

## **28 TAC §120.2**

**1. INTRODUCTION.** The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §120.2 of this title (relating to Employer's First Report of Injury and Notice of Injured Employee Rights and Responsibilities). These amendments are adopted with changes to the proposed text published in the January 1, 2010 issue of the *Texas Register* (35 TexReg 29). The public comment period ended on February 1, 2010. The Division did not receive a request for a public hearing. This rule shall become effective March 22, 2010.

**2. REASONED JUSTIFICATION.** The adopted amendments to §120.2 of this title are necessary in order to implement amendments made by House Bill (HB) 673, enacted by the 81st Texas Legislature, Regular Session, effective September 1, 2009, to the Labor Code provision concerning the Notice of Injured Employee Rights and Responsibilities (Notice of Rights and Responsibilities) in the Texas Workers' Compensation System, specifically Labor Code §404.109.

Labor Code §404.109 requires the Public Counsel of the Office of Injured Employee Counsel (Public Counsel) to adopt, in the form and manner prescribed by the Public Counsel and after consultation with the Commissioner of Workers' Compensation, a Notice of Rights and Responsibilities. The Notice of Rights and

Responsibilities shall be distributed by the Division as provided by a Commissioner of Workers' Compensation or Commissioner of Insurance rule. The adopted Notice of Rights and Responsibilities shall be consistent with Labor Code Title 5 and applicable Division rules and not construed as establishing an entitlement to benefits to which a claimant is not otherwise entitled under the Labor Code.

Adopted §120.2 specifies that the Public Counsel, after consulting with the Commissioner of Workers' Compensation, shall adopt the form and manner of the Notice of Rights and Responsibilities to be distributed to injured employees by an employer.

The Division has changed some of the language in the text of the rule previously published in the proposal. These changes introduce no new subject matter and do not affect persons in addition to those subject to the proposal as published. Adopted §120.2(e)(3) adds any office of the Division as a location where the Notice of Rights and Responsibilities may be obtained. Adopted §120.2(e)(4) adds the physical address and any office of the Office of Injured Employee Counsel as a location where the Notice of Rights and Responsibilities may be obtained.

**3. HOW THE SECTION(S) WILL FUNCTION.** The amendment to §120.2(d) clarifies that the Notice of Rights and Responsibilities is adopted by the Public Counsel.

Under the amendment to §120.2(e) the Public Counsel shall adopt the Notice of Rights and Responsibilities after consultation with the Commissioner of Workers' Compensation, but until the Public Counsel adopts any new notice in accordance with Labor Code §404.109, the notice previously adopted by the Division shall remain in effect. The amendment clarifies that the Notice of Rights and Responsibilities shall be distributed through both the Division's and the Office of Injured Employee Counsel's websites or it will be provided at the physical locations of either agency. The amendment to §120.2(e)(3) adds any office of the Division and the amendment to §120.2(e)(4) adds the physical address and any office of the Office of Injured Employee Counsel.

**4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.**

**Comment:** Some commenters support the proposed rule and believe the rule does not conflict with HB 673. One commenter believes the proposed rule is within rulemaking authority of the Division and another commenter believes the proposed rule is necessary to implement HB 673.

**Agency Response:** The Division appreciates the supportive comments and agrees that the adopted rule implements HB 673 and is within the Division's rulemaking authority.

**Comment:** A commenter questions what an employer or state agency's penalty amount should be for not timely notifying an injured employee of his or her rights and for failing to file the report of injury timely.

**Agency Response:** This comment is not applicable to the rule as proposed because HB 673 does not address penalty amounts in Labor Code §404.109. This adopted rule and the statutory authority for adopting the rule only addressed the substance of the Notice of Injured Employee Rights and Responsibilities. The comment regarding the first report of injury or penalty amounts is outside the scope of HB 673 or this rule.

**Comment:** A commenter requests that the proposed rule clarify that the term "report" in §120.2(d) refers to the requirements of Labor Code §409.005, that the report of injury must be filed with the injured employee and the employer's insurance carrier. The commenter opines that the word "may" in subsection (d) implies that an employer is not required to file an injury report. Also, the commenter states that the Division does not have the authority to adopt a rule that conflicts with a statute.

**Agency Response:** The Division disagrees with the commenter's interpretation. HB 673 only amended Labor Code §404.109 and not Labor Code §409.005, therefore the only change to the statute and the rule concerns the publication of the Notice of Injured Employee Rights and Responsibilities and not the report of injury. The first sentence in §120.2(d), which was not changed by the proposal, already requires an employer to provide a written copy of the report of injury and the Notice of Injured Employee Rights and Responsibilities to the injured employee. Also not changed by the proposal is §120.2(a), which requires an employer to report to the employer's insurance carrier each death, each occupational disease of which the employer has received notice of injury or has knowledge, and each injury that results in more than one day's absence from work for the injured employee. The Division declines to change the word "may" in the third sentence of §120.2(d) because the Division does not agree that it mitigates an employer's duty to file an injury report with the injured employee and the employer's insurance carrier. In no way should the word "may" in the third sentence of §120.2(d) be construed to absolve the obligation of the employer to notify all required parties. The use of the word "may" in §120.2(d) only specifies that the required report of injury may either be in the form specified in §120.2(b) or §120.1(a). Therefore, the Division has the authority to adopt §120.2 as proposed because it does not conflict with Labor Code §404.109, which was

amended by HB 673, and in addition it does not conflict with Labor Code §409.005.

**5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.**

**For:** Property Casualty Insurers Association of America; Office of Injured Employee Counsel.

**For with changes:** None.

**Against:** None.

**Neither for nor against, with recommended changes:** Two individuals.

**6. STATUTORY AUTHORITY.** These amendments are adopted under Labor Code §§404.109, 402.061 and 402.00111.

Labor Code §404.109 allows the Public Counsel by rule to adopt the form and manner of the Notice of Rights and Responsibilities after consulting with the Commissioner of Workers' Compensation. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rule making authority, under Labor Code Title 5.

**7. TEXT.**

**§120.2. Employer's First Report of Injury and Notice of Injured Employee Rights and Responsibilities.**

(a) The employer shall report to the employer's insurance carrier each death, each occupational disease of which the employer has received notice of injury or has knowledge, and each injury that results in more than one day's absence from work for the injured employee. As used in this section, the term "knowledge" includes receipt of written or oral information regarding diagnosis of an occupational disease, or the diagnosis of an occupational disease through direct examination or testing by a doctor employed by the employer.

(b) The Division shall prescribe the form, format, and manner of the employer's first report of injury (report). The report shall contain:

(1) the information required by §120.1(a) of this title (relating to Employer's Record of Injuries);

(2) any additional information prescribed by the Division in accordance with the Labor Code §402.00128(b)(10); and

(3) the information necessary for an insurance carrier to electronically transmit a first report of injury to the Division.

(c) The report shall be filed with the insurance carrier not later than the eighth day after having received notice of or having knowledge of an occupational disease or death, or not later than the eighth day after the employee's absence from work for more than one day due to a work-related

injury. For purposes of this section, a report is filed when personally delivered, mailed, reported via tele-claims, electronically submitted, or sent via facsimile.

(d) The employer shall provide a written copy of the report and a written copy of the Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System (Notice of Rights and Responsibilities) adopted by the Public Counsel of the Office of Injured Employee Counsel (Public Counsel) to the injured employee by personal delivery, mail, electronic submission or facsimile. The Notice of Rights and Responsibilities shall be in English and Spanish, or in English and any other language common to the employee. The written report may be the report specified in subsection (b) of this section, or at a minimum shall contain the information listed in §120.1(a) of this title.

(e) The Public Counsel shall adopt the Notice of Rights and Responsibilities after consultation with the Commissioner of Workers' Compensation. Until the Public Counsel adopts any new notice in accordance with Labor Code §404.109, the notice previously adopted under this section shall remain in effect. A copy of the Notice of Rights and Responsibilities adopted by the Public Counsel shall be distributed through or provided at:

(1) the department's website at [www.tdi.state.tx.us](http://www.tdi.state.tx.us);

(2) the Office of Injured Employee Counsel's website at [www.oiec.state.tx.us](http://www.oiec.state.tx.us);

(3) The Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas, 78744 or any office of the Texas Department of Insurance, Division of Workers' Compensation;  
or

(4) The Office of Injured Employee Counsel, 7551 Metro Center Drive, Suite 100, Austin, Texas, 78744 or any office of the Office of Injured Employee Counsel.

(f) The employer shall maintain a record of the date the copy of the report of injury and the date the Notice of Rights and Responsibilities were provided to the employee. The employer shall also maintain a record of the date the report of injury is filed with the insurance carrier.

(g) If the insurance carrier has not received the report, the employer has the burden of proving that the report was filed within the required time frame. If the carrier receives the report by mail, it will be presumed that the report was mailed four days prior to the date received by the carrier. The employer has the burden of proving that good cause exists if the employer failed to timely file or provide the report.

(h) A party who fails to comply with this section commits an administrative violation.

**CERTIFICATION.** This agency hereby certifies that the adopted amendments have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas on \_\_\_\_\_, 2010.

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Dirk Johnson  
General Counsel  
Texas Department of Insurance,  
Division of Workers' Compensation

**IT IS THEREFORE THE ORDER** of the Commissioner of Workers' Compensation that the amendments to §120.2. specified herein, concerning the Notice of Injured Employee Rights and Responsibilities, are adopted.

**AND IT IS SO ORDERED**

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ROD BORDELON  
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

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Dirk Johnson  
General Counsel

TITLE 28. INSURANCE  
Part 2. Texas Department of Insurance,  
Division of Workers' Compensation  
Chapter 120. Compensation Procedure - Employers

Adopted Amendments  
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COMMISSIONER'S ORDER NO.