

Texas Business Today

Chair Ruth R. Hughs
Commissioner Representing Employers

Choose Managers Wisely

Pushing Pause: The Laws on Employee Breaks

Poor Job Performance: Is it Misconduct in an Unemployment Claim?



30th

Anniversary

Issue



Congratulations to the 31 Texas employers who received our We Hire Vets employer recognition in Killeen, TX. Workforce Solutions Central Texas hosted the event to recognize their local employers, such as Seton Medical Center Harker Heights (pictured left).

Commissioner's Corner: Texas Continues to Receive Top Accolades

Dear Texas Employer,

Welcome to our 3rd quarter, 30th Anniversary issue of *Texas Business Today*! Over the last 30 years, this publication has been a reliable resource for our Texas employers and has covered a number of topics ranging from the most complex to the simplest employment law issues. During that time, many issues have included articles from guest contributors, including leading employment law attorneys who provided their own interesting perspectives on important questions.

In new developments, on August 1st, Governor Greg Abbott designated me to serve as Chair of the Texas Workforce Commission. I am honored to accept this position and will work to ensure our workforce system provides value to all Texans.

Texas is leading the nation in many categories and continues to receive accolades. Just last month, CNBC announced Texas as America's Top State for Business, and WalletHub named Texas the #1 state to start a business in 2018.

Our state continues to demonstrate its appeal to entrepreneurs starting new businesses while supporting existing companies in expanding their payrolls. We are committed to supporting these Texas businesses with a skilled workforce that is unmatched throughout the nation. This support, along with a continued positive business climate, has kept Texas as the number one state to do business year after year.

In June, I attended the first-of-its-kind White House Science, Technology, Engineering, and Math (STEM) Summit to share Texas' success stories and best practices. As a state, we want to make sure our STEM programs meet the needs of employers and provide the necessary tools needed to prepare students for future careers in innovative industries.

To support these efforts, we are excited to roll out our new Texas Industries Clusters campaign this fall.

The campaign will encourage students to explore pathways in key industry clusters, including STEM.

TWC also continues to recognize employers for our *We Hire Vets* program for those whose workforce is comprised of at least 10% military veterans.

I want to congratulate Workforce Solutions of Central Texas for recognizing 31 local employers who have gone above and beyond to hire our nation's heroes. The number of employers recognized continues to increase and we want to keep that number growing.

In addition to our Texas Business Conferences, we will host a *TX Hires Vets* Forum in partnership with Gulf Coast Workforce Solutions, NextOp, and the Texas Veterans Commission. The event will take place on October 10th in Houston and will help employers recruit and retain veterans for their workforce. For more information on this forum, see the flyer on pg.15 or visit: <http://bit.ly/TexasHiresVetsForum>.

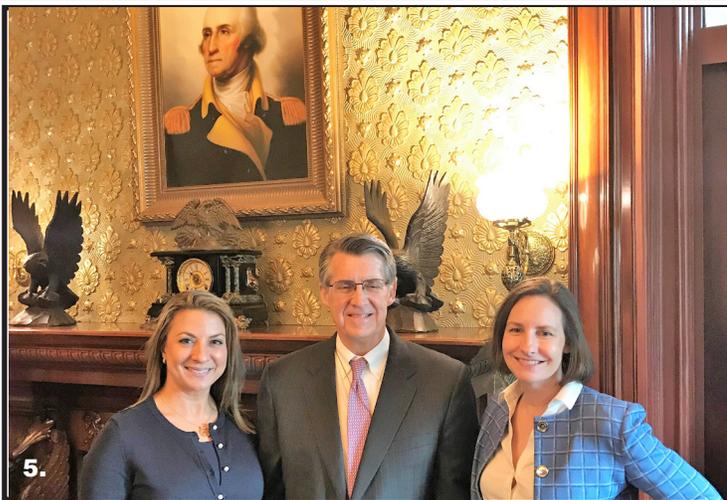
In this issue of *Texas Business Today*, we provide helpful articles discussing laws on employee breaks, information on the new Austin paid sick leave ordinance, and the most frequently asked questions from employers.

Whether you are a first-time subscriber of *Texas Business Today* or you have been with us for 30 years, thank you for reading! My office is committed to being your #1 resource as a Texas employer.

Sincerely,

*Chair Ruth R. Hughes
Texas Workforce Commission
Commissioner Representing Employers*

Making Connections Across the State



- 1.** Dyess Air Force Base hosted our quarterly Texas Transition Alliance Meeting to discuss best practices for our transitioning services members.
- 2.** Grant awarded to Manufacturing Consortium Partners, Richland College, and Workforce Solutions Greater Dallas, which will provide technology training and help maintain a highly skilled workforce.
- 3.** Closing the Digital Divide panel at the Texas Rural Challenge, hosted in New Braunfels, discussed integrating new technologies in rural Texas.
- 4.** Congratulations to the students who attended the Governor's Science & Technology Champions Academy at Southern Methodist University.
- 5.** Joining leaders from all 50 states at the White House for the first Federal STEM Education summit along with Mike Reeser, TSTC Chancellor, and Angela Farley, CFO Dallas Regional Chamber.
- 6.** Tommy Simmons, our Senior Legal Advisor, was recognized with the J. Eldred Hill, Jr. Award at the 2018 National UI Conference, for his dedicated service to the employer community.
- 7.** Congratulations to the new graduates of Project Search at the Dell Seton Medical Center at the University of Texas.



TEXAS BUSINESS CONFERENCES EMPLOYMENT LAW UPDATE

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.

2018 Conference Dates

Amarillo.....September 21

College Station.....September 28

For a list of our 2018 conference locations, visit:

www.texasworkforce.org/tbc

Or for more information, call: **512-463-6389**



Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and 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 \$125 (one day) and \$175 (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. 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. 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.

CONTENTS

02

Commissioner's Corner

03

Making Connections
Across the State

05

Austin's New Paid Sick
Leave

07

Choose Managers
Wisely

09

Pushing Pause: The
Laws on Employee
Breaks

12

Poor Job Performance:
Is it Misconduct in an
Unemployment Claim?

14

Business and Legal
Briefs

18

Frequently Asked
Questions from Employers

Austin's New Paid Sick Leave

William T. Simmons / Legal Counsel to Chair Ruth R. Hughs

On February 16, 2018, Austin, Texas adopted Ordinance No. 20180215-049 and became the first Texas city to require employers with employees working in the city to provide paid sick leave to those employees. Important note: Implementation of this ordinance has been postponed, i.e., is on hold, due to a pending appeal, as explained on the City of Austin website at <http://austintexas.gov/earnedsicktime>, and Austin employers should check that website frequently for updates.

Unless invalidated by a court, the new ordinance will require most companies with workers in Austin (16 or more employees) to provide up to 64 hours, or 8 days, of paid sick leave each year. The leave will be accrued at a rate of one hour for every 30 hours an employee works. Companies with only 15 or fewer employees only have to provide 75% of that total time each year, i.e., 48 hours of paid sick leave, which equals six paid sick leave days. There are no exemptions for part-time workers.

Employers would not be able to ask for medical documentation unless the absence is for four days or longer. Thus, it could be possible for employees to take paid sick leave for undocumented absences of three days or less at a time, and the employer would have to take the employee's word for it that the reason for the absence qualifies for the payment of sick leave. The ordinance does not have a provision that would prevent an employer from imposing appropriate disciplinary action if it has clear proof that an employee has actually falsified a report of an otherwise qualifying sick leave absence. Of course, the burden would be on the employer to prove such a thing.

The paid leave would be available not only for the employee's own medical issues, but also for dealing with the medical issues of the employee's family members, or with related problems such as domestic violence affecting the employee or a family member.

Regarding what family members are covered, the Austin ordinance's definition is broad, including anyone related to the employee by blood,



Photo by iStock/Getty Images

which could include not only immediate family members, but also grandparents, grandchildren, aunts, uncles, great-aunts, great-uncles, nephews, nieces, cousins to the n-th degree, great-nephews, great-nieces, great-grandparents, great-grandchildren, and relatives with even more distant relationships. Aside from blood relatives, "family member" can include people unrelated by blood or marriage, as long as the employee can show some kind of close family-like connection to the individual.

Concerning proration, the only proration is what is provided in Section §4-19-2(A), which provides that "[a]n employer shall grant an employee one hour of earned sick time for every 30 hours worked for the employer in the City of Austin. Earned sick time shall accrue only in hour-unit increments. There shall be no accrual of a fraction of an hour of earned sick time."

The accrual of paid sick leave begins



Photo by iStock/Getty Images

immediately after the employee begins employment. If the employee’s “term of employment” is at least one year, the employer may restrict the employee from using any of the accrued sick leave during the first 60 days of employment. How the one-year “term of employment” will fit with the concept of employment at will is very unclear – that is one of the unclear and untested concepts in the ordinance that could lead to claims of violations.

Government agencies are not covered by the ordinance. Likewise, independent contractors and unpaid interns are not covered. Temporary employees from staffing firms would be covered by their staffing company employers, not by the client companies of the staffing firms.

The paid leave would be paid at the rate of pay that the employee would have earned if the time off had been worked, exclusive of overtime and tips. Employees who are paid solely with commissions and who do not earn a guaranteed hourly wage or salary must be paid at least the Texas minimum wage (currently, \$7.25/hour) for each hour actually taken as paid leave.

Businesses with existing paid sick leave policies that provide at least the required amount of paid time off for sick leave do not have to add anything to their policies. The ordinance adds that employers may grant more paid sick leave than the ordinance requires.

There is a delayed coverage period for very small businesses with fewer than six (6) employees – such small employers will have until October 1, 2020 to begin paying sick leave benefits.

The ordinance prohibits any kind of retaliation against employees who use or attempt to use paid leave under the ordinance. Austin’s EEO / Fair Housing Office will handle any complaints of paid sick leave denials or retaliation. There is a potential fine of \$500 for a violation, but fines will not be imposed until June 1, 2019 or after, unless the violation involves retaliation, in which case the fines begin immediately in the event that a court decision upholding the ordinance becomes final.

There are many other detailed provisions in the ordinance, but the above items summarize the most important points. Various news media and law firms have useful reports about the ordinance that can be found online. Some state leaders have voiced their disagreement with the ordinance and have indicated that they may support legislation that would limit such ordinances in Austin and other cities that may be considering similar action, but since no such legislation could become effective earlier than the next time the Legislature meets (January – May, 2019), Austin employers will need to be prepared to implement paid sick leave under the ordinance in the event that a court decision upholding the ordinance becomes final. 🇹🇽



Choose Managers Wisely

Elsa G. Ramos / *Legal Counsel to Chair Ruth R. Hughs*



Photo by iStock/Getty Images

We've all had one: a bad manager. Choosing managers is one of the most important decisions employers can make. Managers and supervisors need to do more than just tell people what to do and need to know more than the mechanics of performing a job.

Often employers promote a good employee to a management or supervisory position only to find out later that they have turned a good employee into a poor manager and ineffective managers can be costly in more ways than one.

The following is a baker's dozen of a manager's most common duties, which, if not performed well, could result in economic harm or legal liability for employers.

- 1** Ensuring that goals or objectives are met and that work is being performed according to employer expectations.
- 2** Monitoring employee schedules and managing timekeeping requirements.
- 3** Enforcing policies and handling employee discipline.
- 4** Acting as a role model of employers' policies and values.
- 5** Hiring and firing employees.
- 6** Training employees effectively.
- 7** Communicating with employees on behalf of the employer, re: issues/problems/concerns/successes.
- 8** Communicating with the employer on behalf of the employees, re: issues/problems/concerns/successes.
- 9** Ensuring that employees have the tools they need to successfully carry out their jobs.
- 10** Maintaining confidentiality of both employer and employee matters, as appropriate.
- 11** Exercising independent judgment regarding a myriad of work issues.
- 12** Putting aside personal feelings in the interest of advancing the employer's business interests.
- 13** Acting in the employer's best interest while in compliance with local, state, and federal laws.

Managers who are deficient in these areas expose employers to multiple avenues for liability. Not being on board with a company's values, for example, may harm an employer's reputation in the community and its relationship with customers or clients, since a manager speaks for the employer. Poor handling of employee timekeeping opens employers to potential wage claims, as well as claims under the

jobs. Bad managers lead to disgruntled employees, which in turn lead to complaints, lack of motivation and engagement, and finally to employee resignations. While many employers have experienced the high cost of turnover, they may not understand that most issues with employee morale stem from managers who are not able to meaningfully interact with employees. Managers and employees do not need

"EMPLOYEES QUIT THEIR MANAGERS, NOT THEIR JOBS."

to be friends, but employees should feel respected and valued by their managers.

To that end, in order to successfully carry out their duties,

Fair Labor Standards Act for failure to properly pay employees.

Managers who are not able to maintain boundaries between professional and personal relationships, and who let their personal feelings affect how they treat employees or handle employee matters, expose themselves and the business to multiple causes of action, such as sexual harassment, retaliation, and discrimination claims. Those managers who do not understand the laws involved in hiring and firing could engage in discriminatory practices; and poor handling of a termination could result in an unfavorable unemployment claim, which increases an employer's tax burden.

While the potential for legal liability can seem daunting, not all potential harm comes from legal action. A company's bottom line could be negatively affected as well. Employee productivity, as well as the quality of goods and services, all suffer when a manager does not ensure that the work product meets expectations. After all, a company's success is not built on producing a poor outcome. In addition, lack of proper training and necessary equipment may lead to employee injuries or damage to property, which are added costs to those already incurred for substandard quality in goods and services.

Of course, one must not underestimate the cost associated with unhappy employees. It has been said that employees quit their managers, not their

managers need to possess certain character traits, because any good manager's foundation is one of character. A search of the internet will reveal many articles devoted to the many qualities and characteristics found in good managers. And while reasonable minds may differ, the following three traits encompass crucial characteristics necessary to carrying out managerial functions to the benefit of employers and employees alike: integrity, a sense of accountability, and the capacity for fruitful collaboration.

Good managers should lead by example and act as role models for employees. They should clearly and effectively communicate an employer's vision and guide employees to fulfillment of the company's mission. The right person can instill loyalty and a sense of purpose, because employees know that they will be treated fairly, consistently, and with respect. The wrong person can result in unwanted and unnecessary problems, such as employee turnover, low productivity, unhappy clients or customers, and a myriad of potential legal claims and liability. Bottom line: when choosing a manager, choose wisely. 🇺🇸

Integrity	Accountability	Collaboration
the quality of being honest and having strong moral principles	the quality of being accountable; especially: an obligation or willingness to accept responsibility or to account for one's actions	to work jointly with others or together to complete a task or achieve a goal

Pushing Pause: The Laws on Employee Breaks

Velissa R. Chapa / Legal Counsel to Chair Ruth R. Hughs

Take a moment to remember the games we enjoyed as children. Red rover, tag, thumb war, hopscotch—we played whenever possible. Some games like “telephone” were especially thrilling; it showed us how easily a statement of “I like mac and cheese on Tuesdays” could turn into “I like masking bees for toothaches.” While fun, “telephone” also taught us an important lesson: do not always trust what you hear.

As adults, following that lesson is easier said than done. Employers have constant exposure to information via the internet, the news, and those around them. It is easy for employers to receive misinformation, and one of the most commonly misunderstood topics involves employee breaks. For those who are curious, wonder no more. Here are the facts.

1 Are breaks required by law?

No. There is no federal or Texas law that requires employers to provide breaks (absent a few exceptions—see #4). This includes smoking breaks, rest breaks, coffee breaks, and even meal breaks. While many employers believe that employees are entitled to two ten-minute breaks per day, that is not the law. Employers have the authority to determine how many breaks are allowed per day, when they occur, how long they are, and where they may be taken.

However, employers should know that not allowing employee breaks could lead to issues. For one, a lack of breaks could contribute to substandard performance due to fatigue. It could also lead to workplace complaints. As employees have a federally-protected right to discuss working conditions with one another¹, employers are prohibited from forbidding such discussions. Further, the Occupational Safety and Health Administration (OSHA) rules require employers to provide a safe and healthy working environment. Therefore, while bathroom breaks are not technically required by law, failing to provide such a break could result in an OSHA violation.

2 Must I pay employees for breaks?

It depends on the type of break and its length. Any break under 30 minutes is compensable. Meal breaks of 30 minutes or more are not compensable as long as the employee does not perform any work during that time. If an employee performs work during a lunch break, the time becomes compensable.

To prevent employees from working during a lunch break, employers may have a policy requiring employees to leave their workstations during lunch. Violation of the policy may result in disciplinary action.

3 Can I require employees to clock out for all breaks?

Yes, even when the employer knows that the breaks would be compensable. Two 10-minute breaks can easily turn into two 15-minute breaks. Employers have the right to monitor employee break times to ensure that they are not being abused.



Photo by iStock/Getty Images

4 Are there any exceptions to these rules?

Yes, there are a few exceptions to the general rule that employers do not have to provide employee breaks.

a. Nursing Mothers

Federal law requires employers to allow reasonable break times for nursing mothers to express breast milk for their babies. Employers must allow these breaks during the first year following the birth of the child for non-exempt employees. It is also a best practice to extend these rules to exempt employees. The breaks must be provided as frequently as needed, and nursing mothers must have a private, non-restroom place where they will not be disturbed. However, unlike ordinary rest or coffee breaks, nursing breaks are not compensable. If a nursing mother uses one of her regular breaks as a nursing break, that time would be compensable. Employers with less than 50 employees are excused from this requirement if compliance would cause an undue hardship, which would be the employer's burden to prove.²

b. City Ordinances

Some Texas cities have implemented their own laws on breaks for employees who work in construction. For example, Austin and Dallas have city ordinances that entitle construction workers to at least one 10-minute break every four hours.³ Employers may wish to review their local city ordinances for any special rules.

c. Reasonable Accommodation

The Americans with Disabilities Act requires employers with 15 or more employees to reasonably accommodate employees with disabilities.⁴ Therefore, if an employee requires additional breaks as a form of reasonable accommodation, the employer must comply with the request unless doing so would pose an undue hardship.⁵

5 Conclusion

For a business to run smoothly, it is imperative that employers avoid accepting misinformation as truth. For more information on employee breaks, employers may contact our TWC employer hotline at 800-832-9394. 🇺🇸

¹See EMPLOYEE RIGHTS,

<https://www.nlr.gov/rights-we-protect/employee-rights> (last visited July 12, 2018).

²See Nursing Mothers, TEXAS WORKFORCE COMMISSION,

http://www.twc.state.tx.us/news/eftc/nursing_mothers.html (last visited July 13, 2018).

³See Rest Break Ordinance,

<http://www.austintexas.gov/department/rest-break-ordinance> (last visited July 13, 2018);

see Ordinance No. 29965, OFFICE OF CITY SECRETARY (Dec. 12, 2015),

<http://citysecretary.dallascityhall.com/resolutions/2015/12-09-15/15-2268.pdf>

⁴See Accommodations, UNITED STATES DEPARTMENT OF LABOR,

<https://www.dol.gov/odep/topics/Accommodations.htm> (last visited July 13, 2018).

⁵See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

<https://www.eeoc.gov/policy/docs/accommodation.html> (last modified Oct. 22, 2002).

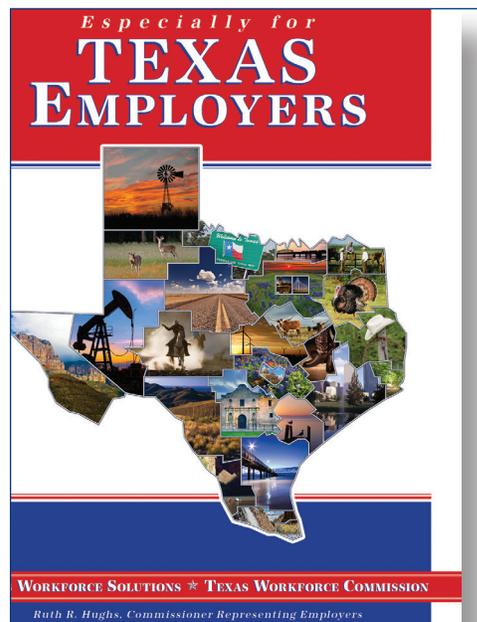


Photo by iStock/Getty Images

Especially for Texas Employers

The most widely-used employment law resource in Texas

Designed for Texas employers, this resource from the Office of Employers at the Texas Workforce Commission includes a wealth of both basic and advanced information about the most important Texas and federal employment laws that every employer must know.



The book's organization is simple and follows the four main phases of work relationships:

- Hiring
- Pay and policies
- Work separations
- Post-employment claims and lawsuits

The book also includes:

- Sample forms and policies
- Training materials on employment law

Especially for Texas Employers is available at no cost to employers in a variety of formats, as noted below:

- **PRINT:** Order a bound copy by mail (“Tax Department, Texas Workforce Commission, 101 E. 15th Street, Room 504, Austin, TX 78778”), fax (512-463-3196), or click the link “To get a print version ...” on the web page at www.twc.state.tx.us/news/efte/tocmain2.html.
- **PDF:** Go to: <https://twc.texas.gov/news/efte/efte.pdf>
- **E-BOOK:** The PDF works well as an e-book on any mobile device with PDF reader software.
- **ONLINE:** The full book, complete with a detailed index and separate pages for each topic, is available online at www.twc.state.tx.us/news/efte/tocmain2.html.
- **WEB APP:** The Texas Business Conference Companion web app at texasworkforce.org/tbcapp has a direct link to the book *Especially for Texas Employers* and includes all of the employment law utilities found in the online book. The web app works on any mobile device using any mobile operating system.

Poor Job Performance: Is it Misconduct in an Unemployment Claim?

Mario R. Hernandez | Legal Counsel to Chair Ruth R. Hughs

Many employers have encountered a situation where an applicant looks great on paper, but when hired, is ultimately not able to meet job expectations. This could result in a job separation if the employer decides to part ways with the employee due to his or her poor work performance. However, if the former employee later files an unemployment claim, a key question can arise: Will poor job performance be considered misconduct?

Wait, What? Poor Job Performance Is Not Always Misconduct?

We start with the backdrop that in an unemployment claim, if the employer was the party to initiate the job separation, then the employer has the burden of proving that the separation was for a reason that constituted misconduct connected with the work. If the employer is unsuccessful, the claimant will not be disqualified from benefits based on the job separation. It is around this time where the employer might think to itself:

“But if the worker is performing poorly, why should the worker be entitled to benefits?”

It is a completely understandable question, and the answer is found by being familiar with how

an unemployment claim dealing with misconduct is analyzed. Employers are sometimes surprised to hear that a claimant’s lack of job performance may not be misconduct connected with the work. Employers have expressed a lack of job performance in a variety of ways, including:

- The claimant was never able to meet our expectations.
- The claimant was just not picking up on how we do things around here.
- The claimant failed to meet his/her production/sales quota.
- The claimant was unable to pass our probationary period.
- The claimant was just not performing up to par.
- The claimant was never able to do the work to our satisfaction.

In an unemployment claim, if the employer explains that it was poor job performance that led to the claimant’s job separation, the employer could nonetheless lose on the claim if the claimant was working to the best of his or her ability.

Working to the Best of His or Her Ability? What Does That Have to Do with Misconduct?

If a claimant was working to the best of his or her ability, and was still not able to meet the employer’s job expectations, then the claimant’s case may be viewed as a separation based on the claimant’s inability to do the job – and inability to do the job is generally not viewed as misconduct. According to [Appeal No. 1456-CA-77](#) in the Texas Workforce Commission’s (TWC) Appeals Policy and Precedent Manual, “[w]here a claimant has performed her work to the best of her ability, her inability to meet the employer’s standards or inability to perform the work to the employer’s satisfaction does not constitute misconduct connected with the work.”



Photo by iStock/Getty Images

So as an Employer, Am I Sunk on the Unemployment Claim Because I Fired an Employee for Poor Job Performance?

The answer is no. The employer is not just going to automatically lose an unemployment claim if the claimant was fired due to poor job performance. However, if the claimant makes the assertion that he or she was working to the best of his or her ability, then the employer will have to provide evidence to overcome that contention. But how have employers been able to do that? Here are a couple of ways:

1 The employer successfully establishes that the work was not complex.

Per TWC's Appeals Policy and Precedent Manual, [Appeal No. 96-003785-10-031997](#) held that "[w]here the work is not complex, an employee's failure to pay reasonable attention to simple job tasks is misconduct." This particular case involved a cafeteria dishwasher.

EVALUATION DAY



"There's nothing about your performance that you need to change ... other than everything."

Photo by iStock/Getty Images

2 The employer successfully establishes that the claimant was previously able to consistently meet job expectations.

We again look to TWC's Appeals Policy and Precedent Manual for guidance. [Appeal No. 1123-CA-76](#) held that "[a]n employee's failure to meet the employer's production standards cannot be deemed misconduct connected with the work unless the evidence clearly shows that the individual, in the past, demonstrated an ability to consistently meet the required production standards." In addition, [Appeal No. 3616-CF-75](#) held that "[a]n individual's inability to learn a job or to increase productivity during a probationary period, in the absence of evidence showing that the individual had previously been able to meet the employer's standards, does not constitute misconduct connected with the work."

In essence, job performance cases are unique because key questions considered are: Was the failure to perform due to inability? Or was it due to something that the claimant had control over? As one might glean from the precedent cases cited earlier, poor job performance that stems from neglect, or from an unexplained drop in production where the working conditions have not changed, has a better chance of being viewed as misconduct. On the other hand, in cases where the poor performance stems from claimants giving it their best shot and still falling short, those job separations may very well be viewed as cases of inability, and not misconduct.

Conclusion

Remember, a large part in establishing misconduct on an unemployment claim is showing two key elements: that there was a final incident close to the time of discharge and that the claimant knew or should have known that the final incident would lead to discharge. However, in cases where those elements center around poor job performance, the employer should be prepared to show that the lack of performance was due to the claimant's own fault, rather than inability. 🇹🇽

Business and Legal Briefs

By William T. (Tommy) Simmons / Legal Counsel to Chair Ruth R. Hughs



Photo by iStock/Getty Images

80th Anniversary of the Fair Labor Standards Act

The U.S. Department of Labor (DOL) has posted a special section on its Wage and Hour Division website regarding the Fair Labor Standards Act (FLSA), which was signed in 1938, back when the minimum wage was only 25¢ per hour. The concept behind minimum wage (which is now \$7.25 per hour) is that no matter what the pay method is, an employee must be paid at least minimum wage for all hours actually worked during a seven-day workweek. The law also required the payment of overtime pay at the rate of time and a half for all hours actually worked in excess of 40 in a workweek. Although there are certain exceptions to those general rules, almost every worker is covered by those fundamental rights in our modern economy. The FLSA also regulates

child labor (restrictions on hours of work and duties performed by workers younger than 18) and equal pay (men and women who perform the same job at the same level of skill, experience, qualification, and responsibility must receive the same pay).

More information on the FLSA and the 80th anniversary recognition are on the DOL's Wage and Hour Division website at:

<https://blog.dol.gov/2018/06/25/eighty-years-later-fair-labor-standards-act>

Definition of “Unemployed” for Unemployment Claims

On May 25, 2018, the Texas Supreme Court issued a key ruling in the case of *Tex. Workforce Comm'n v. Wichita Cty.*, No. 17-0130, 2018 Tex. LEXIS 443 (Tex. May 25, 2018) relating to what is required for an individual to be considered “unemployed” and thus able to file an unemployment claim. The claimant had been on unpaid medical leave under the Family Medical Leave Act (FMLA) and filed an unemployment claim while still on leave. During the FMLA leave, the county continued to pay for the claimant's fringe benefits, including health insurance. When she filed an unemployment claim, the county took the position that the claimant was not unemployed, since she was still in an employment relationship under the FMLA and was continuing to receive health benefits. TWC disagreed on the basis of its position that the controlling definition of “unemployed” is in Section 201.091(a) of the Texas Labor Code, which boils down to the proposition that a person is “unemployed” for the purpose of filing a basic unemployment claim if the person is no longer performing work for pay. The Texas Supreme Court agreed with that view. Even though the claimant was receiving an economic benefit from the employer during the period in question, the

money being paid to keep her insurance in effect was not given in return for any work she was performing during that time. Thus, even though the employment relationship was still in effect under the FMLA, she was unemployed under the Texas unemployment law and could file an initial claim. It is important to keep in mind that even though a claimant can file an unemployment claim if no longer working for pay, there are several other requirements that must be satisfied before an unemployed individual can receive UI benefits, including being available and actively searching for full-time work, medically able to work, authorized to work in the United States, and others.

Important Arbitration Case

In the case of *Huckaba v. Ref-Chem, L.P.*, No. 17-50341, 2018 U.S. App. LEXIS 15678 (5th Cir., June 11, 2018), an arbitration agreement that the employer asked the employee to sign, but which the employer failed to sign itself, was not enforceable against either the claimant or the employer. This was especially the case where the language of the agreement makes it clear that it is based on the “mutual agreement” of the parties and that the parties intend to be bound by their signatures. As the court put it, if the express language of the

agreement “clearly indicates an intent for the parties to be bound to the arbitration agreement by signing,” then both parties must sign it. Lesson: it is generally essential for an employer to sign any important company document that refers to mutual obligations and to both parties being bound by its terms. Due to the complexity of the issues, it is inadvisable for any employer to attempt to implement an arbitration agreement without the expert counsel of an experienced employment law attorney in the private sector. 



Photo by iStock/Getty Images



Legal Updates

Tax credit for employers that offer paid family and medical leave benefits:

<http://www.uwcstrategy.org/new-family-medical-leave-credit-employers-becomes-law/>

The Department of Labor (DOL) has a new fact sheet to help institutions of higher education properly classify their salaried workers as exempt or non-exempt from the payment of overtime pay. Employers can find Fact Sheet #17S, “Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA)” on the Wage and Hour Division (WHD) website at <https://www.dol.gov/whd/overtime/whdfs17s.pdf>

Speaking of DOL wage and hour fact sheets, they are extremely useful for understanding the often-complicated wage and hour laws, so reviewing them is highly recommended. There is an online index of all WHD fact sheets at:

<https://www.dol.gov/whd/regs/compliance/whdcomp.htm>

Important court decision defining “volunteer” for the purpose of determining whether a worker performing a service for a charitable institution must be paid at least minimum wage: *Acosta v. Cathedral Buffet*, 887 F.3d 761 (6th Cir., Apr. 16, 2018). In finding for the church employer operating a restaurant on its premises, the court held that, “... to be considered an employee within the meaning of the FLSA, a worker must first expect to receive compensation. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). It is undisputed that the volunteers who worked at Cathedral Buffet had no such expectation.”

New National Labor Relations Board (NLRB) guidance on employee handbook policies that are acceptable under the National Labor Relations Act (NLRA) is in General Counsel memo GC 18-04, issued on June 6, 2018, titled “Guidance on Handbook Rules Post-Boeing.” The memo outlines three categories of policies ranging from rules that are most likely lawful, to rules that require individual analysis, to rules that are normally unlawful for an employer to maintain. This guidance is well-written and extremely useful in the way that it offers specific examples of acceptable and unacceptable workplace policies. Employers can download the guidance at:

<https://apps.nlr.gov/link/document.aspx/09031d45827f38f1>

As a payroll taxing authority, the Internal Revenue Service (IRS) enforces several different employment-related taxes. Unfortunately, there are scam artists who take advantage of people, including business owners, and try to fool them into giving out information that is useful for identity theft and related mischief. In response, the IRS has put some good resources on its website as part of a public awareness campaign to help taxpayers know how to avoid scammers and impostors – the link is:

<https://www.irs.gov/newsroom/how-to-know-its-really-the-irs-calling-or-knocking-on-your-door>

ARE YOU AN EMPLOYER?

TAKE ADVANTAGE OF THESE OPPORTUNITIES



TX HIRES VETS

HELPING EMPLOYERS HIRE MILITARY VETERANS

WHEN: OCTOBER 10, 2018
WHERE: AMEGY BANK
1717 West Loop South
Houston, TX 77027
TIME: 10:00AM-2:30PM

- How to Recruit Veterans
- Best Practices & Resources
- Learn About Veteran Tax Credit

REGISTER AT:
<http://bit.ly/TexasHiresVetsForum>

*\$25.00 Registration Fee *Lunch Included * Free Parking



TEXAS HIRE ABILITY

#TXHireAbility

TO LEARN MORE:
TxHireAbility.texasworkforce.org

Employing individuals with disabilities is cost-effective.

33% of hiring managers and executives reported that employees with disabilities stay in their jobs longer.

Employees with disabilities are rated by supervisors as being equally or more productive than coworkers and as achieving equal or better overall job performance.



Frequently Asked Questions

By William T. (Tommy) Simmons | Legal Counsel to Chair Ruth R. Hughs

Q:

We use timesheets which have the ability to force employees to turn on GPS and will log their location. These employees are working at different construction projects. They are currently using their personal phone, and we do not reimburse for their usage, but do supply them with a company laptop and 5GB+ of hotspot for their use. Are we able to force GPS when they clock in on their personal device? All employees are located in the state of Texas.

A:

Expense reimbursement and privacy issues are the most important things to consider:

1. Texas and federal law do not currently restrict employers from requiring employees to use GPS tracking systems while on duty or while using company property, such as vehicles.
2. Texas Penal Code Section 16.06 would require the employer to obtain the consent of the employee to install a GPS tracking device on the employee's personal vehicle. That would not be an issue with an employer-owned vehicle.
3. Be careful with requiring employees to allow GPS-capable business apps on their personal devices. Any increased phone service costs for employees should be reimbursed by the company to minimize the risk of a minimum wage claim. The cost reimbursement formula should be reasonable, easy to calculate, and fair for the employee. Very importantly, any such app on an employee's personal phone absolutely must be configured to avoid privacy issues, i.e., the app should relay only what the company needs for the declared purpose, and nothing more. Set the app to be inactive during non-duty hours, and use a firewall - failing to respect privacy boundaries puts the company at great risk in the event of any data breaches or unauthorized snooping.

Q:

We have an employee who reported commission earned on sales which should have been paid at \$.50 per unit, but she was actually paid \$1 per unit. She was also paid commission for some material that she did not sell. Is the company entitled to take the amount that was wrongfully paid back from the employee?

A:

That situation basically involves a wage overpayment – the following are some of the most important issues to keep in mind.

1. Under the FLSA, the U.S. Department of Labor guidance on wage overpayments indicates that it is permissible to deduct from future wages to offset a previous overpayment of wages, even if the deduction takes the future pay below minimum wage for the workweek in question.
2. However, the wage payment law in Texas also applies and must be followed. Under the Texas Payday Law, any deduction that is not ordered by a court or required by a law must be made for a lawful purpose and authorized by the employee in writing.
3. There is a detailed topic in our employer handbook that explains those issues: http://www.twc.state.tx.us/news/efte/deduction_problems_under_tpl.html#wageoverpayments
4. Handling wage-related errors will be simpler if you utilize a standard written policy like the sample one in the book: http://www.twc.state.tx.us/news/efte/wage_overpayment_policy.html
5. If for some reason your company cannot obtain the employee's written authorization for a wage deduction, an alternative might be to delay the effective date of a future pay raise until the amount is recouped, or else impose a small temporary reduction in pay. Keep any such reduction as small as possible for the reasons explained in the book in the following topic: http://www.twc.state.tx.us/news/efte/ui_law_the_claim_and_appeal_process.html#ui-20percentrule Not driving the employee off with an excessive process will help in recovering the full overpayment.

Q

I have a client who is a trucking company that employs mechanics who are required to wear PPEs, such as eye covers, steel-toed boots, etc. This employer has both leased employees and W-2 employees. Can you please confirm that there are no state or federal requirements for the employer to pay for the PPEs for leased employees? Also, I believe the employer is required to pay for PPEs for its W-2 employees, but can you please let me know where I can access the regulations on this?

A

Ultimately, both the client of a PEO and the PEO must be concerned about the legalities of PPEs for employees who must use such equipment. That is because in a situation involving leased employees, i.e., employees obtained through the services of a PEO, the employees are jointly or co-employed by both the client company and the PEO, and both companies are thus covered by various employment law obligations. Concerning the costs of providing PPEs, OSHA regulations state that such costs must be borne by the employer (either the client or the PEO). There is a good OSHA fact sheet on that issue at:

https://www.osha.gov/dte/outreach/intro_osh/7_employee_ppe.pdf

An OSHA opinion letter addresses the issue of replacement costs, deposits, wage deductions, and so on at:

<https://www.osha.gov/laws-regs/standardinterpretations/2014-11-13>

Thus, either the client company or the PEO must pay for the PPEs used by employees who are required by OSHA standards to use them. Other types of required items, such as uniforms and non-PPE that an employer merely wishes the employees to have, involve potential minimum wage issues. The cost of uniforms and other non-PPE items that are a job requirement for an employee cannot be passed along to an employee if the cost would effectively take the employee's pay below minimum wage for the workweek in which the cost is incurred. The U.S. Department of Labor guidance on that is summarized and partially quoted in our book *Especially for Texas Employers* in the following topic:

http://www.twc.state.tx.us/news/efte/deduction_problems_under_tpl.html#deductionsotercosts

If minimum wage is not an issue, then the issue of who pays for the non-PPE required items is up to the employer and the employee to work out between themselves. Most companies pay for any such items above a certain cost level, while others cover all such costs. In a "seller's market" like we have today (very low unemployment, giving employees lots of choices as to where they work), companies that do not cover such costs may find it hard to attract and keep qualified workers.

Q

Are all salaried non-exempt employees required by law to track their time? For example, an administrative assistant writing down on timesheets how many hours they worked each day?

A

The basic answer would be "yes." Under the FLSA, an employer must track all time actually worked by non-exempt employees, regardless of how the employees are compensated. See section 516.2(a)(7) of the U.S. Department of Labor regulation on timekeeping at:

http://www.twc.state.tx.us/news/efte/wh_part516.html#516_2

The number of hours worked is necessary for ensuring that the employee is being paid at least minimum wage for all hours actually worked, and if applicable, overtime pay at time and a half based on the regular rate of pay. The specific method for recording work time is up to the employer to determine. See in our book online at:

http://www.twc.state.tx.us/news/efte/b_recording_working_time.html

The questions above were compiled from past Texas Business Conferences around the state and questions from Texas employers on our employer hotline (1-800-832-9394) and via e-mail at employerinfo@twc.state.tx.us.

Texas Business Today

Texas Business Today is provided to employers **free of charge**.

Texas Business Today is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be comprehensive legal analyses of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

Subscribers may go to
www.texasworkforce.org/TexasBusinessToday
and enter their email to receive *Texas Business Today*



A proud partner of the **americanjobcenter** network

Telephone: 800-832-9394 • 512-463-2826

Fax: 512-463-3196

Email: employerinfo@twc.state.tx.us

www.texasworkforce.org

For tax and benefits inquiries, email tax@twc.state.tx.us.

Equal Opportunity Employer/Program Auxiliary aids and services are available upon request to individuals with disabilities.

Relay Texas: 800-735-2989 (TTY) and 711 (Voice)

Copies of this publication (9/18/18) have been distributed in compliance with the State Depository Law, and are available for public use through the Texas State Publication Depository Program at the Texas State Library and other state depository libraries.

Material in *Texas Business Today* is not copyrighted and may be reproduced with appropriate attribution.



Printed in Texas on recycled paper