

Texas Business Today

Second Quarter 2016

Strengthening
the Workforce
through
Small Business

Ruth R. Hughs
Commissioner
Representing Employers

Dress Codes & Grooming Standards ■ Medical Inquiries & Doctor's Notes ■ New DOL Rules

Building Partnerships to Keep Texas Strong

Commissioner's Corner



Dear Texas Employer,

In March 2016, Governor Greg Abbott established the Tri-Agency Workforce Initiative to assess local economic activity, examine workforce challenges and opportunities, and consider innovative approaches to meeting the state's workforce goals. The commissioners from all three agencies, Texas Education Agency, Texas Higher Education Coordinating Board, and Texas Workforce Commission, have been traveling the state to attend a series of Statewide Regional and Education Workforce meetings to assess the needs of job creators and ensure Texas is meeting the needs of employers.

Our first meeting was in Midland, followed by San Antonio, Houston, and Dallas, which led to many successful conversations ranging from the biggest hurdles in finding labor, to ideas on improving talent development strategies. We want to learn what is working best for employers and how they are interacting and using our systems. We need to understand how we can enhance our services and connections to the economic developers in local communities. "By establishing this initiative, the State of Texas now seeks to ensure that the needs of both its growing workforce as well as new and existing businesses are met and each



Commissioner Hughs speaking at the Houston Tri-Agency Initiative Meeting, April 29.

are prepared to successfully operate in an ever-changing 21st century economy," said Governor Abbott.

Governor Abbot charged the Commissioners to identify public and higher education initiatives, work with industry and local stakeholders to assess the local workforce, evaluate current agency efforts, identify gaps in services to Texas veterans, and to make recommendations that build the skills of the Texas workforce and support the 60x30TX plan.

A vital part of the Tri-Agency Workforce Initiative is identifying gaps in service to our Texas Veterans. Texas is home to 1.7 million veterans and we want to make sure they have a seamless transition when entering civilian life and know about all of the high-wage, high-demand opportunities throughout the Lone Star State. Veterans are a great resource for employers because of the unique knowledge, skills, and abilities they acquire while serving in the military. We want to do all we can for our nation's heroes and this enhanced effort will provide more opportunities for transitioning service members to be connected with education and employment resources at the earliest stage of departure from the military.

The Department of Assistive & Rehabilitative Services Program (DARS) will officially be joining the Texas Workforce Commission team on September 1, 2016. We are working tirelessly to secure a smooth transition. Bringing workforce and disability

services together through this transfer will enhance both agencies through strengthened collaboration and in-house experts.

May 1-7, 2016, was National Small Business Week. A week that is very important to us because we believe that small businesses are the backbone of the Texas economy and they play a key role in the success of the state. There are an estimated 2.4 million small businesses in Texas and they employ about half of the state's private workforce. Each and every small business is an important part of our continued economic success. We are proud of your hard work, your determination and your perseverance.

In this issue of *Texas Business Today*, you will find an article from Governor Abbott highlighting Texas small businesses in the global market, as well as some helpful articles discussing medical inquiries and doctor's notes, dress codes and grooming standards, and the latest developments on Texas and federal employment laws.

Chief Executive Magazine has voted Texas the best state in the country to do business for the 12th consecutive year! Thank you for all of your hard work! 🇹🇽

Sincerely,

Ruth R. Hughs
Texas Workforce Commission
Commissioner Representing Employers

Connecting Texas Small Businesses to Global Markets



Global tech is big business for small businesses in Texas.

A delegation of Texas small businesses recently returned from a historic trade mission to Hannover, Germany, the site of the world's largest and most influential global trade event for industrial technology, Hannover Messe 2016.

Texas small businesses in the energy, tech, and manufacturing sectors promoted their products and services to more than 200,000 potential global trade partners, thanks to a partnership of the Governor's Office of Economic Development and Tourism, the Texas Economic Development Corporation, and the Texas Workforce Commission.

Opening the door to new business opportunities like this is one reason why the Consumer Technology Association recently awarded the State of Texas with its Innovation Champion Award.

Texas is Transforming into the New Tech Mecca

Texas is the top high-tech exporting state, beating California for three years in a row.

Texas is also No. 1 for cloud, network support, and data services jobs.

Texas ranks second for overall high-tech employment and high-tech firms, for gaming and entertainment software jobs, and for engineering and electrical engineering doctorates awarded.

And the IT and software sector is No. 1 for foreign direct investments in Texas.

Texas Means Business

Businesses succeed in Texas because we've built a framework that allows free enterprise to flourish — less government, lower taxes, smarter regulations, and right-to-work laws help business owners and entrepreneurs grow jobs in Texas.

Texas also offers lower operating costs with no personal or corporate income tax, and we just slashed the business margins tax by 25 percent. Plus, we're speeding up permitting and reining in regulations.

Texas is Making Strategic Investments in Education

To ensure your workforce needs are met, I've established a Tri-Agency Workforce Initiative to assess local economic activity, examine workforce challenges, and consider innovative approaches to align Texas public education in an ever-changing 21st century economy.



The initiative is spearheaded by TEA Commissioner Mike Morath, THECB Commissioner Raymond Paredes, and TWC Commissioner Andres Alcantar, who are hosting a series of statewide Regional Education and Workforce meetings and will report back their findings and recommendations.

And finally, to spur continuing economic expansion we are committing \$450 million to elevate our university research programs, including the Governor's University Research Initiative, providing matching funds to attract even more Nobel laureates and National Academy members. They will develop top research centers and partner with the private sector to develop the next generation of innovations.

We want your business to succeed. When you succeed, Texas succeeds.

For upcoming meetings of the Workforce Initiative, visit www.twc.state.tx.us/events.

For exporting and trade opportunities, visit www.TexasWideOpenForBusiness.com. 

Greg Abbott
Governor of Texas



TEXAS BUSINESS CONFERENCES

EMPLOYMENT LAW UPDATE

Please join us for an informative, full-day conference where you will learn the 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.

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as: Hiring Issues, Employment Law Updates, Personnel Policies and Handbooks, Workers' Compensation, Independent Contractors and Unemployment Tax Issues, Unemployment Claim and Appeal Process, and Texas and Federal Wage and Hour Laws.

The non-refundable registration fee is \$125 (one-day) and \$199 (two-days). Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resources professionals attending this conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Business Conference, please visit the Texas SHRM website. Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

2016 CONFERENCE DATES

- College Station June 10**
- McAllen June 24**
- Amarillo July 1**
- Arlington (2-days)..... July 21-22**
- Fredericksburg August 5**
- Abilene August 19**
- The Woodlands September 1**
- Midland September 16**
- Mesquite September 30**

**To register, visit www.texasworkforce.org/tbc
or for more information call 512-463-6389.**

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Making Connections Across the State



1. Mercy Kids Rehab Center participating in Teacher Externship Program with Workforce Solutions South Texas – Laredo
2. Skills Grant presentation onsite at M&G Chemicals – Corpus Christi
3. Commissioner Hughes honored local employers at the 15th Annual Awards Banquet – Lubbock
4. Addressing attendees at a Texas Business Conference – Corpus Christi
5. Nicky Ooi, CEO, instructing how to make a 3-ring binder at the South Texas Lighthouse for the Blind – Corpus Christi
6. On location at the Craft Training Center Coastal Bend during the SkillsUSA Competition – Corpus Christi

Business and Legal Briefs

The following is a quick overview of important recent employment law developments and upcoming enforcement actions:

New EEOC reporting

requirements: The EEOC has finished taking comments regarding proposed changes to its EEO-1 reporting form that would require employers to report the W-2 wages and work hours of employees, in order to facilitate enforcement of wage discrimination laws. For more information, see www.eeoc.gov/eeoc/newsroom/release/3-16-16.cfm.



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NLRB union rights case

ConAgra Foods, Inc. v. NLRB, 813 F.3d 1079, 2016 U.S. App. LEXIS 2838, 205 L.R.R.M. 3407 (8th Cir., Feb. 19, 2016): The 8th Circuit Court of Appeals held that the NLRB's rule, that in order to be a "solicitation," an employee must actually present a union card to another employee for a signature, was unreasonable. It is sufficient for a solicitation that an employee talk to coworkers during working time and seek support for a union.

FLSA tipped employee case

Oregon Rest. & Lodging Ass'n v. Perez, 2016 U.S. App. LEXIS 3119, 26 Wage & Hour Cas. 2d (BNA) 10 (9th Cir., Feb. 23, 2016): According to the majority's opinion, the DOL had the authority to issue a regulation to the effect that the tipped employee regulations, including the one restricting application and use of a

tip pool, apply even to employees who are paid the full minimum wage, instead of a subminimum cash wage plus a tip credit, if they receive tips from customers. As an indication that the question may one day have to be settled by the U.S. Supreme Court, the 9th Circuit decision was rejected by a district court in Utah dealing with the same tip credit issue: *Brueningsen v. Resort Express, Inc.*, 2016 U.S. Dist. LEXIS 39747 (D. Utah Mar. 24, 2016).

Administrative overtime exemption case

Lutz v. Huntington Bancshares, Inc., 2016 U.S. App. LEXIS 3860, 26 Wage & Hour Cas. 2d (BNA) 160 (6th Cir. Ohio 2016): The 6th Circuit Court of Appeals held that mortgage underwriters who primarily served as residential loan underwriters met the requirements for the administrative overtime exemption because their work was directly related to the

bank's general business operations, and they exercised sufficient discretion and independent judgment in how they did their work. The court compared the underwriters favorably to insurance claim adjusters, who are generally found to qualify for the same exemption.

New overtime exemption regulations effective on December 1, 2016:

The DOL announced on May 17, 2016 that the minimum salary for a salaried exempt employee, currently \$455/week, will increase to \$913/week effective December 1, 2016. DOL's announcement, complete with links to detailed further information, is online at www.dol.gov/whd/overtime/final2016/. 

William T. (Tommy) Simmons
Senior Legal Counsel to
Commissioner Ruth R. Hughes

Medical Inquiries and Doctor's Notes: Employer Rights and Obligations

Many employers believe that it is illegal to request a doctor's note from employees who are out due to illness or claim to have a medical condition requiring accommodation. The truth is, not only do employers have the right to make certain inquiries and ask for a doctor's note, but they may be obligated to do so in order to reasonably accommodate an employee who is out for medical reasons. Where employers get into trouble is when they ask for more than what is needed to make business arrangements while the employee is absent or on light duty. The following information will explain under what circumstances an employer may ask for a doctor's note and what information employers can request in that note.

Rule #1: Do not ask for medical information that is not job-related or consistent with business necessity. This is the main point to remember because it helps explain why so many questions are impermissible. Employers should avoid asking for more details than needed to resolve the issue at hand. For employers, the purpose of making medical inquiries and asking for documentation is threefold: 1) to verify that the employee was out for a medical reason, 2) to determine how to reasonably accommodate the employee for a medical condition, and 3) to keep the business running smoothly while accommodating the employee. Questions that do not answer these issues are impermissible.

Rule #2: Do not ask what you already know. In many cases, asking for medical documentation may not be necessary if the illness or disability is obvious and accommodations can



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be made through simple workplace adjustments reached by mutual agreement. Only if the employer has a good-faith belief that the employee is being dishonest or is self-diagnosing can an employer ask for confirmation of the medical condition. The employer would have the burden to show that the question was permissible based on objective evidence. For example, if a pregnant employee requests accommodation, do not ask for medical documentation confirming that she is pregnant if that is already known or obvious. Rather, the focus should be on obtaining documentation regarding her limitations resulting from the pregnancy.

Rule #3: Only ask for a general doctor's note when approving typical sick leave days. If an employee is out due to a common illness (for example, the flu or a cold), the employer may ask for a doctor's note verifying that the employee saw the doctor on that day. Asking for any additional details would likely be considered an unlawful medical inquiry. If the employer does not usually require such a note, it can

ask for a note under suspicious circumstances. For example, if the employee is always sick on a Friday or a Monday, the employer may ask for a doctor's note. Employers should be able to produce documentation confirming the established pattern to justify the request.

Rule #4: Comply with the Americans with Disabilities Act (ADA) when dealing with impairments requiring reasonable accommodation. The ADA requires employers with 15 or more employees to reasonably accommodate an employee with a medical condition, unless doing so would create an undue hardship for the employer. Employers often need medical documentation in order to comply with this requirement. The following is a breakdown of how it works.

First, if the employee claims to have a disability, but it is not obvious or known, the employer may ask for documentation to confirm the impairment, which can be physical or mental in nature.

If the impairment is known or obvious, the employer may need clarification on which major life activities are affected by the medical condition. Major life activities encompass a wide range of actions, including but not limited to physical actions such as bending, lifting, walking, standing, and breathing, or mental actions such as reading, concentrating, thinking, and communicating. The employer would also need to know the length of time that the employee will need accommodation (e.g.: not able to lift more than 10 pounds for the next 6 weeks).

In sum, in order to comply with the ADA, employers may ask for documentation confirming the impairment and describing the accommodations needed for whatever length of time. If dealing with an extended absence, the doctor's note should provide a return to work date and should state whether the employee is released to full duty or light duty. If the employee is released on light duty, the note should clarify what restrictions the employee will be under and for how long. For this reason, employers should provide a list of the employee's job duties to the doctor to allow for an accurate assessment.

Medical documentation can be insufficient if it does not specify the functional limitations, accommodations needed, length of time, or appears fraudulent or from the wrong kind of health care professional. Under these circumstances, the employer is obligated to promptly explain why the information is insufficient and give the employee time to provide the necessary documentation in a timely manner. If the interactive process stalls because the employee does not provide you with the requested paperwork, document it. The employer should be prepared to show that any breakdown in the interactive process occurred due to the employee's willful lack of participation.

Rule #5: Do not ask an employee to explain the nature or severity of the illness, and do not ask for a diagnosis. This is an unlawful inquiry under the ADA because having knowledge of the specific illness or diagnosis is not information the employer needs to know in order to accommodate the employee and make business arrangements. As stated above, employers should never ask for this information unless there is a good-faith belief based on objective evidence that a legitimate reason exists to question the existence of the disability.

Rule #6: Do not tolerate gossip about the employee's medical condition, even if the employee has revealed the information willingly to coworkers. Medical information remains confidential, whether or not the employee discloses it voluntarily. Therefore, employers must refrain from sharing or discussing this information with anyone other than those who are on a need-to-know basis. Releasing information either negligently or willfully can result in civil or criminal liability for each separate disclosure. Therefore, employers should keep an eye out for gossip and take disciplinary action against any staff engaged in this impermissible activity.

Rule #7: Do not ask for complete medical records. The focus is to reasonably accommodate the employee due to the impairment at issue. Asking for complete records goes beyond the limited scope of information necessary to make the accommodation.

Rule #8: Do not ask employees what medications they are taking. Again, this is outside the scope of permissible questions because it is a preemptive move and does not give the employer the information truly needed to make business arrangements.

There is an exception to this rule. Employees in jobs affecting public safety (for example, safety officers and truck drivers) may be required

to notify the employer when they are taking medications that may affect their ability to perform the job safely.

Rule #9: Do not ask only for a full duty medical release. Many employers will only allow an employee to return to work with a full medical release. This could violate law, as the ADA requires employers to reasonably accommodate employees who are under light-duty restrictions as well.

Rule #10: Do not ask for genetic information of the employee or the employee's family members. Doing so would violate the Genetic Information and Nondiscrimination Act (GINA). If the employer uses a medical information request form for the business, specific safe-harbor language can be placed in the request to prevent liability under GINA. The language is available for viewing here: www.law.cornell.edu/cfr/text/29/1635.8.

Rule #11: The employer must pay all medical costs when sending the employee to the employer's doctor of choice.

The protocol on this rule is simple. First, allow the employee time to provide documentation. If the information is insufficient, give the employee another chance to get the documentation. If that produces no results, ask the employee for written permission to discuss the matter with the doctor directly. If the employee refuses, the employer may then require him or her to see the employer's doctor of choice. Document the entire process and only allow the doctor to address the functional limitations associated with the employee's impairment.

Following the above rules can help shield the employer from liability down the road, so employers should take care to document every step taken in this process carefully. For further guidance on these matters, employers may contact our employer hotline at **1-800-832-9394**. 

*Velissa R. Chapa
Legal Counsel to
Commissioner Ruth R. Hughes*

TWC Launches Electronic Correspondence Service for Employers

In February, Texas Workforce Commission (TWC) launched Employer Benefits Services (EBS), which provides additional online unemployment benefits services for Texas employers. The first service is Electronic Correspondence. Employers now have electronic access to their unemployment benefits documents from a secure inbox using their EBS account at Texasworkforce.org/EBS. TWC will continue to mail documents through the U.S. postal service for employers who do not wish to sign up for this service.

What Electronic Correspondence Does

Electronic Correspondence (EC) allows employers to receive most, but not all, of their unemployment benefits notices and forms electronically, such as the Notice of Application for Unemployment Benefits, Notice of Potential Chargeback, claim determinations, and more. Documents not included are appeals correspondence, tax notices, and forms.

When new correspondence is available, TWC sends the employer an e-mail notification. Employers then log on to EBS to view their online mailbox.

In addition to providing convenient access to benefits documents, this service provides a safe and secure portal for employers to better manage unemployment claim issues.



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How Electronic Correspondence Works

To sign up, an employer must provide a valid e-mail address and agree to TWC's Electronic Correspondence Terms and Conditions.

After the employer signs up for EC:

- TWC sends a courtesy e-mail to notify the employer when new correspondence has been sent to their inbox.
- The employer has the option to view correspondence in a Portable Document Format (PDF) image or an accessible HTML for people who are visually impaired.

The employer is responsible for regularly checking their online inbox, regardless of whether they receive an e-mail notifying them of new mail.

Registration/Opting In

Before signing up for EC, employers must register to use the EBS portal. However, if they already have a User ID and Password for the

Unemployment Tax Services system, they can use that ID to log into the portal. Otherwise, they should sign up for a user ID by providing a TWC employer tax account number, Federal Employer Identification number and, if TWC has sent an unemployment benefits document in the last two weeks, they may need information from that document.

Although more than one person may log on to an employer's account, the first person to sign up becomes the administrator for the employer account.

Opting Out

Employers may opt out at any time. If an employer opts out, TWC will resume mailing correspondence to the mailing address on file.

For More Information

Call the TWC Tele-Center at **866-274-1722** to speak with one of our customer service representatives. 

Unemployment Insurance Information Support Unit

Frequently-Asked Questions from Employers

This is another in a continuing series of answers that the attorneys in Commissioner Hughs' office give to employers for the most frequently-asked and important questions that we receive.

Q: *We are developing a grievance policy for employees to follow if they have a complaint regarding work. What should we look out for? Also, do I need a grievance form for employees?*

A: Even small companies should have an organized way to handle grievances or complaints. A good grievance policy will cover the following points: the grievance procedures are part of an overall dispute resolution program; the company encourages employees to use the grievance process as a constructive alternative to actions that would make others feel harassed or threatened; even verbal grievances and the steps taken to resolve them will be documented; treat all grievances as seriously and consistently as possible; allow multiple levels of review or action; allow employees to go outside the "chain of command" in case their grievance involves the one with whom a grievance must be filed; and maintain documentation relating to grievances in files that are separate from the regular personnel files for the employees involved. Your company does not have to have a special form for grievance filings. However, in the interest of keeping the process consistent and maintaining standard documentation (which helps in the event that discrimination or other types of claims are filed), having a standard form for submission of

grievances would be a good idea. If someone refuses to use the standard form, have the person dealing with the grievance fill out the form on the employee's behalf, in keeping with the statement in the policy that any grievances made known to supervisors will be documented.

Q: *We currently don't use E-Verify to verify an employee's eligibility. Is it mandatory for all employers? Also, when I take the documents for I-9s, I believe I read online that I don't have to photocopy the documents. Is that true?*

A: E-Verify is mandatory only for Texas state agencies. It is optional for private-sector companies. Photocopying of I-9 documents is not required, but is permitted. The U.S. Department of Homeland Security guidance on that issue indicates that if your company keeps copies of some employees' documents, it should keep copies for all employees.

Q: *Do we have to continue the E-Verify system for as long as we are in business? Apparently, it was required for a job a few years back and we were told that once we started, we could not stop, but would like to see if that still holds true.*

A: The USCIS website indicates that an employer may choose to stop using the E-Verify system, but there is a specific procedure for doing that. See the information under "How do I request termination of my company's E-Verify account?" at www.uscis.gov/faq-page/e-verify-employers#t16969n47169.



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Q: *We use a time clock to record employees' work times. Do employees have to be paid for every minute after they clock in? We are thinking about rounding up or down to the nearest five minutes. Is it correct to assume that they have to be paid for their time if they clock in 10 +/- minutes early/late without permission from supervisor?*

A: Employees do not have to be paid for every minute they work. Time clock rounding is permitted under U.S. Department of Labor regulations, as discussed in our book *Especially for Texas Employers* in the following topic: www.twc.state.tx.us/news/eftc/c_time_clock_rounding_.html. The main idea behind the DOL regulations is that if an employer rounds employees' times, it should do so up or down on a consistent basis using the smallest time interval used by a company for payroll purposes, and the results should even out over time so that an employee is not always losing time. Concerning permission to be early or late, regardless of whether they have permission from their supervisor to clock in at a certain time, employees are entitled to be paid for the time they actually work, modified only by the normal rules on time clock rounding as noted above. Of course, the issue of whether employees should be paid or not paid based on time clock

rounding procedures is separate from the issue of whether they should face some kind of corrective action for creating additional work and trouble for supervisors and payroll staff when they fail to follow the company's work schedule and timekeeping policies. For a sample policy of that type, see www.twc.state.tx.us/news/efte/work_schedule_policy.html in the book. That could be used in conjunction with a related policy on attendance, an example of which appears in the book at www.twc.state.tx.us/news/efte/attendance_policy.html. The basic legal issues involved with disciplinary procedures are outlined in the topic at www.twc.state.tx.us/news/efte/discipline.html.

the check and deposit it in a timely manner. If he files a wage claim under the Texas Payday Law, you could respond by pointing out that a wage claim under that law must be filed within 180 calendar days of the date on which the wages were due, and it would seem that that particular deadline has already passed. Under the federal law, the statute of limitations for filing a claim for minimum wage and overtime pay is two years after the wages should have been paid, assuming that the employer acted in good faith, but the deadline is extended to three years in the event of an intentional or reckless violation of the FLSA. That having been said, the U.S. Department of Labor generally

minus the stop-payment fee authorized by the employee.

Q: *We have a training manual we would not want our competitors to get a hold of. Can we withhold final payment until we receive it back if an employee leaves? What's the protocol for that kind of situation?*

A: The Texas Payday Law would not allow an employer to hold an employee's final paycheck until the employee returns the company's training manual. As the law sees it, the employee's duty to return company property is separate from your company's duty to pay him his wages. It would be legal to incentivize an employee to return company property by designing a wage agreement with a provision something like the following: "I understand and agree that my pay rate for my final pay period will be minimum wage, unless I fulfill the following conditions within 24 hours of my last day of work: 1) return all company property that has been issued by the company to me; 2) give my supervisor all of my passwords for accessing the files, folders, directories, and storage media that I have used or accessed during my employment with the company; and 3) [any other condition] your company considers important. In the event that I satisfy all of those conditions within the stated timeframe, my pay rate for the final pay period will be the same as my pay rate for the pay period immediately preceding the final pay period." Keep in mind that it is very difficult to prevent various forms of misuse of company documents, and almost impossible to achieve complete information security these days, so even if an employee gives the appearance of giving documents back, he or she may have copied the information anyway.



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Q: *I have an employee that just recently found a pay check from 2014 that he never cashed. Do we have to rewrite the check to him since it has been more than a year since this check was written?*

A: As long as you have reliable documentation proving that your company delivered the wages in a timely manner by one of the allowable methods (see www.twc.state.tx.us/news/efte/delivery_of_wages.html), you are not required to reissue a paycheck, since it was the employee's responsibility to properly handle

does not regard an expired paycheck as evidence that the employer failed to follow the law, since the responsibility for properly handling the paycheck is on the employee, once the pay has been properly issued. Of course, if you are satisfied that the employee is telling the truth, your company could do what some other companies do in similar situations and tell the employee that as long as he agrees in writing to have the stop-payment fee deducted from a reissued paycheck, the company will get the bank to cancel the first check and will then issue a new paycheck,



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Q: *Our small company's president is proposing a stipend for health insurance for our employees. The stipend would be extra pay, and employees would be responsible for signing up on their own. I think that's about \$12K a year for each employee (we have 8 employees). Any thoughts on how to get employees insurance?*

A: The kind of payment that the company president is talking about would be classified as “wages” and would be subject to the same wage reporting and payroll tax procedures as each affected employee's regular pay would be. Aside from that, the company could investigate the possibilities for employees obtaining their own insurance through a health insurance exchange, as suggested on the WebMD website at www.webmd.com/health-insurance/tx/texas-health-insurance-marketplace. That site has some basic information and includes links to the various alternatives.

Q: *We have someone who is helping us out for one day in April, 2016. Should I treat them as an employee and have them complete an application, W-4, submit to the attorney general, etc? The individual does not have their own company, so I don't think they would be classified as a contractor.*

A: You correctly determined that the temporary employee would not be an independent contractor. They would be an employee, so go ahead and do all of the normal new-hire paperwork for the employee, including the I-9. If that person works only one day in April and files an unemployment claim before October 1, 2016, your company would not be financially involved (because it would not be a base period employer) and would have no chargeback liability. If the employee waits until the fourth quarter of 2016 or later to file an unemployment claim, any chargeback liability that your company might have would be based on one day's worth of pay, i.e., any chargeback would be extremely small.

Q: *We are having problems with the front desk checkout people not running tips, which is causing unhappy providers as they are not getting paid for their tips. In some industries (such as restaurants), tips not run are deducted from the paycheck of the person who did not run the tips. I understand this also is a practice in some salons. What are the legalities? Can we legally deduct tips not run from the front desk's paycheck?*

A: The kind of problem you describe falls into the category of an error, so the question would be to what extent it is legal to make an employee pay for an error attributable to the employee. A deduction from pay for a reason like that would be legal under the following conditions: a) the deduction may not take the employee's pay below minimum wage; and b) the employee has given the employer written authorization to make a deduction like that. The written authorization for the deduction needs to be as specific as possible, both as to the amount that the deduction is likely to be and the purpose for which the deduction will be made. You can find examples of deduction authorization language in the sample wage deduction authorization agreement in our book *Especially for Texas Employers* at www.twc.state.tx.us/news/efte/wage_deduction_authorization_agreement.html. Of course, it would probably not be very effective to carry out such deductions on a more-than-occasional basis. If your company finds itself doing such deductions often, that would be a sign of deeper problems, such as an employee who persistently fails to follow simple procedures, or else a credit card processing system that needs to be redesigned to make avoidable errors like that less likely. 🇺🇸

*William T. (Tommy) Simmons
Senior Legal Counsel to
Commissioner Ruth R. Hughs*

Keeping You Posted on Workplace Posters

The posting of workplace related posters is one compliance measure that is mandatory for Texas employers, but has also been the source of some confusion. This article will explore which posters are required for employers in the Lone Star State, where to get them, and the potential consequences for incidents of non-compliance.

The Workplace Poster Requirement

First, all Texas employers must display posters with information on the Worker's Compensation Act, the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Fair Labor Standards Act (FLSA), the Employee Polygraph Protection Act, and the Occupational Safety and Health Act (OSHA). Most employers in Texas will also be required to have posters relating to the Texas Payday Law. Additionally, employers who have fifteen (15) or more employees will be required to display the "Equal Employment Opportunity Is the Law" notice, which contains information on the Equal Employment Opportunity Commission and the Americans with Disabilities Act. Moreover, employers who are subject to the Texas Unemployment Compensation Act will have to display posters dealing with unemployment benefits. It is also important to note that the U.S. Department of Labor (DOL) makes posters that are required for many employers (a link to their poster webpage can be found below). For more information about DOL required posters, you can contact the help line at **866-4-USA-DOL (866-487-2365)**.

Next, public employers such as state or local governmental entities have special posters that directly apply to their places of business. Specifically, posters about the Texas Whistleblower Act and the Texas Hazard Communication Act need to be

on hand.

It is important to remember this list is not exhaustive. Employers in some job industries will be subject to broader poster requirements than others. Employers seeking further guidance on which posters to display at their businesses may call the Texas Workforce Commission's (TWC) labor law unit at **800-832-9243 or 512-475-2670**.

Where to Get the Posters

We receive many calls on our employer hotline (**800-832-9394**) from concerned employers who notify us that they received an intimidating compliance letter from an "official agency." Usually, this letter warns of penalties, sanctions, and other types of misfortune if the employer does not comply with the workplace poster requirements. Then, in almost instant fashion, the tone of the letter turns from alarming to resourceful by offering the employer laminated, colored, and compliance-ready posters for a fee. These types of letters are mostly the work of private vendors who sell workplace posters for profit.

While there are penalties for not having the required posters at your place of business, an employer is not obligated to pay a vendor to acquire them. If the employer prefers the laminated, colored, and fancy versions of the posters – by all means, that is definitely the employer's prerogative. Alternatively, employers can obtain the required workplace posters for free and directly from TWC and DOL at **www.texasworkforce.org/posters** and **www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm**, respectively. Furthermore, if employers feel that they are being harassed or treated inappropriately by a vendor, TWC's Fraud and Program Abuse hotline is available at **800-252-3642**.

How to Display Workplace Posters and the Consequences for Non-Compliance

Employers should place the posters in the most heavily trafficked areas of the office so that all employees get the benefit of knowing that the posters exist and can learn from the material on them. Additionally, some employers have unique business setups that deviate from the traditional office environment. For more information on virtual offices, professional employment organizations, and other unique workplace poster situations, please visit **www.twc.state.tx.us/news/efte/required_posters.html**.

The penalties for workplace poster violations can range from citations to monetary fines. In addition, employers who are under state or federal contracts may jeopardize their chances of being awarded future contracts for deliberate cases of non-compliance.

In Conclusion

Employers need to be aware that workplace poster requirements do exist and that there are penalties for non-compliance. However, employers can satisfy these requirements for free and are not required to purchase workplace posters from a third party vendor. As such, employers who are knowledgeable about the ins and outs of poster compliance will be in a great position to avoid penalties and keep a well-informed workforce.

To Order Free Posters

TWC Posters: **www.twc.state.tx.us/businesses/posters-workplace**

DOL Posters: **www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm** 

*Mario R. Hernandez
Legal Counsel to
Commissioner Ruth R. Hughs*

From Tattoos To Nail Tips: Can Employers Limit Employees' Self-Expression?

Self-expression in one's appearance has become more inventive, bold, and creative in the past few years. There was a time when only certain groups of people sported tattoos, prominent piercings, brightly colored hair, or daring wardrobe and makeup styles. Nowadays, thanks to influence from the entertainment industry and social media, these types of personal expression are much more mainstream.

While employees or job applicants may be showing up to work or job interviews displaying various forms of body modifications or levels of ornamentation, not all employers may feel ready to embrace such individuality and freedom of expression. This raises the question: Can an employer place limits on an employee's appearance?

Dress Codes and Grooming Standards

Generally, employers are able to implement and enforce dress codes and grooming standards for their employees, as long as they are enforced in a non-discriminatory fashion. In addition, it's legal for employers to have different rules and standards for men and women, as long as the rules don't impose a greater burden on one gender over another. In other words, it would not be legal to impose and enforce a dress code for only one gender and not another. See: *Especially for Texas Employers*: www.twc.state.tx.us/news/efte/dress_codes.html.

Because it's reasonable for employers to implement rules and policies related to employee appearance in order to promote legitimate business interests, such as employee safety, minimizing



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disruptions, or presenting a professional image, employers should have a basic understanding of how the law treats different grooming and appearance issues.

Hairstyles and Hair Color

Employers can legally require that employees comply with certain hair length, style, and color guidelines. For example, it's permissible for employers to have policies that allow women to have long hair but require men to maintain theirs short. In addition, depending on their occupation, employers may require employees with long hair, whether male or female, to pin their hair or restrain it in such a way that it doesn't pose a safety risk. Employers may also insist that their employees' hair be clean, combed, and well groomed.

As to the bright, rainbow colors that some employees choose to display on their heads, employers can prohibit certain hair colors. In general, employers with hair color

policies which place limits on the hues considered acceptable in the workplace would not be in violation of current Texas or federal laws.

Facial Hair

It is not illegal to require men to shave their faces if the employer strives for appearance standards which highlight a clean-shaven face. However, employers should be aware that certain religions require men to maintain beards or prohibit the removal or altering of facial hair. In addition, employees who suffer from pseudofolliculitis barbae, a medical term for persistent irritation caused by shaving, may ask to be excused from such a requirement. Because this condition affects a majority of African American men, enforcement of such a policy could have a disparate impact on men of a certain race. Therefore, when faced with employees asking to be excused from a clean-shaven face policy due to religious or medical reasons, employers should consider reasonably accommodating these requests in order to avoid risk of a claim of religious or racial discrimination.

Makeup

Employers can dictate a woman's use of make-up in the workplace—whether that means requiring employees to wear a certain minimum amount of color cosmetics or, on the contrary, limiting the quantity or type of products that an employee uses. While such policies seem to be inextricably tied to gender and gender stereotypes, courts have not struck down these types of policies. Employers still have discretion in dictating how much or how little artificial cosmetic enhancement is essential to promoting their business image. Currently, employers can

require that female employees wear makeup while prohibiting use by male employees.

Piercings

Employers can prohibit the display of certain piercings while at work based on an employer's desired business image or safety concerns or regulations. While pierced earlobes



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are commonplace on women, nowadays it's not unusual for both men and women to have multiple piercings per earlobe. In addition, some individuals have piercings on other parts of their bodies, including visible parts of the head and face, such as the lip, the nose, the eye brow, the outer ear, or the tongue. Although employers may place limits on this form of expression, as with other forms of body art, employers should be aware that some piercings may be part of a religious practice and that employees may seek religious accommodation.

Tattoos

Like with piercings, it's also not unusual for individuals with tattoos to have multiple tattoos. When these tattoos are visible, and may detract from the professional image that the

employer considers essential to its business, the employer may require employees to cover their tattoos or ensure that they are not visible. This may be more difficult than it sounds if an employee has tattoos on his or her face, neck, or hands. In addition, even if an employer does not require that employees cover their tattoos, depending on the subject matter of the tattoo, if the image displayed is offensive to co-workers or possibly contributes to a hostile work environment, an employer can insist that a certain tattoo be covered. Of course, employers must always remember that employees may claim that certain tattoos are religious in nature and ask for religious accommodation.

Fingernails

A person's canvas for personal expression reaches all the way down to the tip of the fingers and toes. Nail art and ornamentation has evolved over the last several years to include acrylic, gel, and plastic nails, as well as just about every color of nail enamel under the sun. Employees may come to work with fingernails over an inch long and encrusted with jewels, rhinestones, or glitter. However, depending on the type of work that employees perform, such as jobs that require manual dexterity, or where safety concerns are paramount, it may be impractical or impossible to perform the required duties with long or ornate nails. In these types of cases, employers may reasonably regulate an

employee's nail appearance, including length, shape, and embellishment, in order to advance business needs and objectives.

Conclusion

There are many legitimate business reasons for implementing and enforcing specific dress codes or grooming standards in the workplace. These range from trying to promote a business' public image to preventing accidents or injuries. However, since existing laws and court cases do not automatically prohibit appearance-based rules and policies regarding body ornamentation or modification, employers have broad discretion in drafting and implementing these rules or policies.

As a result, employers should be aware that certain policies or requirements, although legally allowed, could be interpreted as discriminatory in nature or have a discriminatory impact. If so, these policies could run afoul of an employee's religious practice or racial and ethnic identity. Therefore, it's best for employers to keep legitimate business interests in mind when thoughtfully and prudently drafting appearance-based rules and standards. 🇹🇽



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*Elsa G. Ramos
Legal Counsel to
Commissioner Ruth R. Hughs*

The Texas Economy Soldiers On

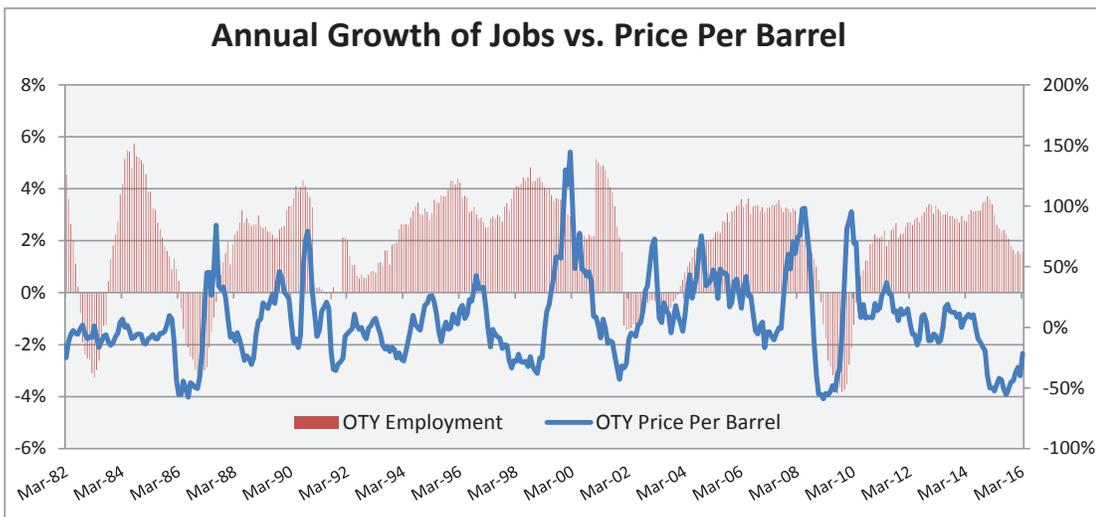
Despite falling oil prices, Texas employers continue to create jobs, making the economy stronger. As of March 2016, Texas added jobs in 22 of the past 24 months. Over the year, employment has remained positive for 71 consecutive months, with 185,000 jobs being added since March 2015. The addition of jobs in Financial Activities, Professional Business Services, and Education and Health Services sectors have helped offset the loss of energy sector jobs.

During the 1986 oil bust, Texas' unemployment rate rose dramatically, peaking at 9.2 percent. Since oil prices started dropping in the middle of 2014, the unemployment rate in Texas has held steady between 4.3 and 4.6 percent. Most recently, Texas recorded a 4.3 percent unemployment rate in March 2016, seven-tenths of a percentage point lower than the US rate.

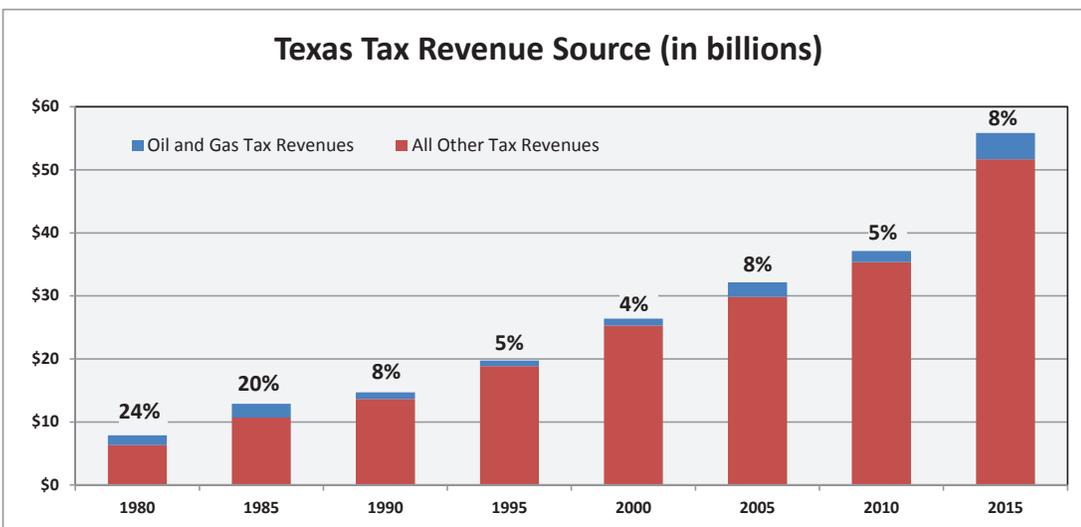
In 1980, oil and natural gas production revenues accounted for 24% of all state collected revenues. Today, that figure has dropped to 8%.

With a more diverse economy, Texas is in a better positioned to navigate decreasing energy prices, something it was not able to do in the past. 🇹🇽

Mariana Vega
Labor Market and Career Information



Source: Texas Comptroller of Public Accounts



Source: TWC/BLS Current Employment Statistics and U.S. Energy Information Administration

Recent Regulatory Activity at the U.S. Department of Labor

Joint Employment Guidance

On January 20, 2016, The U.S. Department of Labor (DOL) issued its Administrator's Interpretation No. 2016-1 (AI) on the issue of "Joint employment under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)" (see www.dol.gov/whd/flsa/Joint_Employment_AI.htm). The guidance discusses the similarities and differences between "horizontal joint employment," covered in Part 791 of the DOL's wage and hour regulations, and "vertical joint employment," which one might find in certain labor contractor or staffing firm relationships. The issue of joint employment is very important, since in a joint employment situation, both employers are individually and severally liable for the entire amount of wages due to an employee under the FLSA. That means that if one company fails to pay the wages, the other joint employer can be required to pay the employee, and it would be up to the paying employer to seek repayment from the non-paying employer.

As the AI notes, the FLSA and MSPA define "employee" as "any individual employed by an employer," and "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." The same laws state that "employ" means "to suffer or permit [an individual] to work."

The AI explains that applying the DOL's "economic realities" test under the FLSA, the concept of joint employment is broader than it is under many other laws, such as the National Relations Labor Act (NLRA) and Occupational Safety and Health Administration (OSHA).

DOL regulation 29 C.F.R. § 791.2(a) (horizontal joint employment) states that a single worker may be employed by two or more employers at the same time. This kind of joint employment arises due to the type and degree of association between two employers that are nominally separate. The most relevant factors mentioned in the regulation are 1) whether the two employers have an agreement to share an employee's services; 2) whether one employer is acting in the interest of the other employer in relation to the employee; or 3) whether the two companies are or are not completely disassociated with respect to a worker's employment and share control over the employee through a control or shared control relationship with each other. That third factor is similar to the "single employer" concept used in other employment laws (see items 2 and 3 at www.twc.state.tx.us/news/efte/alternatives_to_hiring.html#co_employment). The AI includes a detailed list of factors that are useful in evaluating the degree of association between potential horizontal joint employers, such as common ownership; overlapping officers, directors, or management; shared

operational control; centralized control over labor relations; supervisory relationship between the two entities; shared supervision over the employees; whether the two entities share a "pool" of employees; common customers or clients; and whether any agreements exist between the two potential joint employers.

The AI offers the following examples of situations showing joint employment and no joint employment:

- **Joint employment:** An employee is employed at two locations of the same restaurant brand. The two locations are operated by separate legal entities (Employers A and B). The same individual is the majority owner of both Employer A and Employer B. The managers at each restaurant share the employee between the locations and jointly coordinate the scheduling of the employee's hours. The two employers use the same payroll processor to pay the employee, and they share supervisory authority over the employee. These facts are indicative of joint employment between Employers A and B.
- **No joint employment:** In contrast, an employee works at one restaurant (Employer A) in the mornings and at a different restaurant (Employer B) in the afternoons. The owners and managers of each restaurant

know that the employee works at both establishments. The establishments do not have an arrangement to share employees or operations, and do not otherwise have any common management or ownership.

These facts are not indicative of joint employment between Employers A and B.

Concerning the concept of vertical joint employment, the AI notes that “[i]n contrast to the horizontal joint employment analysis, where the focus is the relationship between the employers, the focus in vertical joint employment cases is the employee’s relationship with the potential joint employer and whether that employer jointly employs the employee.” This type of joint employment typically arises when one employer supplies labor to another, and the employee is economically dependent upon both companies. The vertical joint employment situation must be distinguished from the situation in which an intermediary employer is actually an employee of the potential joint employer. In such a situation, all employees working for the intermediary are also employees of the joint employer as well, and no joint employment analysis needs to be made. If the intermediary is not an employee, though, the economic realities test must be applied. The AI cites a seven-factor test found in MSPA regulation 29 C.F.R. § 500.20(h)(5)(iv): directing, controlling, or supervising the work performed; controlling employment conditions; permanency and duration of relationship; repetitive

and rote nature of work; integral to business; work performed on premises; performing administrative functions commonly performed by employers. The guidance also cites economic realities tests from several different court cases.

The AI gives the following examples of situations showing vertical joint employment and no vertical joint employment:

■ **Joint employment:**

A laborer is employed by ABC Drywall Company, which is an independent subcontractor on a construction project. ABC Drywall was engaged by the General Contractor to provide drywall labor for the project. ABC Drywall hired and pays the laborer. The General Contractor provides all of the training for the project. The General Contractor also provides the necessary equipment and materials, provides workers’ compensation insurance, and is responsible for the health and safety of the laborer (and all of the workers on the project). The General Contractor reserves the right to remove the laborer from the project, controls the laborer’s schedule, and provides assignments on site, and both ABC Drywall and the General Contractor supervise the laborer. The laborer has been continuously working on the General Contractor’s construction projects, whether through ABC Drywall or

another intermediary. These facts are indicative of joint employment of the laborer by the General Contractor.

- **No joint employment:** A mechanic is employed by Airy AC & Heating Company. The Company has a short-term contract to test and, if necessary, replace the HVAC systems at Condor Condos. The Company hired and pays the mechanic and directs the work, including setting the mechanic’s hours and timeline for completion of the project. For the duration of the project, the mechanic works at the Condos and checks in with the property manager there every morning, but the Company supervises his work. The Company provides the mechanic’s benefits, including workers’ compensation insurance. The Company also provides the mechanic with all the tools and materials needed to complete the project. The mechanic brings this equipment to the project site. These facts are not indicative of joint employment of the mechanic by the Condos.

Persuader Rule

Two of the main laws dealing with unions and collective bargaining rights are the NLRA, enforced by the National Labor Relations Board (NLRB), and the Labor-Management Reporting and Disclosure Act (LMRDA), enforced by the U.S. Department of Labor (DOL). In past

issues, we have written about the NLRB's guidance on matters such as pay-discussion policies and employees' rights when using social media. Now, it is DOL's time to be noticed. On March 24, 2016, DOL published its final "Persuader Advice Exemption Rule," which went into effect April 25, 2016 (online at www.gpo.gov/fdsys/pkg/FR-2016-03-24/pdf/2016-06296.pdf). That document notes that the new rules will apply to persuader activities occurring on or after July 1, 2016. The rule impacts DOL's interpretation of the so-called "advice exemption" in Section 203(c) of the LMRDA. As a general matter, employers and their consultants must report to DOL any persuader activities involving direct contact with employees, but in the past, there was an exemption for advice given by the attorneys and consultants to employers regarding how to persuade employees from joining or supporting a union, as long as the employer was free to accept or reject the advice, and the attorney or consultant did not have direct contact with employees concerning the union campaign. The new rule substantially reinterprets those exemptions, making "indirect" persuader activities reportable via the new revised reporting forms. As seen in the new reporting form LM-20, the reportable activities include "drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees; drafting,

revising, or providing a speech for presentation to employees; drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees; drafting, revising, or providing website content for employees; planning or conducting individual employee meetings; planning or conducting group employee meetings; training supervisors or employer representatives to conduct individual or group employee meetings; coordinating or directing the activities of supervisors or employer representatives; establishing or facilitating employee committees; developing employer personnel policies or practices; identifying employees for disciplinary action, reward, or other targeting; conducting a seminar for supervisors or employer representatives; speaking with or otherwise communicating directly with employees; and other" activities. As DOL explains it on its website at www.dol.gov/olms/regs/compliance/ecr_finalrule.htm, the rule will help ensure "that employees are given more information about the source of (union avoidance) campaign material, which helps them make a more informed choice in exercising their rights." The new interpretation from DOL has gained notice from business groups, bar associations, and some states. As of the writing of this article, three lawsuits have been filed by business groups

and bar associations: *Associated Builders and Contractors of Arkansas, et al. v. Perez, et al.*, Case No. 4:16-cv-00169-KGB (E.D. Ark., filed March 30, 2016); *NFIB, TAB, et al. v. DOL, et al.*, Case No. 5:16-cv-00066 (N.D. Tex., filed March 31, 2016); and *Labnet, Inc. et al. v. DOL, et al.*, Case No. 0:16-cv-00844-PJS-JSM (D MN, filed March 31, 2016). Due to the complexity and importance of the issues involved, any employer that seeks any kind of advice from a third party on how to deal with union-related efforts should consult an experienced labor law attorney before taking any action. 🇺🇸

William T. (Tommy) Simmons
Senior Legal Counsel to
Commissioner Ruth R. Hughs

Texas Business Today

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Fax: 512-463-3196 Email: employerinfo@twc.state.tx.us

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