

CHAPTER 128. BENEFITS--CALCULATION OF AVERAGE WEEKLY WAGE
28 TAC §§128.3, 128.5 - 128.7.

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes to amend 28 TAC §§ 128.3 and 128.5 - 128.7, concerning calculating the average weekly wage (AWW). The proposed amendments implement Texas Labor Code Sections 408.041, 408.042, 408.043, 408.044, and 408.0446 which govern calculating and adjusting an employee's average weekly wage for workers' compensation benefits. DWC posted for comment an informal working draft of the amendments and considered all the comments received.

EXPLANATION. The proposed amendments to Sections 128.3, 128.6, and 128.7 are to correct obsolete references and update the text for plain language and agency style. The proposed amendments to Section 128.5 changes the process for insurance carriers to request adjustments to a seasonal employee's average weekly wage and get wage information from seasonal employees.

Section 128.3 sets out the method for calculating AWW for all benefits paid to full-time injured employees, as well as AWW for temporary income benefits for all employees. Section 128.3 implements Labor Code §§408.041 and 408.042.

Section 128.6 sets out the method for calculating AWW for injured employees who are minors, apprentices, trainees, or students on the date of injury. Section 128.6 implements Labor Code §408.044.

Section 128.7 sets out the method for calculating AWW for school district employees. Section 128.7 implements Labor Code §408.0446.

Section 128.5 defines seasonal employees and tells how to compute AWW for seasonal employees. It also provides that the AWW may be adjusted to reflect the seasonal wages that the employee could reasonably have expected to earn based on earnings from the corresponding time periods of previous years. Section 128.5 implements Labor Code §408.043 and provides, in part, that the AWW for a seasonal employee is adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. Amending §128.5 is necessary to provide instructions for insurance carriers to request wage information from seasonal employees and give guidance if there is a dispute over calculating the AWW for seasonal employees.

Previously, insurance carriers could request that DWC provide them with wage information from the Texas Workforce Commission (TWC). Because of changes to data-sharing contracts between TWC and DWC, DWC is prohibited from sharing wage information from TWC's system. Since January 2021, DWC received 12 requests from insurance carriers to get wage information. Half of these requests were not fulfilled because the insurance carrier did not give proper notice to the injured employee. During this same period, DWC received 20 requests to adjust the AWW for seasonal employees. Eighteen requests were denied because the insurance carrier did not give proper notice to the injured employee and the wage information the insurance carrier submitted did not support the proposed wage adjustment. Two requests were withdrawn.

Under the proposed rule, if the employee does not provide the requested wage information or request a benefit review conference within 14 days after the employee receives notice from the insurance carrier, the insurance carrier may ask DWC to issue a

subpoena for the seasonal employee's wage information to determine if the AWW should be increased or decreased to more accurately reflect the seasonal nature of the employment. Employees must respond to the subpoena. If the employee does not respond to the subpoena, insurance carriers are still able to use the other available methods of discovery to obtain wage information and may submit relevant wage information that it obtained by methods other than DWC subpoena. The rule also allows an employee or insurance carrier to request a contested case hearing if the employee or insurance carrier disputes DWC's decision on the request to adjust the AWW.

The proposed amendments also include nonsubstantive editorial and formatting changes that make updates for plain language and agency style to improve the rule's clarity.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Deputy Commissioner for Claims and Customer Services Erica De La Cruz has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by the statute. Although DWC will no longer receive the \$15 fee for processing wage information requests, the impact to agency revenue is negligible because of the low number of requests for wage information. There will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections because local governments are not involved in enforcing or complying with the proposed amendments.

Deputy Commissioner De La Cruz does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Deputy Commissioner De La Cruz expects that enforcing and administering the proposed amendments will have the public benefits of promoting compliance with the Workers' Compensation Act, as well as ensuring that DWC's rules conform to Labor Code §§408.041, 408.042, 408.043, 408.044, and 408.0446 and are current and accurate, which promotes transparent and efficient regulation.

Deputy Commissioner De La Cruz expects that the proposed amendments will not increase the cost to comply with Labor Code §§408.041, 408.042, 408.043, 408.044, and 408.0446 because they do not impose requirements beyond those in the statutes. Labor Code §408.043 requires that the AWW for a seasonal employee is adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. Labor Code §408.041 provides the calculation for AWW and contemplates the use of the employee's wage information. Insurance carriers may choose to serve a subpoena and may incur a cost to serve it. However, the costs of serving a subpoena are attributable to the insurance carrier's choice to serve a subpoena, the laws related to service of subpoenas, and the fees established by those the law authorizes to serve a subpoena. As a result, the costs associated with getting the employee's wage information and serving a subpoena do not result from the enforcement or administration of the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. DWC has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities because the proposed amendments clarify the process for getting seasonal employee wage information and make editorial changes, changes to update obsolete references, or updates for plain language and agency style. The proposed issuance of

subpoenas for seasonal employee wage information does not change the people the rule affects or impose additional costs because the injured employee could provide the wage information, and it is up to the insurance carrier to choose to request a subpoena. As a result, and in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. DWC has determined that this proposal does not impose a possible cost on regulated persons. As a result, no additional rule amendments are required under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT. DWC has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the agency;
- will not require an increase in fees paid to the agency;
- will not create a new regulation;
- will expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

DWC made these determinations because the proposed rule enhances efficiency and clarity of producing evidence of wages; conforms the language to current agency

structure, practice, and related rules; and makes editorial changes for plain language and agency style. The proposed amendments do not change the people the rule affects or impose additional costs.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal, and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR INFORMATION AND PUBLIC COMMENT. DWC requests public comments on the proposal, including information related to the cost, benefit, or effect of the proposal and any applicable data, research, and analysis. DWC will consider any written comments on the proposal that DWC receives no later than 5:00 p.m., Central time, on December 15, 2025. Send your comments to RuleComments@tdi.texas.gov; or to Texas Department of Insurance, Division of Workers' Compensation, Legal Services, MC-LS, P.O. Box 12050, Austin, Texas 78711-2050.

To request a public hearing on the proposal, submit a request before the end of the comment period to RuleComments@tdi.texas.gov; or to Texas Department of Insurance, Division of Workers' Compensation, Legal Services, MC-LS, P.O. Box 12050, Austin, Texas 78711-2050. The request for public hearing must be separate from any comments.

CHAPTER 128. BENEFITS--CALCULATION OF AVERAGE WEEKLY WAGE.

28 TAC §§128.3, 128.5 - 128.7.

STATUTORY AUTHORITY. DWC proposes §§128.3, and 128.5 - 128.7 under Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 408.041, 408.042, 408.043, 408.044, and 408.0446.

Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.00128 describes the general powers and duties of the commissioner, including to hold hearings; issue subpoenas to compel the attendance of witnesses and the production of documents; take testimony directly or by deposition or interrogatory; and prescribe the form, manner, and procedure for the transmission of information to the division.

Labor Code §402.061 provides that the commissioner of workers' compensation shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §408.041 provides the calculation for AWW.

Labor Code §408.042 provides the calculation for AWW for part-time employees or employees with multiple employment, among other things.

Labor Code §408.043 provides in part that the AWW for a seasonal employee is adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid.

Labor Code §408.044 provides that the calculation for AWW must be adjusted to reflect the level of expected wages during the period that the benefits are payable for employees that are minors, apprentices, trainees, or students at the time of the injury.

Labor Code §408.0446 provides the calculation of AWW for school district employees.

CROSS-REFERENCE TO STATUTE. Section 128.3 implements Labor Code §408.041, Section 128.5 implements Labor Code §408.043, Section 128.6 implements Labor Code §408.043, enacted by House Bill (HB) 752, 73rd Legislature, Regular Session (1993), and amended by HB 7, 79th Legislature, Regular Session (2005). Section 128.7 implements Labor Code §408.0446, enacted by HB 2600, 77th Legislature, Regular Session (2001), and amended by HB 7, 79th Legislature, Regular Session (2005).

TEXT.

§128.3. Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees.

(a) All income benefits for full-time employees are based on [~~upon~~] an average weekly wage calculated according to this rule. A full-time employee is one who regularly works at least 30 hours per week and whose [~~that~~] schedule is comparable to other employees of that company or [~~and/or~~] other employees in the same business or vicinity who are considered full-time.

(b) Temporary income benefits are based on an average weekly wage that [~~which~~] is calculated according to this rule for all employees. However, the average weekly wage for determining temporary income benefits of seasonal employees may be periodically adjusted as set out in §128.5(c) of this title (~~relating to~~ Average Weekly Wage Calculation for Seasonal Employees).

(c) The average weekly wage for impairment income, supplemental income, lifetime income, and death benefits must [~~shall~~] be calculated according to this section concerning full-time employees, §128.4 of this title (~~relating to~~ Average Weekly Wage

Calculation for Part-Time Employees), or §128.5 of this title (~~relating to~~ Average Weekly Wage Calculation for Seasonal Employees). The average weekly wage for an employee who is also a minor, an apprentice, a trainee, or a student must ~~shall~~ be adjusted for determining these income benefits (but not temporary income benefits), according to the procedure described in §128.6 of this title (~~relating to~~ Average Weekly Wage Adjustment for Certain Employees Who Are Also Minors, Apprentices, Trainees, or Students).

(d) If an employee has worked for 13 weeks or more before ~~prior to~~ the date of injury, or if the wage at the time of injury has not been fixed or cannot be determined, the wages paid to the employee for the 13 weeks immediately preceding the injury are added together and divided by 13. The quotient is the average weekly wage for that employee.

(e) If an employee has worked for less than 13 weeks before ~~prior to~~ the date of injury, the wages paid to that employee are not considered. Instead, the wages used for the average weekly wage calculation are those paid by the employer to a similar employee who performs similar services, but who earned wages for at least 13 weeks. If there is no similar employee at the employer's business, the calculation is based on wages paid to a similar employee who performed similar services in the same vicinity, for at least 13 weeks. When a similar employee is identified, the wages paid to that person for the 13 weeks immediately preceding the injury are added together, and divided by 13. The quotient is the average weekly wage for the injured employee.

(f) For purposes of computing average weekly wage under subsection (e) of this section, the following definitions apply:

(1) a similar employee is a person with training, experience, and skills and wages that are comparable to the injured employee. Age, gender, and race must ~~shall~~ not be considered;

(2) similar services are tasks performed or services rendered that are comparable in nature to, and in the same class as, those performed by the injured employee, and that are comparable in the number of hours normally worked.

(g) If the methods ~~[set forth]~~ in this rule cannot be applied reasonably due to the irregularity of the employment or, if the employee has lost time from work, without remuneration, during the ~~[said]~~ 13-week period due to illness, weather, or other cause beyond the control of the employee, the commissioner ~~[commission]~~ may determine the employee's average weekly wage by any method that is ~~[it considers]~~ fair, just, and reasonable to all parties and consistent with the methods established under this section.

§128.5. Average Weekly Wage Calculation for Seasonal Employees.

(a) A seasonal employee is an employee who, as a regular course of the employee's conduct, engages in seasonal or cyclical employment ~~[which may or may not be agricultural in nature,]~~ that does not continue throughout the entire year.

(b) The average weekly wage used to determine temporary income benefits for seasonal employees must ~~[shall]~~ be determined according to the procedure described in §128.3(d) or (e) of this title (~~[relating to]~~ Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees), subject to the periodic adjustment described in this rule.

(c) The average weekly wage for computing temporary income benefits may be increased or decreased as often as necessary to ~~[more accurately reflect the seasonal nature of the employment, if such an adjustment would more accurately]~~ reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. To adjust the average weekly wage: ~~[Evidence of earnings shall be submitted at the time an adjustment is requested. The evidence should include proof of the employee's earnings in corresponding time periods of previous years. In case of a~~

~~dispute, the commission shall set a benefit review conference to consider whether an adjustment should be made.]~~

(1) The insurance carrier must notify the employee and the division of its intent to adjust the average weekly wage for temporary income benefits under this subsection. The notice must contain all the information on the division's specimen form, located on the division's website at www.tdi.texas.gov/wc, including claim information, the notice of intent to adjust the average weekly wage, and the requester's information.

(2) The employee must provide the insurance carrier documents showing the employee's wages in previous years during the corresponding time periods.

(3) If the employee does not provide the requested wage information within 14 days after the employee receives the notice, the insurance carrier may request that the division issue a subpoena for the requested wage history. If the employee does not respond to the subpoena for wage information within 14 days of receiving the subpoena, the insurance carrier may file a request to adjust the average weekly wage under paragraph (4) of this subsection.

(4) The insurance carrier must file with the division the request to adjust the average weekly wage and provide a copy to the employee. The request must contain all the information on the division's specimen form, located on the division's website at www.tdi.texas.gov/wc, including claim information, the notice of intent to adjust the average weekly wage, the request to adjust the average weekly wage, and the requester's information.

(A) The insurance carrier must submit evidence of earnings at the time the insurance carrier requests an adjustment. The evidence should include proof of the employee's earnings in the corresponding time periods of previous years.

(B) The insurance carrier may not make the adjustment until the division approves the request.

(C) The claimant or insurance carrier may appeal DWC's determination by requesting a contested case hearing through the dispute resolution process outlined in Chapters 140 - 144 of this title.

(d) The average weekly wage used to determine impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits for a seasonal employee must ~~[shall]~~ be calculated by:

(1) adding together the total wages received by the employee in the 12 months preceding the date of injury and dividing the result by 50; or

(2) if it is impractical to compute the average weekly wage as provided by paragraph (1) of this subsection, another fair, just, and reasonable method as determined in a contested case hearing ~~[benefit review conference]~~ if requested by the person claiming income benefits or the insurance carrier.

§128.6. Average Weekly Wage Adjustment for Certain Employees Who Are Also Minors, Apprentices, Trainees, or Students.

(a) To ~~[In order to]~~ adjust average weekly wage under this rule, for purposes of computing impairment income, supplemental income, lifetime income, and death benefits, an injured employee must fit ~~[come within]~~ one of the following definitions, on the date of injury:

(1) a minor is an employee less than 18 years of age and not emancipated by marriage or judicial action, and is also an apprentice, trainee, or student;

(2) an apprentice is an employee learning a skilled trade or art by practical experience under the direction of a skilled crafts person or artisan;

(3) a trainee is an employee undergoing systematic instruction and practice in some art, trade, or profession with a view toward ~~[towards]~~ proficiency in it; and

(4) a student is an employee enrolled in a course of study or instruction in a high school, college, university, or other institute of higher education or technical training.

(b) The average weekly wage used to determine temporary income benefits for a minor, apprentice, trainee, or student must ~~[shall]~~ be computed according to §128.3 of this title (~~[relating to]~~ Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees), and may not be adjusted. The basic average weekly wage for other income and death benefits must ~~[shall]~~ be calculated depending on ~~[upon]~~ whether the employee worked full-time, part-time, or as a seasonal employee, and may be adjusted as described in this section.

(c) The average weekly wage of an employee who is less than 18 years of [a] age, but not a minor as defined in this section, must ~~[shall]~~ not be adjusted.

(d) The average weekly wage used to determine impairment income benefits, supplemental income benefits, lifetime income benefits, or death benefits for an employee defined under subsection (a) of this section must ~~[shall]~~ be adjusted on the basis of this rule if the employee also proves that:

(1) the employee's employment or earnings at the time of the injury were limited primarily because of apprenticeship, continuing formal training, or education that can be reasonably calculated to enhance the employee's future wages; and

(2) the employee's wages would reasonably be expected to change during the period for which the impairment income, supplemental income, lifetime income, and death benefits are payable not to exceed three years after the date of injury.

(e) An insurance carrier and the person claiming income benefits may agree to adjust the average weekly wage used to compute impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits for an employee who meets the requirements of subsections (a) and (d) of this section. The adjustment must

[shall] not reflect the level of the expected wages for a period in excess of three years after the date of injury.

(f) If an insurance carrier and the person claiming income benefits dispute the need for, or the amount of, an adjustment for expected wage levels, the division will [commission shall] schedule a contested case hearing through the dispute resolution process outlined in Chapters 140 - 144 of this title [benefit review conference]. The division will [commission shall] then consider the evidence submitted by the insurance carrier and the claimant. Objective, documentary, or expert evidence is favored over testimony of interested parties[;] in determining a fair and just expected wage level [an expected wage level which is fair and just].

§128.7. Average Weekly Wage for School District Employees.

(a) This rule applies only to school district employees injured on or after December 1, 2001. The calculations in this rule apply to the portion of the employee's average weekly wage [~~AWW~~] based on [~~upon~~] the employee's employment with the school district where the school district is; the "Claim Employer" as that term is used in §122.5 of this title ([~~relating to~~] Employee's Multiple Employment Wage Statement). The average weekly wage [~~AWW~~] of a school district employee injured before December 1, 2001, is computed using the law and [commission] rules in effect on the date of the injury.

(b) For determining the amount of temporary income benefits of school district employees under Texas Labor Code Chapter 504, the average weekly wage [~~AWW~~] is computed on the basis of wages earned in a week. "Wages earned in a week" are equal to the amount that would be deducted from an employee's salary if the employee were absent from work for one week and the employee did not have personal leave available to compensate the employee for lost wages for that week. For this calculation, "wages" includes only pecuniary wages.

(c) For determining the amount of temporary income benefits of a school district employee, the average weekly wage must [~~AWW shall~~] be computed as follows.

(1) For a school district employee working under a written contract with the school district, the average weekly wage must [~~AWW shall~~] be computed by dividing the amount the employee would have been paid had the employee fully completed the terms of the contract (including any stipend the employee was earning or scheduled to receive under the contract) by:

(A) the number of days that the employee was required to work under that contract and multiplied by five (if the contract has specified the number of work days); or

(B) the number of months that the contract was to cover and then dividing the result by 4.34821.

(2) For a school district employee who is employed on a nonwritten [~~non-written~~] contract basis (i.e., hourly, daily, salaried, or other basis), the average weekly wage must [~~AWW shall~~] be computed by dividing the total gross wages earned in the previous 13-week period immediately preceding the date of injury by 13.

(d) The average weekly wage [~~AWW~~] for computing temporary income benefits may be increased or decreased to more accurately reflect wages the school district employee reasonably could expect to earn during the period for which temporary income benefits are paid.

(1) An insurance carrier [~~carrier~~] may adjust the average weekly wage [~~AWW~~] based on evidence of earnings.

(2) A school district employee may request adjustments by submitting evidence of earnings to the insurance carrier.

(3) For a period a school district employee would not have earned wages, the average weekly wage [AWW] may be adjusted to zero and no minimum benefit payment may be required.

(e) For determining the amount of impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits, the average weekly wage must [AWW shall] be computed in accordance with this subsection using only pecuniary wages.

(1) The insurance carrier must [shall] add together the total wages earned by the school district employee during the 12 months immediately preceding the injury and dividing the result by 50 weeks.

(2) If the school district employee provides wage information from other employers for whom the employee worked in the 12 months immediately preceding the injury, these wages must [shall] be included in the calculation of the average weekly wage [AWW]. Note that for injuries on or after July 1, 2002, the effect of wages from a Non-Claim Employer (as the term is defined in §122.5 of this title (~~relating to~~ Employee's Multiple Employment Wage Statement)) on the employee's average weekly wage [AWW] is governed by §128.1(h)(2) of this title (~~relating to~~ Average Weekly Wage: General Provisions).

(f) In the event the school district employee or insurance [and/or] carrier believes that the average weekly wage [AWW] computed based on the calculations in this rule does not reflect the true average weekly wage [AWW], the employee and insurance carrier may enter into a written agreement regarding the average weekly wage [AWW] or request a contested case hearing through the dispute resolution process outlined in Chapters 140 - 144 of this title [benefit review conference].

CERTIFICATION. The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on October 29, 2025.



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