Amendments to Chapter 815 Unemployment Insurance Rules
Policy Concept

Background

On March 18, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA), which, in part, provides states with $1 Billion in emergency Unemployment Compensation (UC) administrative grant funding, including $88.3 million allocated to and received by the state of Texas. The purpose of these grants is to assist states with the unprecedented unemployment claim volumes associated with COVID-19.

Subsequently on March 27, 2020 Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law (P.L.) 116 – 136. TITLE II--Assistance for American Workers, Families, and Businesses, Subtitle A--Unemployment Insurance Provisions, of the CARES Act provides for new, limited duration, entitlement programs including, Federal Pandemic Unemployment Compensation (FPUC), Pandemic Emergency Unemployment Compensation (PEUC), Federally Reimbursed Waiting Week (FRWW), and Pandemic Unemployment Assistance (PUA).

In response, the Commission undertook emergency rulemaking to address the requirements of both EUISSA and the CARES Act. On April 14, 2020, the Commission adopted emergency modifications to TWC Unemployment Insurance (UI) rule §815.12 and §815.29 to conform with the CARES Act. Section 815.12 was modified to reflect the required waiver and overpayment provisions. FPUC, PEUC, and the FRWW require that a claimant, who receives benefits to which the claimant is not entitled, repay those benefits unless the payment was made to the claimant without fault and such repayment would be contrary to equity and good conscience. Section 815.29 was amended to address the coordination between existing benefit programs and those provided for in the CARES Act.

On April 28, 2020, the Commission adopted emergency rules relating to the EUISSA emergency funding. EUISSA consists of two grants, Allotment I & II. Texas has obtained both grants and is therefore additionally entitled to have its Extended Benefits (EB) program fully federally funded through the benefit week ending December 26, 2020.

One of the requirements of Allotment I under EUISAA §4102(a) is that "the State requires employers to provide notification of the availability of unemployment compensation to employees at the time of separation from employment." The US Department of Labor (USDOL) stated that this notice must be individually made to the separated employee. Therefore, the Commission modified §815.1(14) to clarify that “places accessible” under Texas Labor Code §208.001(b) include a general notice in the workplace and an individual notice upon separation.

With EB being fully federally funded, the Commission also utilized its authority under Texas Labor Code §209.025 to implement the optional Total Unemployment Rate (TUR) trigger by reinstating the majority of Chapter 815, Subchapter F, Extended Benefits. The rules were modified from their previous iteration to be generally applicable when EB is fully funded rather than tied to a specific funding source.

The emergency rules were found to be conforming by USDOL. Since the adoption of these rules, USDOL has issued a substantial amount of implementing guidance to the states in the form of Unemployment Insurance Program Letters (UIPLs).

Issue 1: Emergency Rules have a Deadline
Texas Government Code §2001.034(c) provides "A rule adopted under this section may be effective for not longer than 120 days and may be renewed once for not longer than 60 days."

The emergency rules pertaining to the CARES Act became effective April 14, 2020, 120 days from which is August 12, 2020; an additional 60 days would be October 11, 2020.

The emergency rules pertaining to EUISSA became effective April 28, 2020, 120 days from which is August 26, 2020; an additional 60 days would be October 25, 2020.

1 Texas Administrative Code §91.37(j) provides that an extension of emergency rules must be filed within the last 20 days of those rules' effectiveness period. 1 Texas Administrative Code §91.38 allows for an emergency rule to be withdrawn immediately or for a time specified at a later date.

The emergency rules adopted in response to the CARES Act and EUISSA continue to be necessary. Without Commission action, these rules will expire before permanent rulemaking can be achieved.

Recommendation
Staff recommends the Commission vote to renew both sets of emergency rules for 60 days, and direct staff to file appropriate notices of these actions. Staff also recommends the Commission vote to withdraw both sets of emergency rules at the time the permanent rules take effect, and direct staff to take appropriate action to effectuate this vote. These actions will allow for the completion of the permanent replacement rules and for staff to put those permanent rules into effect immediately rather than waiting for the emergency rules to expire.

If the Commission were to agree to staff's recommendation, staff would further recommend this vote occur separately from the possible approval to move forward with proposed rulemaking as it pertains to action outside of the drafting of those proposed rules.

Issue 2: The EUISSA and Related EB Provisions Will Expire
In order to take advantage of the substantial Allotment I & II grants under EUISSA, as well as the 100% federal funding of EB, the Commission voted to approve the emergency adoption of §815.1(14). This section defined "places accessible" under Texas Labor Code §208.001(b) to include general notice in the workplace and an individual notice upon separation. In order to retain these grants, and the full EB funding, USDOL requires §815.1(14) become a permanent rule.

Additionally, on an emergency basis, the Commission adopted Chapter 815 Subchapter F pertaining to EB. The emergency Subchapter F replaced the previously repealed Subchapter F which was specifically tied to funding provisions under P.L. 111-5, the American Recovery and Reinvestment Act of 2009.[1] The emergency Subchapter F was designed to maximize EB any time it is fully federally funded as allowed under Texas Labor Code §209.025.[2] This includes during periods of high unemployment which provide for up to an additional seven weeks of EB.

Recommendation

Staff recommends the permanent adoption of emergency rule §815.1(14) and emergency Subchapter F as currently written. Doing so will allow the Agency to retain its EUISSA grant funding, 100% federally funded EB, and maximize the receipt of EB during any period it is fully federally funded.

Issue 3: Placement of the CARES Act Rules in Chapter 815

The CARES Act requires not only that the prior emergency rulemaking become permanent, but also additional rules to effectuate it. Many of the required rules are unique to the CARES Act and the funding tied to it.

Recommendation

Staff recommends the creation of a new Subchapter G in Chapter 815. Doing so will allow a single reference point for staff and the public for CARES Act rules.

Issue 4: The Current CARES Act Rules Will Expire

Prior to the emergency amendment of §815.12, these waiver and overpayment provisions only applied to the Temporary Emergency Unemployment Compensation (TEUC) program of 2001 and by extension, the Emergency Unemployment Compensation (EUC) program of 2008. Included in §815.12(i) is a provision stating that requiring a claimant to repay a TEUC, and by extension, EUC, overpayment will always cause a financial hardship because the claimant would have already been unemployed for an extended period of time. Section 815.12 also includes a waiver process whereby the claimant must request a waiver in writing from the Agency in order for the waiver to be considered.

In order to comply with certain CARES Act provisions relating to waiver and overpayment, the Commission approved the emergency amendment of §815.12 to include FPUC, PEUC, and the FRWW. Section 815.12(i) was also amended to state that financial hardship will be considered on a case by case basis for these CARES Act programs.

The CARES Act also requires a Coordination Rule to explain the order in which these programs will pay benefits. To comply, the Commission approved the emergency amendment to §815.29, replacing the former EUC Coordination Rule.

[1] The previous §815.170(d) stated: "This section continues in effect until the week ending four weeks prior to the last week of unemployment for which 100 percent federal sharing is available under P.L. 111-5, Division B, Title II, §2005(a), without regard to the extension of federal sharing for certain claims as provided under §2005(c) of such law." Sections 815.171, 815.173, and 815.174 were also tied to this provision.
[2] HB 2831, 82nd Texas Legislature, Regular Session (2011).

Recommendation

If the Commission grants staff the authority to withdraw the emergency rules, or when they ultimately expire, §815.12 will revert to its previous form and only address TEUC, and by extension, EUC. Staff recommends taking this opportunity to convert §815.12 to a rule generally applicable to conforming federal extended unemployment compensation programs. By doing so, if Congress were to pass another extended unemployment compensation program in line with all their previous extension programs, the rule language for waiver and overpayment would already be in place.

This would involve removing references to TEUC and replacing them with phrasing similar to "federal extended compensation program" or "unemployment benefit program of the United States." A rule would then be created in the new Subchapter G which would state that FPUC, PECU, and FRWW are federal extended compensation programs per §815.12. This approach would have the added benefit of retaining the overpayment and waiver provisions of TEUC and EUC.

This would also involve removing §815.12(i) altogether since such a presumption of financial hardship is not generally applicable, as demonstrated by the CARES Act programs. Finally, it is recommended the waiver provisions of §815.12 be amended to reflect current Agency processes whereby the waiver is automatically considered by the Agency rather than requiring the claimant to request a waiver in writing.

Concerning §815.29 and the Coordination Rule, staff recommends making the emergency rule permanent with its current text unchanged with two exceptions. It is recommended emergency rule §815.29 (d) and (e) not be carried over to the permanent rule. Subsection (d) ties PUA to Title 20, Part 625, of the Code of Federal Regulations (CFRs) as stated in §2102(h) of the CARES Act. However, DOL has subsequently modified its guidance on the PUA program to include protocols which do not adhere to the CFRs. This can be seen in areas such as appeals. To prevent confusion, it is recommended this section be removed.

It is also recommended subsection (e), the self-repealing section, be removed. Staff will present a request to repeal the entirety of Subsection G at the appropriate time.

For ease of use, staff recommends relocating the rule to the newly created Subchapter G. As the former §815.29 relating to TEUC is no longer relevant, staff recommends it be deleted.

Issue 5: New CARES Act Rules are Required

The CARES Act, and its subsequent guidance, contain certain requirements which are not currently specified in the Texas Unemployment Compensation Act (TUCA) or Commission rule. Those areas concern appeals, overpayment offsets, and fraud.

Appeals

Concerning the appeals process, although §2102(h) of the CARES Act states any issues not addressed by §2102 will be addressed by the Code of Federal Regulations for Disaster

Unemployment Assistance (20 CFR 625), USDOL guidance states that PUA appeals will be handled in the same manner as other benefit resolution issues under state law. The same applies to FPUC, PEUC, and the FRWW. Regarding FPUC, since it is tied to the underlying claim, the Appeal Tribunal is required to consider the merits of the denial of the underlying benefit when determining eligibility for FPUC payments. USDOL guidance also notes that employers are not a party of interest for PUA, FPUC, PEUC, and the FRWW.

Overpayment Offsets

Under USDOL guidance and Texas' Cross Program Offset Agreement, a state may not offset more than 50% from a PUA, FPUC, PEUC, or the FRWW payment to recover overpayments from the Regular UI program and federal unemployment benefit programs. An overpayment under these programs may not be collected until the determination causing that overpayment has become final.

Overpayments from other states must be offset at 50% from all benefit programs under the Agency's Interstate Reciprocal Overpayment Recovery Arrangement.

Fraud

USDOL guidance dictates that the 15% state fraud penalty located in TUCA §214.003(a)(2) is not applicable to PUA, FPUC, PEUC, or the FRWW. Specifically concerning FPUC, the Agency is required to examine the underlying payment or statement which precipitated the fraud determination when examining FPUC fraud.

USDOL guidance also states 20 C.F.R. 625.14 shall apply with respect to PUA fraud to the same extent and in the same manner as in the case of DUA. 20 C.F.R. 625.14(i) addresses disqualification for fraud as follows:

"(i) Disqualification for fraud. Any individual who, with respect to a major disaster, makes or causes another to make a false statement or misrepresentation of a material fact, knowing it to be false, or knowingly fails or causes another to fail to disclose a material fact, in order to obtain for the individual or any other person a payment of DUA to which the individual or any other person is not entitled, shall be disqualified as follows:

(1) If the false statement, misrepresentation, or nondisclosure pertains to an initial application for DUA -

(i) The individual making the false statement, misrepresentation, or nondisclosure shall be disqualified from the receipt of any DUA with respect to that major disaster; and

(ii) If the false statement, misrepresentation, or nondisclosure was made on behalf of another individual, and was known to such other individual to be a false statement, misrepresentation, or nondisclosure, such other individual shall be disqualified from the receipt of any DUA with respect to that major disaster; and

(2) If the false statement, misrepresentation, or nondisclosure pertains to a week for which application for a payment of DUA is made -

(i) The individual making the false statement, misrepresentation, or nondisclosure shall be disqualified from the receipt of DUA for that week and the first two compensable weeks in the Disaster Assistance Period that immediately follow that week, with respect to which the individual is otherwise entitled to a payment of DUA; and

(ii) If the false statement, misrepresentation, or nondisclosure was made on behalf of another individual, and was known to such other individual to be a false statement, misrepresentation, or nondisclosure, such other individual shall be disqualified from the receipt of DUA for that week and the first two compensable weeks in the Disaster Assistance Period that immediately follow that week, with respect to which the individual is otherwise entitled to a payment of DUA."

Recommendation

Staff recommends creating CARES rules defining each federal CARES program, how the decisions are appealed, the parameters of overpayment offsets, how PUA fraud is adjudicated, and stating the 15% fraud penalty will not apply to these federal programs under the parameters stated above. This includes notifying employers that while they may attend hearings, they are not a party of interest to these federal benefit claims as they would be under §815.15.

Specifically concerning overpayment offsets, staff is recommending allowing flexibility within the rule for the overpayment offset of these federal programs to be up to 50% as allowed by USDOL. Although the current intent is to set the offset at 50%, allowing this flexibility would be useful if the Commission determined it prudent to reduce this offset in the future. As stated above, Interstate overpayments must be offset at 50% for all benefit types.

It is anticipated the PUA fraud rules will closely mirror the regulations in 20 C.F.R. 625.14(i). Specifying these rules is recommended to help draw the distinction between PUA fraud, and fraud as dictated by TUCA Chapter 214.

Staff believes these rules will provide assistance for staff and the public understanding the parameters of the CARES Act.

Vote Recommendation

As stated in Issue 1, it is recommended the Commission make two votes on this Policy Concept.

The first is for the Commission to vote to renew both sets of emergency rules for 60 days, and direct staff to file appropriate notices of these actions, and for the Commission to vote to withdraw both sets of emergency rules at the time the permanent rules take effect, and direct staff to take appropriate action to effectuate this vote.

The second vote would approve staff to move forward with developing the proposed rules as outlined in this policy concept.