions; Adequate Notification](#)

- TWC Employer Commissioner Publication: [Epecially for Texas Employers](#)
 - Unemployment Insurance Law – Dealing with Claim Notices (p. 235 *et seq*)



WHAT DOES THIS MEAN TO EMPLOYERS?

AUTO PERSPECTIVE

RICH SIEGEL , PRESIDENT, AUTO



Barnett Associates, Inc	Equifax Workforce Solutions	Renaissance UI Consultants, Inc.
Careworks CCI of Ohio	First Nonprofit Companies, Inc.	Sedgwick
Corporate Cost Control	NSN Employer Services	T &W Employer Services, Inc.
Employer Advocates LLC	PAYCHEX, Inc.	The USC Companies
Employers Edge LLC	Peoplesystems/NEC Inc.	UC Advantage, Inc.
Employers Unity	Employment Tax Specialists, Inc.	U.C. Consultants
Employment Tax Specialists, Inc.	Equifax Workforce Solutions	Unemployment Tax Management Corp.
	Personnel Planners, Inc.	

BEST PRACTICES

Everyone Owns Integrity!

- **Employers**

- Be proactive!
 - Respond to ALL requests with timely and adequate information
- Don't wait for your state to begin enforcement
 - The regulations are on the books in all states and enforcement can begin at any time without warning

- **State UI Agencies**

- Clearly define “adequate”
- If a “pattern” is included in regulation, clearly define the time period
 - Calendar year, rolling 12 months from occurrence, previous 12 months....
- Communicate what forms / activities are considered a “request”
- Consult with other state UI agencies, TPAs, and employer organizations

- **USDOL**

- Provide guidance to state UI agencies beyond the original UIPL 02-12 and two addendums

Thank You!

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