

EQUAL

JUSTICE

CENTER

December 10, 2014

**WRITTEN TESTIMONY SUBMITTED BY THE EQUAL JUSTICE CENTER TO THE  
TEXAS SUNSET ADVISORY COMMISSION ON THE TEXAS WORKFORCE  
COMMISSION**

The Equal Justice Center (“EJC”) is a non-profit employment justice organization specializing in promoting workplace fairness for low-income working men and women. From our offices in Austin, Dallas, and San Antonio, the EJC provides legal services and employment rights assistance to help low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people throughout Texas in their efforts to recover unpaid wages and protect their rights under federal and state labor and employment laws.

The EJC primarily represents low-wage workers in unpaid wage claims, and also handles disputes concerning unemployment insurance, sexual harassment, and workplace discrimination. In this capacity, our office has assisted many workers through the Texas Workforce Commission’s (TWC) wage claim process. The TWC wage claim process is important to workers in the State of Texas because it is often the only viable option available to workers who are not paid what they were promised.

The EJC submits this written testimony to speak in favor of certain recommendations in the Sunset Advisory Commission Staff Report on the TWC, as well offer comments relating to pending legislation that impacts the TWC and low-wage workers across Texas.

**I. EJC supports recommendations 4.1 and 4.2 in the Staff Report.**

The Staff Report identified in Issue 4 that “TWC’s appeals process lacks certain tool that would increase consistency and transparency.” We agree with this conclusion and support recommendations 4.1 (direct TWC to create a searchable and publicly accessible precedent manual for wage disputes) and 4.2 (direct TWC to establish procedure and criteria for determining when policies clarified through precedents would be more appropriate for rulemaking).

We want highlight one part of the recommendation that is of central importance to successfully implementing a wage claim precedent manual: including published decisions from state and federal courts that govern wage cases.<sup>1</sup> Including court cases in the precedent manual is important for both the practical reason that a large body of TWC wage claim precedent may not exist and the larger reason

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<sup>1</sup> Sunset Advisory Commission, Staff Report with Hearing Materials – Texas Workforce Commission, Texas Workforce Investment Council, December 2014, p. 43, available at [https://www.sunset.texas.gov/public/uploads/files/reports/TWC\\_TWIC%20Hearing%20Material.pdf](https://www.sunset.texas.gov/public/uploads/files/reports/TWC_TWIC%20Hearing%20Material.pdf).

that TWC's wage claims precedents should be consistent with state and federal court cases on a large number of wage and hour present in TWC wage claims, including central questions such as employee v. independent contractor status, joint employment, and individual employer liability.

**II. TWC can take additional steps to increase transparency in the wage claim process.**

Adopting Recommendations 4.1 and 4.2 would improve the wage claim process by providing a more transparent appeals process, but additional steps can be taken to increase transparency throughout the wage claim process. After a wage claim is submitted, a TWC investigator processes the claim, conducts a brief investigation, and enters a Preliminary Wage Determination Order (PWDO). In our experience, the PWDO often lacks sufficient information for either the wage claimant or the employer to determine the basis for the investigator's calculation of unpaid back wages.

While not addressed in the Staff Report, we recommend that the TWC adopt practices to include information at the PWDO stage that contains the basic information as to the basis for the order (e.g., the number of hours worked, the pay rate, authorized deductions, etc.). Adopting this practice would provide both the wage claimant and employer with the necessary information to determine whether or not to appeal the decision, and streamline the appeals process. Further, adopting this practice should not impact TWC's resources as the work is already being done at the investigative stage and simply involves disclosing that information to the parties.

**III. There are several bills introduced for the 2015 session that would provide necessary protections to workers and impact the TWC.**

The following bills will help protect workers from unscrupulous employers and work to level the playing field for businesses that play by the rules: SB 152/HB 162 (relating to administrative penalties assessed by the TWC against certain employers for failure to pay wages); SB 153 (relating to the period during which an employee may file a claim for unpaid wages with the Texas Workforce Commission); HB 94 (relating to a database of employers penalized for failure to pay wages or convicted of certain offenses involving wage theft).

Additionally, we want to highlight SB 151 relating to employer retaliation against employees who seek recovery of unpaid wages and procedure in wage claim hearings conducted by the Texas Workforce Commission. We have received several reports from workers that have not been paid what they were promised, but fail to make wage claims because they fear that the employer will take an adverse action against them for having filed a claim. Adopting the anti-retaliation language for Payday Law claims is a necessary step to better protect workers with legitimate complaints for unpaid wages.

**IV. HB 434 aims to address the problem of worker misclassification in the construction industry, but its treatment of the question of independent contractor versus employee status may exacerbate the misclassification problem.**

HB 434 creates a set of penalties for construction employers that misclassify its employees. We support the effort to address the misclassification problem, but the bill—as currently drafted—has the potential to harm workers because the test for employee status conflicts with established TWC rules, IRS rules, and decades of case law on this question.

Unscrupulous employers misclassify their employees as independent contractors to avoid tax obligations and to gain an unfair advantage over their competitors. Workers that are misclassified do not receive overtime pay, have a higher income tax burden, and are denied other basic labor and employment rights.

The proposed legislation creates a new test for determining whether an individual is an employer or independent contractor by outlining “facts and circumstances” to be considered when an employer appeals, including “the contents of any written contract between” the parties, “documentation that the individual represents that the individual is an independent contractor,” and a series of other facts. There is no existing basis in the law for these set of facts to be determinative of employee status, and these set of factors contradict the long-held and well-established economic reality test.

The relevant question in determining whether or not an individual is an employer or independent contractor is whether, as a matter of economic reality, the individual is in business for himself or economically dependent upon the business to which he renders his services.<sup>2</sup> To make that determination, courts apply a five factor test derived from a Supreme Court case, *United States v. Silk*.<sup>3</sup> The courts consider five factors:

- (1) the degree of control exercised by the alleged employer;
- (2) the extent of the relative investments of the worker and alleged employer;
- (3) the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer;
- (4) the skill and initiative required in performing the job; and
- (5) the permanency of the relationship.

Courts emphasize that “[t]hese factors are merely aids in determining the underlying question of dependency, and no single factor is determinative.<sup>4</sup> Notably, the TWC has an independent contractor test that tracks the common law test and reflects IRS guidance and the decades of case law on this issue for the Texas Unemployment Compensation Act<sup>5</sup>. Specifically, the TWC has adopted the old IRS twenty-factor test as guidance in applying the common law test.<sup>6</sup> The TWC currently provides similar

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<sup>2</sup> *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 327 (5th Cir. 1993); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043, 1054 (5th Cir. 1987)

<sup>3</sup> *United States v. Silk*,<sup>3</sup> 331 U.S. 704, 715, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947)

<sup>4</sup> *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 327 (5th Cir. 1993); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043, 1054 (5th Cir. 1987).

<sup>5</sup> Tex. Lab. Code § 201.041.

<sup>6</sup> TWC, Especially For Texas Employers, Independent Contractors/Contract Labor, available at [http://www.twc.state.tx.us/news/efte/ics\\_contract\\_labor.html](http://www.twc.state.tx.us/news/efte/ics_contract_labor.html).

instructions to Texas employers on this question in its Especially for Texas Employers guide,<sup>7</sup> which is consistent with guidance from the Department of Labor.<sup>8</sup>

Similarly, the IRS publishes its own guidance on the question of employee versus independent contractor and adopts the existing common-law rules. Publication 15-A (2014), p. 7, available at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>. The IRS provides a list of relevant inquiries by industry,

The current HB 434 proposes a new and confusing approach to this question and redefines who is an employee and who is an independent contractor in a manner that can be exploited by employers seeking to gain an unfair competitive advantage. The Misclassification problem needs to be addressed to protect workers and responsible employers, but it should not be done at the expense of redefining the employer-employee relationship in the construction industry and intentionally creating a conflict with existing Texas and Federal laws. To maintain a consistent approach and not to undermine the rights of working people in Texas, the test should be amended to track the existing and well-established common law test to determine whether a worker is truly an independent contractor in business for herself or himself, or whether worker is an employee and the employer has the right to direct or control the work.

Respectfully submitted on December 10, 2014.

Sincerely,

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<sup>7</sup> TWC, Especially For Texas Employers, Independent Contractor Test, available at [http://www.twc.state.tx.us/news/eft/independent\\_contractor\\_tests.html](http://www.twc.state.tx.us/news/eft/independent_contractor_tests.html).

<sup>8</sup> U.S. Department of Labor, Wage and Hour Division, Fact Sheet #13, available at <http://www.dol.gov/whd/regs/compliance/whdfs13.pdf>.