

Texas Business Today

Message to Texas Employers About
COVID-19

Frequently Asked Questions From
Employers On COVID-19

Business and Legal Briefs

Aaron S. Demerson
Commissioner Representing Employers

First Quarter 2020





Commissioner's Corner:

Message to Texas Employers About COVID-19

Dear Texas Employers,

With the uncertainty surrounding COVID-19, the Texas Workforce Commission (TWC) continues to offer Texas employers our full support. From legal questions regarding work-from-home policies to resources for loans, we are here to answer your questions and help to ensure that things go as smoothly as possible. To contact our Employer Hotline, please call: 800-832-9394.

I want to thank Governor Abbott for his leadership in providing support and guidance through his COVID-19 press conferences and his Supply Chain Strike Force, and also for his immediate action in granting TWC's request to waive the one week waiting period for those applying for unemployment benefits.

We have also developed a webpage with resources and information on actions taken by TWC in response to COVID-19. This page will be continuously updated with answers to questions

about operating your business during this time. Please visit: <https://twc.texas.gov/news/covid-19-resources-employers>.

Information about managing multiple layoffs is available at the following site: <https://twc.texas.gov/businesses/mass-claims-unemployment-benefits>. Here you will find information about filing a mass claim for unemployment benefits for your employees and our Rapid Response services.

For information on preventing layoffs by cutting employee hours or furloughing workers, we encourage you to explore shared work programs. These programs are designed to allow employers to supplement their employees' lost wages because of reduced work hours with partial unemployment benefits. For more information, or to apply for a shared work plan, visit <https://twc.texas.gov/businesses/shared-work> or email ui.sharedwork@twc.state.tx.us.

If you need to hire new employees in the face of changing demand, we encourage you to post your positions on WorkinTexas.com or call your [local Workforce Solutions office](#). Both resources can instantly connect you with qualified individuals to ensure you are

meeting customer needs.

Small businesses are the backbone of our great state. We encourage those concerned about operating capital or making the next payroll, to apply for any designated programs under the [U.S. Small Business Administration](#).

TWC will continue to provide up-to-date information on our response to the employment issues facing Texans due to the COVID-19 virus. To stay informed, please be sure to follow our webpage and sign up for updates [here](#) and on Facebook, Twitter, and LinkedIn.

We encourage all Texas employers to follow the [Centers for Disease Control and Prevention](#) guidelines on social distancing, cleaning and disinfecting frequently, and providing teleworking options when available.

Times may be tough, but so are Texans. We thank you for your hard work and investment. We remain prepared to help in any way we can.

Sincerely,

*Aaron S. Demerson
Texas Workforce Commission
Commissioner Representing Employers*

Making Connections Across the State



1. Presented our We Hire Vets employer recognition to VIA Metropolitan Transit at our Texas Conference for Employers in New Braunfels, TX.

2. Keynote speaker at the Texas Association of City and County Health Officials in Houston, TX.

3. Attended the Business PFirst Breakfast in Pflugerville to speak to local business owners on topics including internships, minternships, and apprenticeships.

4. Check signing presentation at Richland College in partnership with the Dallas County Manufacturers' Association, the Garland Chamber of Commerce, and Workforce Solutions Greater Dallas, which will provide training to seven local manufacturing employers.

5. Partnered with First Lady Cecilia Abbott and LifeWorks Austin to kick-off our Foster Youth Transition Center Tour and provide information on the Network of Nurture initiative.

6. Spoke at Park Crest Middle School's African American History Month Assembly. The theme for the assembly was "We Can Do This. Achievement and Caring."

7. Moderated a panel at the Port of Futures Conference on the importance of seaports and workforce development.

8. Met with Texas State Technical College to discuss future partnerships.





Texas Conference for Employers

Please join us for an informative, full-day or two-day conference where you will learn about relevant state and federal employment laws that are essential to efficiently managing your business and employees.

We have assembled our best speakers to guide you through ongoing matters of concern to Texas employers and to answer any questions you have regarding your business.

2020 Conference Locations

- Kilgore.....May 29th
- Laredo.....June 5th
- Beaumont.....June 12th
- Sherman.....July 17th

For more information and registration, visit: www.texasworkforce.org/tbc

Topics include matters such as:

- Hiring Issues • Employment Law Updates
- Personnel Policies and Handbooks •
- Workers' Compensation • Independent Contractors and Unemployment Tax Issues • The Unemployment Claims and Appeals Process • Texas and Federal Wage and Hour Laws



The non-refundable registration fee is \$175 (one day) and \$225 (two days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Conference for Employers, please visit the Texas SHRM website. Also, attorneys may receive up to 5.5 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference, or 11 hours for the two-day conference (one hour of ethics available). Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

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Frequently Asked Questions From Employers About COVID-19

By William T. (Tommy) Simmons / *Legal Counsel to Commissioner Aaron S. Demerson*

Q: I am concerned that my small shop might be ordered to close its doors to control the pandemic. Would I have to pay for unemployment benefits for my employees?

A: If a business shuts down due to a closure order from a governmental entity, Section 204.022(a)(1-2) (see <https://statutes.capitol.texas.gov/Docs/LA/htm/LA.204.htm#204.022>) of the Texas Labor Code may allow an employer to ask for chargeback protection. If that were to happen, you should include a copy of the shutdown order with your response to the unemployment claim and argue that the closure was mandated by a local or state order.

Q: Has TWC waived the one-week waiting period for UI Benefits?

A: Yes, Governor Abbott granted the Texas Workforce Commission's request to suspend the one-week waiting period. Workers in Texas will be able to receive benefits immediately after their unemployment benefit applications are approved.

Q: Can TWC assist us if the pandemic forces a mass layoff?

A: Yes – TWC's Rapid Response Unit can help employers and affected employees access unemployment claim and reemployment services in a very streamlined and efficient manner. For information, see the TWC website at <https://twc.texas.gov/businesses/rapid-response>.

Q: What other alternatives exist to avoid mass layoffs?

A: TWC administers the Shared Work Program, which allows partial unemployment benefits for similarly-situated employees whose hours are reduced by a standard amount between 10 and 40 percent – information about that program is at <https://twc.texas.gov/businesses/shared-work>. If the reduction in hours is necessitated by the pandemic, an employer with a shared work plan can request protection from chargeback of benefits paid to affected employees.

Q:

What can an employer ask for if an employee tells us she is ready to return to work?

A:

A question that might come up is whether it is permissible for an employer to require a doctor's release / fitness for duty certificate or something similar if an employee is returning from an absence caused by something that looks or acts like Covid-19. It would be good to keep in mind that many employees may have financial problems relating to inability to pay to see a doctor, so employers should take that into account, and also that at least under current conditions, medical documentation should be requested only if a person is known to have been exposed to a communicable disease (not just coronavirus, but also things that are just as infectious, such as colds, flu, and other viral pests). Moreover, medical offices are almost overwhelmed, so issuing documentation will not be high on their priority lists, and tests for Covid-19 are not yet widely available. Finally, requests for medical documentation should be done consistently and fairly for all similarly-situated employees.

Q:

Is an employer allowed to send an employee home if they are showing signs of illness, such as coughing, sneezing, or report that they have aches or chills?

A:

Yes, in keeping with an employer's general duty under OSHA to maintain a safe and healthy workplace for employees, employees who appear to be sick may be asked to go home, but do so as politely and discreetly as possible. However, the employer should be consistent and treat all employees who exhibit risky symptoms the same.

Q:

What if we know that an employee has been exposed to Covid-19, but they are showing no symptoms?

A:

Generally, there is no Texas or federal law that would prohibit a company from telling employees to stay home if they have had a higher-than-normal degree of exposure to individuals actually infected with the disease. As noted above, be consistent and do not base self-isolation orders on factors such as race or national origin. There have been scattered reports of ethnic discrimination, particularly against people who look like they might have come from Asia. The EEOC is already warning employers that singling employees out based on ethnic or national origin concerns could trigger a discrimination charge.

Q:

Would the employer have to pay sick leave to that employee?

A:

Yes, if the company offers such paid leave. Paid leave policies should be followed - failure to pay for leave owed under a written paid leave policy is a violation of the Texas Payday Law. A federal bill to require up to 80 hours of paid sick leave for full-time employees, H.R. 6201, has passed Congress and has been signed by the President as of March 18, 2020. The text of that bill is online at: <https://www.congress.gov/bill/116th-congress/house-/6201/text/enr>.

Q:

Could they file unemployment claims and draw unemployment benefits if they are told to go home for medical reasons?

A:

No, if they are receiving paid leave benefits. While on paid medical leave, they would not be considered "unemployed" under TWC laws and would not be able to claim unemployment insurance (UI) benefits. Once the paid leave runs out, they could file unemployment claims.

Q: What if they are not getting paid leave?

- A:** ● If they are on unpaid leave, they could be considered unemployed if they are out long enough to satisfy the test for either partial or total unemployment (for those definitions, see our book for *Texas Guidebook for Employers* online at <https://twc.texas.gov/news/efte/ui-law-eligibility-issues.html#de-fin-of-unemployment>).

Q: Does an employee get unemployment benefits even if they are too sick to work?

- A:** ● Any claimant who is able to file a claim for UI benefits must meet the eligibility requirements in order to actually draw benefits. Most notably, the claimant must be medically able to work. The usual eligibility requirement to search for work has been waived by TWC for the immediate future as part of the pandemic relief effort.

Q: Is there any way an employer can avoid the cost of unemployment benefits?

- A:** ● An employer may be eligible for protection from chargebacks from UI benefits if the evidence shows that the work separation was for medical reasons. However, if the reason for the work separation was merely a cautionary period of time off to minimize potential exposure of others to someone who might be infected, but might not be, chargeback protection would most likely not be extended to the employer. To minimize the chance of unemployment claims being filed, the employer can encourage employees to work from home if the job is such that remote work is possible. Proper recording of work time is necessary, and the employer would need to work with the employees to set up a time-keeping system that functions well and takes all time worked into account.

Q: What other information is on the TWC website about workplace illness issues?

- A:** ● The following topics in our book *Texas Guidebook for Employers* may be useful: https://twc.texas.gov/news/efte/medical_leave_laws.html and <https://twc.texas.gov/news/efte/fmla.html>.

Q: Who do I contact if I have other employment law questions, including COVID 19 guidance?

- A:** ● You can call our Employer Hotline at: 800-832-9394. This line directly goes to the Office of Employers where you can speak to an employment law attorney.

Business and Legal Briefs

By William T. (Tommy) Simmons / Legal Counsel to Aaron S. Demerson

New Marketplace Contractor Rule Is In Effect

The new marketplace contractor rule, called by some the “gig economy” rule, has been in effect for close to ten months as of the writing of this brief, but has not come up much at all in actual cases. This writer has seen Rule 815.134(b) (online at [https://texreg.sos.state.tx.us/public/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=20&ch=815&rl=134](https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=20&ch=815&rl=134)) as an issue in only two cases, and in both of them, TWC held that the workers in question were not “marketplace contractors” because the facts of their work relationships did not meet all nine of the required criteria in subsection (b)(2) of the rule, and in one case, the company using the workers did not meet the definition of a “marketplace platform” because it was actually a temporary help firm. Any company that believes the workers sent out on jobs via an app are really marketplace contractors who are exempt from the definition of “employee” should remember that in order for the exemption to apply, all of the criteria in the rule must be satisfied, not merely “most” of them.

New Payrolling Rule Is a Reality

The new TWC rule pertaining to payrolling (Rule 815.117, online at [https://texreg.sos.state.tx.us/public/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=20&ch=815&rl=117](https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=20&ch=815&rl=117)) is in effect, and employers with common paymaster situations should review that rule and consult their CPA or employment law attorney concerning whether they qualify. As the new rule indicates, companies related by common ownership that have one or more employees who perform services for both entities may choose to have one of the companies report the combined wages to TWC. The brand-new rule includes important definitions and examples of what will apply and what will not apply. Employers may also contact their account examiners at TWC for clarification.

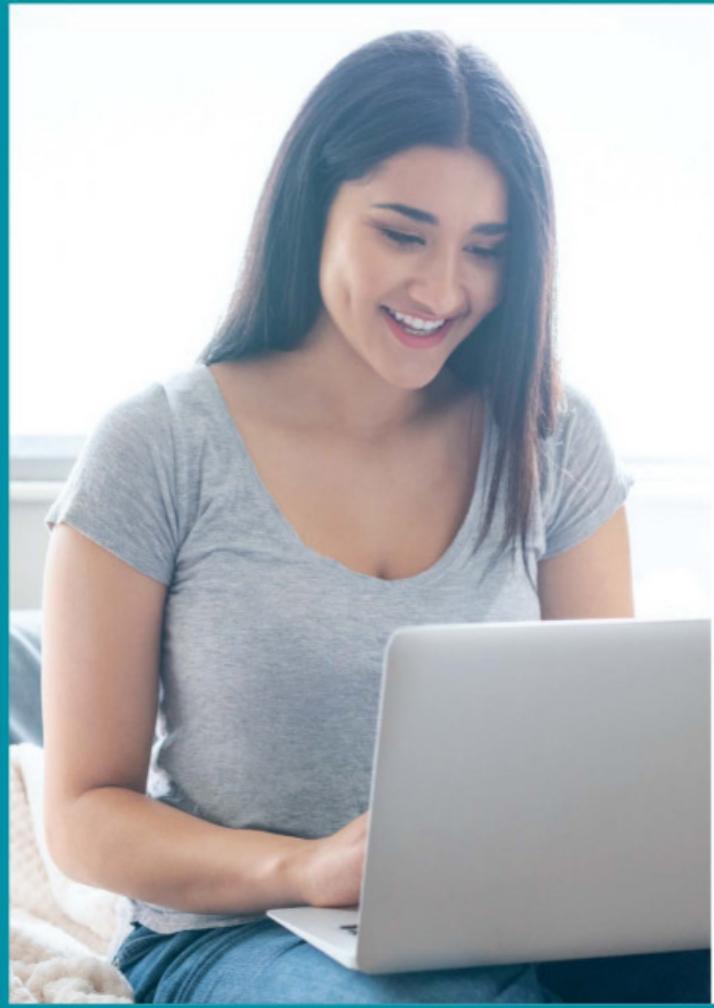
Restroom Breaks

Hopefully, every employer is aware of the OSHA regulation requiring employers to allow reasonable opportunities to go to the restroom during the workday, using clean, sanitary, and private facilities (see https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=22932&p_table=INTERPRETATIONS). From a wage and hour standpoint, such breaks count as work time (see U.S. Department of Labor regulation 29 C.F.R. §



The new marketplace contractor rule, called by some the “gig economy” rule, has been in effect for close to ten months.

785.18 at https://twc.texas.gov/news/efte/wh_part785.html#785_18). Sometimes, questions arise if employees spend too much time on restroom breaks. These days, excessive time in the restroom often has something to do with cell phone use. Regulating that would be a matter of policy. An employer can legally restrict the use of personal electronic devices in restrooms on its premises, but should be consistent in enforcing such a rule. An interesting “slant” on this issue came out recently in an article at <https://www.siliconrepublic.com/careers/toilet-game-of-thrones-uk>, which mentioned a new kind of toilet that is built with a slight incline, apparently just enough to make sitting there not so tempting after a certain amount of time. Regarding those who seem to literally camp out in restrooms, that would be a matter for individual discussion, which of course should be private, diplomatic, and confidential. Ultimately, if an employee claims a medical need to take prolonged restroom breaks, the employer would have the right to require the employee to furnish medical documentation of such a need. The documentation should not include medical details, but should be enough to show that a medical health professional has certified that the employee has a genuine need to visit the restroom more often or longer than what might seem normal. Since some longer restroom breaks may be the result of a disability protected under the Americans With Disabilities Act (ADA), it would be important for an employer to consult a private-sector employment law attorney for an analysis of what the important legal issues are.



Respond your way to the 2020 Census.

By April 1, 2020, every home will receive an invitation to participate in the 2020 Census. You will have three options for responding. All of them are easy!



The 2020 Census marks the first time you will be invited to respond online—even on your mobile device. The online form is available in many different languages. Visit 2020CENSUS.GOV for more information about responding online.

2020CENSUS.GOV
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Texas Business Today

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