

Chapter 801. Local Workforce Development Board.
§ 801.2 Waiver Requirements.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
PART XX. Texas Workforce Commission
CHAPTER 801. Local Workforce Development Boards
40 TAC §801.2

The Texas Workforce Commission adopts amendments to §801.2, Waiver Requirements, now referred to as §801.2 Waivers, concerning waivers that may be granted regarding service delivery, board staffing and developmental services, with one change to the proposed text as published in the January 31, 1997, issue of the Texas Register (22 TexReg 1089). Specifically, in Subsection (a), the final two sentences are deleted and replaced with the sentence "Only under circumstances that fit the criteria specified in those statutes will requests for waivers be granted."

The Texas Labor Code, as amended by Chapter 655, Acts of the 74th Legislature, 1995, requires the Commission to establish rules for the formation of local workforce development boards to plan and oversee the delivery of all workforce training programs in local workforce development areas. The Act restricts the delivery of workforce training and services and developmental services and requires that local workforce development boards have an independent staff. The rule reiterates that waivers may be granted based on one or more of the three statutory prohibitions if a board can show that a waiver is necessary for the delivery of workforce training programs in the local workforce development area. The adopted amendment clarifies that operational functions such as intake, eligibility determination, assessment and referral, are included within the meaning of "workforce training and services." The adopted amendment also clarifies the criteria for granting a waiver. The amendment deletes statutory definitions from the rule as such information is repetitive and unnecessary. The amendment also clarifies that the Commission will issue a recommendation on submitted waiver requests to the Texas Council on Workforce and Economic Competitiveness. The adopted amendment replaces the requirement that certain documentation be submitted with a provision granting the Commission discretion in identifying what documents may be needed to support a request for a waiver. Finally, the adopted amendment eliminates the procedure of the Commission reviewing its decision prior to the expiration of a waiver once a waiver has been granted.

The Commission held a public hearing on the proposed amended rule on February 28, 1997. Oral comments received at the hearing and by telephone, e-mail and facsimile are replicated in substance within the 67 written comments received. Of the total comments received, 60 commenters are in support of the proposed amended rule, while 32 commenters are opposed to the proposed changes.

The following parties submitted written and/or oral comments prior to, and/or following publication of the proposed rule: Ray L. Laughter, North Harris Montgomery Community College District; Monty McLaurin, St. Joseph's Hospital and Health Center; Earl Joy, Business Development Corporation of Vernon; Ronda Bauman, Texas Association of Business and Chamber of Commerce; Ramon Dovalina, Laredo Community College; Gerald Burson, Navarro College; Carl M. Nelson, Texarkana College; Cheyl T. Sparks, Howard College; Dennis Michaelis, McLennan Community College; Tom Dressler, Panhandle Regional Planning Commission; Norm Haley, Upper Rio Grande Private Industry Council; Jackson N. Sasser; Frank E. Carelli, North American Energy Service; Gary R. O'Connor, O'Connor Insurance; Mike Swanson, Earthgrains; Mary Ann Grams, Blinn College; Dr. Ronnie Glasscock, North Central Texas College; Judge Chuck Superville, Lamar County; Kim Kirchoff, Director of HHS, Representing the Texas Association of Regional Councils; Judge Charles D. Johnson, Dimmit County; Janet Gott, Chair of Texoma Workforce Development Board; Judge Billy J. Gilbert, Cottle County; J.W. Martin, Chairman

of Executive Committee of Nortex Regional Planning Commission; Paul Edwards; Alan Miller, former Executive Director of Capital Area Workforce Development Board; Judge William R. Mitchell, Uvalde County; Judge Ron Harris, North Central Texas; Walter Glenn, Deep East Texas Council of Governments; Judge L.D. Williamson, Red River County; Mayor Kelly Couch, City of Vernon; Mayor Pat Norris, City of Burkburnett; Judge Nick Gipson, Wichita County; John Wroten, Chair, North Central Texas Workforce Development Board; Arthur Pine, Board Chairman of Middle Rio Grande Development Council; Gary Vest, Lamar County Chamber of Commerce; Bonnie Woodfin, Lamar County Coalition of Education, Business and Industry; Curtis Fendley, President of Paris Economic Development Corporation; Robert L. Parker, Parker Agribusiness; Carl Cecil, Liberty National Bank, Max Graxiola, "The Paris News"; JoAnn Parkman, TV Electric; Hip Harper, Harrison, Walker and Harper; Donald G. Wilson, President, Rogers Wade Quality Manufacturers; William R. Gibson, Vice President, We Pack Logistics; Eleanor V. Maddox, Campbell Soup Company; Gary W. Short, Kimberly-Clark; Mike Creamer, Phillips Lighting Company; Richard E. Thomas, Babcock & Wilcox, Gary Cunningham & Ike Jewett, Paris Central Labor Council (AFL-CIO-CLC); State Senator Tom Haywood; Barry Murdock, Texarkana College; Ray Garcia, Texas Association of Community Colleges; Tom Wilkinson, Jr., Brazos Valley Development Council; James F. Ray, Executive Director of Texas Association of Regional Councils; Mr. Walter Diggles, Deep East Texas Council of Governments; Steve Hardy, Dean of Continuing Education at Collin County Community College; Carol LaFleur, El Paso Community College; Julie Fowler, Kilgore Community College; Billy Junge, Deep East Texas Workforce Development Board, Linda K. Davis, Manager of Workforce Development; and Judge Floyd A. (Dock) Watson, Shelby County; JoAnn F. Minnfee, Region 08, and the Workforce Development Legislative Oversight Committee members.

The majority of commenters in support of the amended rule, including Rep. Rene Oliveira and Senator Rodney Ellis, expressed the concern that boards must remain independent and free from undue influence so that the integrity of the workforce development system envisioned by House Bill (HB)1863 was maintained. They wanted to insure that proper checks and balances were in place so that the board could make decision without any conflicts of interest. The commenters wanted the Commission to take all necessary actions to strengthen and give effect to the limitations found within HB 1863.

Three commenters were concerned that if the administrative and fiscal functions are separate from service delivery, the administrator does not have control over services which would result in performance problems. The Commission believes that the structure contemplated by HB 1863 requires the board to be responsible for ensuring that service providers achieve appropriate standards. To accomplish this the board should ensure adequate procedures are in place to monitor service delivery to identify deficiencies and to require appropriate corrective action. Thirteen groups and individuals indicated that changing the rule undermines the flexibility and intent of legislation to return control of government to the local leaders of a community. A resolution signed by the 29 members of the Panhandle Workforce Development Board and the governing body of the Panhandle Workforce Development Consortium were also concerned that proposed changes would infringe on local authority and limit the options available to local workforce development boards and chief elected officials for structuring efficient and effective service delivery systems. In addition, Senator Tom Haywood expressed concern that the proposed rule would require the board to obtain a waiver if a single entity provides both the staffing and other functional operations. The Commission acknowledges that one purpose of the legislation is to grant to local leaders greater flexibility and the authority to determine what services delivery systems best suit their needs. However, the legislation also clearly indicates that some structures are unacceptable unless a waiver is granted by the Texas Council on Workforce and Economic Competitiveness. The waiver rule clarifies and reinforces these statutory provisions. The rule does not prohibit

boards from utilizing certain workforce delivery structures; the rule merely sets forth the procedure to meet the statutory criteria for obtaining a waiver before implementing such structures and clarifies what types of delivery systems require a waiver.

One commenter proposed adding the following language: " A waiver allowing a local workforce board to contract with a singular entity to provide: 1) staffing support to the board, 2) management of the career development center, and 3) operational functions, limited to intake, eligibility determination, assessment, referral, and case management, will be granted for a period equal to that covered by the partnership agreement of the workforce area seeking the waiver as long as an independent evaluation of those operational functions is obtained and conditions described within subsection (e) of this rule are met." The Commission believes that this language is contrary to statutory provisions which require that waivers be granted based on a detailed justification which supports the waiver request.

One commenter proposed the deletion of the sentence "Only under exceptional circumstances will waivers from such prohibitions be allowed[.]" in subsection (a) because there may be an inconsistency within the rules as to the appropriate standard for obtaining a waiver. The Commission agrees and amends the rule accordingly and reiterated that the statutory criteria will be utilized. The commenter also proposed the deletion of proposed subsection (e) (3) relating to the Commission's authority to request documents supporting the waiver request. The commenter was concerned that any additional information required in planning guidelines or workforce development letters, which are not subject to any public review and comment, would be extra, unnecessary work for local boards; and that subsection (e) (1) and (2) are sufficient to determine whether a waiver request is justified and in the best interest of the area served. The Commission's intent in adopting subsection (e) (3) was to incorporate the original subsection (f) (2) (B), which identifies documents that must be submitted with the waiver request, into Commission directive and issuances. This would allow the Commission to elaborate in further detail the types of documents that a board could submit to support its waiver request. It also gives the Commission and boards greater flexibility in identifying and submitting documentation that would be needed to support a waiver request based on the statutory criteria. Five commenters discussed the fact that limited resources in an area may be the driving force behind having one entity performing the three functions: service delivery, board staffing and developmental services, the general sentiment being that allowing one entity to control all facets of the workforce system will save tax dollars and allow for a streamlined system. One commenter believes that use of a single entity is conducive to consolidation of programs. The Commission acknowledges that consolidation, limited resources and efficiencies are a primary concern for local workforce development areas. However, the legislation creating workforce development areas was premised on a checks and balances system of service delivery. By prohibiting boards from providing workforce training and services and requiring an independent staff, the board will not be subject to even appearances of conflicts of interest and undue influences in fulfilling its responsibilities under the legislation.

Some commenters were concerned that the Commission was changing its rule too soon after publication of the original rule and that too many changes undermine the credibility of the Commission. It is the desire of the Commission to provide clear guidance to the boards regarding applicable requirements. However, if there is confusion as to a rule, the Commission must act quickly to clarify the confusion. The Commission notes that the waiver rule is not a new rule, but merely a clarification of an existing rule. The rule had been interpreted by some inconsistently with the Commission's intent in passing the original waiver rule. To ensure there is no confusion in the future, the rule is amended to clarify that intake, eligibility determinations, assessment and referral are

within the definition of workforce training and services. Several commenters were concerned that boards had agreed to form and were moving forward based on their belief that the entity administering or providing one-stop services could also provide board staffing. They stated that this could impact a board's desire to move forward and that it could cause some boards to decertify. Two commenters suggested allowing boards that already have contracts with one entity to keep those contracts in place. They maintain that partnership agreements under current rules designate a single entity to provide the three basic functions. Given their concern on this issue, some of these commenters suggested that a "grandfather" clause be included. The Commission recognizes that the original rule may have been misinterpreted and was the cause of some confusion. However, while some negative ramifications may occur due to this clarification, the Commission may not act beyond statutory limitations. Sections 2308.264, 2308.267 and 2308.312, Government Code, set forth what actions are prohibited unless a waiver is obtained in accordance with the statutory criteria. The Commission is without authority to adopt or interpret a rule contrary to these provisions. One commenter noted that the definitions of "workforce services" and "operational functions" should be clarified. The Commission agrees and believes that the rule clarifies that "operational functions" are a part of "workforce services."

One commenter indicated that if the effective term of an approved plan and budget is more than one year, then the waiver approval should be for a period of one year or less. The Commission believes that waivers should be reviewed and determined on a case-by-case basis and, therefore, does not want to limit its ability to recommend an appropriate duration for a waiver. The Commission believes that this suggestion would be too restrictive and notes that the current language in the rule, which states that "a waiver may be granted for a period less than, but not to exceed, the effective term of an approved plan and budget" allows for greater flexibility.

One commenter suggested that the Commission should maintain an interpretation of the rule that would minimize the potential for conflicts of interest between the board as an administrator and as service provider. Another commenter with a similar view stated that it would lessen the potential for conflict of interest to allow a board to perform "operational function" than to allow those functions to remain with a training provider. The Commission believes that allowing a board to also perform "operational functions" increases the potential for conflicts of interest and, therefore, is adopting the amendments to clarify that a waiver is needed before a board may perform "operational functions." The Commission believes that the amended rule minimizes such potential conflicts of interest.

Several commenters indicated opposition to the rule because they did not want an administrative entity to deliver training, educational and assessment services to community colleges. The Commission agrees and believes the amended rule addresses those concerns.

The amendment is adopted under Texas Labor Code, Title 4, §302.061(a) and §302.063, as amended by Chapter 655, Acts of the 74th Legislature, 1995, which provide the Texas Workforce Commission with the authority to develop objective criteria for the granting of waivers under Texas Civil Statutes, Government Code, §§2308.264, 2308.267, and 2308.312. No other statute, article or code will be affected by this adoption.

§801.2.Waivers.

(a) Purpose of Rule. The Workforce and Economic Competitiveness Act, §§2308.264, 2308.267, and 2308.312, Government Code, Vernon's Texas Codes Annotated, sets forth prohibitions regarding service delivery, board staffing, and developmental services. Only under circumstances that fit the criteria specified in those statutes will requests for waivers be granted.

(b) Independent Service Delivery. A board is prohibited from directly providing workforce training and services, including operational functions normally associated with such services such as intake, eligibility determination, assessment, and referral, unless a waiver is obtained.

(c) Separate Staffing. The board's staff must be employed separately and independently of any person that provides workforce training and services, as described in subsection (b) of this section, unless the board arranges for independent evaluation of any other workforce services provided by the staffing organization and obtains a waiver.

(d) Developmental Services. A person who provides "one-stop" services at a Career Development Center may not also provide developmental services unless a waiver is obtained.

(e) Requesting a Waiver.

(1) Waiver requests should be submitted to the Commission and contain detailed justification as specified in the respective statutes. The Commission will forward a recommendation to the Texas Council on Workforce and Economic Competitiveness for a determination.

(2) In recommending action on such requests, the Commission will apply only the criteria specified in the respective statutes.

(3) The Commission may require a board to submit documentation as outlined in the Texas Workforce Planning Guidelines and/or Workforce Development Letters to support its waiver request.

(f) Duration of Waiver.

(1) A waiver may be granted for a period less than, but not to exceed, the effective term of an approved plan and budget.

(2) A waiver may be conditioned upon the board's completion of measures taken to eliminate the need for a waiver.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. Issued in Austin, Texas, on March 24, 1997.

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