

# Texas BusinessToday

Chair Ruth R. Hughs  
Commissioner Representing Employers

Third Quarter 2019

Neither Jekyll nor Hyde: Employer  
Conduct at Work

Employment Verification and Job  
References

To Ask or Not to Ask: Criminal  
History Inquiries During Hiring



# The Future is Bright



Texas A&M University hosted the Texas Science and Engineering Fair (TXSEF), which is a competition for middle and high school students to showcase their research projects in STEM fields and compete for top prizes in 22 project categories.

## Commissioner's Corner:

# Texas Continues to Invest in our Future Workforce

Dear Texas Employer,

Welcome to our 2019 3rd quarter issue of *Texas Business Today*! Texas continues to be the best place in the country for job growth and economic development. The Texas economy's seasonally adjusted unemployment rate in June 2019 set a new historic low rate of 3.4 percent, breaking the previously held rate of 3.5 percent. This is the lowest it has ever been since tracking began in 1976.

In addition, *Wallethub* named Texas the top state for business start-ups for the second year in a row. *Wallethub* compared the 50 states across 26 key indicators, including business environment and access to resources. Texas boasts a healthy business environment with an almost 11 percent growth in the number of small businesses, and a 36 percent growth of average business revenue. Our economy is thriving across multiple industries, attracting new companies every day, proving that Texas is the best state in the nation to do business.

Did you know that small businesses make up 99.8% of our Texas workforce? On May 5-11, we celebrated *National Small Business Week*. Currently, there are 2.6 million small businesses in Texas and they are a critical component to our state's economy. It is vital that we recognize the efforts of those contributing to our economic stability and growth. In honor of this week, the Texas Workforce Commission (TWC) highlighted 3 small businesses from different regions in Texas that bring growth and innovation to their communities. Congratulations to E Squared Marine Service, PALS Home Health, and Shell Machine Works on your hard work and perseverance.

Investing in Science, Technology, Engineering, and Math (STEM) education is key to developing workforce pathways and bridging the talent gap. To support these efforts, Texas A&M University hosted the Texas Science and Engineering Fair (TXSEF). This event, hosted for the first time in College Station, is a competition for middle and high school students to showcase their research projects in STEM fields and compete for top prizes in 22 project categories. These future engineers and scientists of Texas presented their work to judges and showcased their commitment to improving the world around them

through innovation. These students will enter into an increasingly competitive job market with the applied skills in STEM disciplines that are highly coveted by Texas employers. Congratulations to all of the students and to Texas A&M University on the success of their first year hosting.

To continue our efforts in supporting work-based learning, TWC, along with our Tri-Agency partners—the Texas Education Agency, and the Texas Higher Education Coordinating Board—held a press conference to promote the Texas Internship Challenge, hear internship success stories from across the state, and recognize the importance of paid internships. The event was held at Ascension Seton and demonstrated the collective commitment of our state's top employers to continue to promote paid internships and grow the Texas Internship Challenge. For more information on this campaign and to post internships, go to: [www.txinternshipchallenge.com](http://www.txinternshipchallenge.com).

In closing, the 86th general session of the Texas Legislature has ended. Our office followed several bills throughout the session that were related to employment law. We received a number of calls from Texas employers about implications of specific bills, and our employment law attorneys were there as a valued resource to assist with their questions. You can find a summary and analysis of employment law bills beginning on page 15.

As we close out the 3rd quarter, I look forward to continuing partnerships with employers, workforce development boards, and community stakeholders to develop innovative opportunities that help create and keep jobs right here in Texas. Please do not hesitate to contact my office if you need assistance. 🇹🇽

Sincerely,

Chair Ruth R. Hughs  
Texas Workforce Commission  
Commissioner Representing Employers

# Making Connections Across the State



1. Attended the Lower Rio Board of Directors Development Workshop in South Texas.
2. We Hire Vets ceremony in Texarkana recognizing our Texas employers for their efforts in hiring our nation's heroes.
3. Participated on a panel at the Texas Rural Challenge about our rural communities and the many resources that are available to promote a strong and sustainable future for rural Texas.
4. Keynote speaker at the 2019 Women in Economic Development Conference hosted in Waco, TX.
5. Joined the conversation at the Summer Superintendent's Institute at Baylor University.
6. Presented our Skills Development Fund grant to Panola College and Jefferson ISD in partnership with East Texas Workforce Solutions.
7. Student demonstration on new state-of-the-art equipment at a Jobs and Education for Texans grant presentation by Gregory-Portland ISD in partnership with Workforce Solutions Coastal Bend.





# 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.



## 2019 Conference Locations

- Lubbock.....August 22-23
- Midlothian.....August 30
- Witchita Falls.....September 13
- Longview.....September 20

For more information and registration, visit: [www.texasworkforce.org/tbc](http://www.texasworkforce.org/tbc)

**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. For more information on how to apply for these Professional Development Credits upon attending the Texas Business Conference, please visit the Texas SHRM website. Also, attorneys may receive up to 5.5 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference, or 11 hours for the two-day conference (one hour of ethics available). Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

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# Neither Jekyll nor Hyde: Employer Conduct at Work

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

It can be easy to feel frustrated as an employer. There's always something to worry about, a problem that needs solving. Sometimes, an employer's reactions to these problems are not always ideal, and employees may feel mistreated as a result.

Employers often justify their own negative conduct at work by believing that because Texas is an at-will state, the occasional outburst is acceptable. However, there could be consequences, even if the conduct is not unlawful.

## Discrimination, Harrassment, & Retaliation

The at-will doctrine will not shield employers from a lawsuit for unlawful conduct. Employers who engage in harassment or encourage a hostile work environment risk significant legal liability. "Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information" (<https://www.eeoc.gov/laws/types/harassment.cfm>). While it should be obvious, it bears repeating: employers should avoid making discriminatory statements based on such characteristics (<https://www.eeoc.gov/laws/types/index.cfm>).

Avoiding sexual harassment is another consideration. Of course, this includes blatant conduct such as unwelcome sexual advances, but it also includes verbal statements of a sexual nature. Remember: the situation is always viewed through the eyes of the victim. For more information, see the following links: <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>; [https://twc.texas.gov/news/eftc/harassment\\_minimizing\\_liability.html](https://twc.texas.gov/news/eftc/harassment_minimizing_liability.html).

Employers would also do well to avoid retaliating against employees. Do not take any adverse action against employees who make good-faith complaints about discriminatory or harassing conduct. Common examples include demotions, terminations, or cuts in pay as "punishment" for complaining. Employees may seek compensatory and punitive damages for retaliation: [https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#B.\\_Compensatory](https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#B._Compensatory).



## Unemployment Claims

In many cases, an employer's conduct does not violate law. But what if the conduct drives an employee to quit and file for unemployment? Under the rules of the Texas unemployment system, employees can qualify for unemployment benefits if they had a good, work-related reason to quit. This includes intolerable working conditions. Therefore, while it may not be against the law for employers to lose their tempers at work, it may be enough to lose an unemployment claim, which could affect an employer's tax rate for three years.

The general idea is to refrain from conduct that a reasonable person would perceive as intolerable. This includes yelling, shouting, physical aggression, harassment, and other actions that are demeaning, belittling, humiliating, or insulting. It does not matter if the employee engaged in the conduct first; employers who behave badly are not rewarded. Employers are also usually held to a higher standard. A sample policy on harassment and disrespect toward others can be found [here](#), and serves as good guidance for employers as well as employees.

Intolerable working conditions, however, are more than just general dissatisfaction with the

working environment (see VL 515.05 at <https://twc.texas.gov/files/jobseekers/appeals-policy-precedent-manual-voluntary-leaving-twc.pdf>). For example, employees who are “not excited” to be at work, or who quit for minor issues, will generally not qualify for unemployment benefits. The situation must be one that rises to the level of “intolerable,” which can be open to interpretation. Employers should err on the side of caution here.

## The National Labor Relations Act

While not against the law, an employer’s unprofessional conduct can lead to another problem. It should come as no surprise that disgruntled employees talk. It can be tempting as an employer to silence these conversations. However, employers who attempt to stop these discussions, or who discipline or punish employees for discussing their working conditions, could violate the National Labor Relations Act (NLRA) (<https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1>). Under the NLRA, employees have the right to discuss the terms and conditions of their employment. Therefore, while it may not be unlawful to have outbursts at work, employers should be prepared for employees to talk about it.

## The Other Side of the Coin

In many cases it is the employee, not the employer, who is acting inappropriately. In response, some employers do nothing and allow the conduct to continue. There are several common reasons as to

why: the employer is too busy, the employer is afraid the employee will retaliate, the employer does not like confrontation, or the employee is desperately needed in the office. Unfortunately, none of those reasons shield employers from liability.

Employers who fail to address an employee’s inappropriate conduct could cause others to feel that there is favoritism in the office. This could not only affect employee morale, but it could also lead employees to argue that the employer supported or encouraged discrimination, harassment, or a hostile work environment. In addition, failing to address an employee’s bad behavior could lead other employees to quit and file for unemployment, citing intolerable working conditions. Delays in addressing the behavior will not bode well for employers.

That is why employers should strive for equal enforcement of policies and procedures, and document at every opportunity. Employers should take action as soon as possible to remedy any complaints. Those who delay, risk losing lawsuits and unemployment claims.

The above information could cause an employer to feel overwhelmed. However, the solution is simple: follow the golden rule and be respectful. Investigate and address workplace complaints immediately. The manners we were taught as children can go a long way and can help keep the employer on the right track. 🇹🇽



*Employers often justify their own negative conduct at work by believing that because Texas is an at-will state, the occasional outburst is acceptable. However, there could be consequences, even if the conduct is not unlawful.*

# ARE YOU AN EMPLOYER?

## TAKE ADVANTAGE OF THESE OPPORTUNITIES



FOR MORE  
INFORMATION

### ARE YOU AN EMPLOYER?

IS YOUR WORKFORCE  
COMPOSED OF  
10% MILITARY VETERANS?

WE WANT TO RECOGNIZE  
YOU FOR OUR  
"WE HIRE VETS" PROGRAM

GO TO: [WWW.TEXASOPERATIONWELCOMEHOME.COM](http://WWW.TEXASOPERATIONWELCOMEHOME.COM)

## TEXAS

## HIRE

## ABILITY

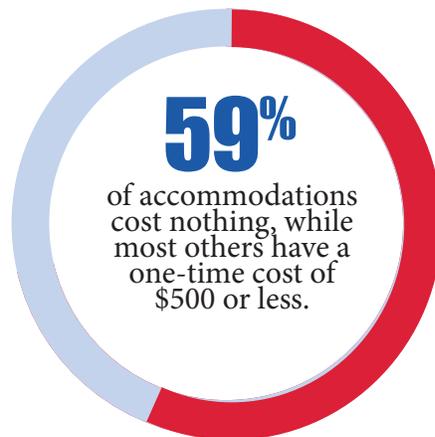
#TXHireAbility

TO LEARN MORE:  
[TxHireAbility.texasworkforce.org](http://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.



# Employment Verification and Job References

**Mario R. Hernandez** / Legal Counsel to Chair **Ruth R. Hughs**

As an employer, you may have encountered a situation where another company or business is calling you to ask questions about an employee who used to work for you. This could create a moment of pause where you might think: What can I say? How much information should I provide? Are there consequences for the release of such information? This article will explore the topic of employment verification and job references and what it means for employers.

## Be Cautious Over the Phone

Many employment verification requests and job references take place over the phone. The purpose for such requests can vary based on their nature. For instance, the call could be coming from a different employer who is thinking about hiring one of your former employees and is looking for job reference information. Sometimes calls come in from lenders like banks or loan companies that are looking to verify employment on a current employee. On the other hand, the call could also easily be coming from some other source like a private investigator, stalker, or identify thief. In other words, you just do not know who it is on the other end of the call. Since someone with ill will might be masquerading as a benign entity, do not release information over the phone unless you have absolute certainty as to who is calling and for what purpose. Even still, a best-case scenario would be to obtain written consent from the individual being asked about to release information pertaining to them (see below section on Best Practices).

## Potential Consequences

One issue that employers want to be aware of when providing information in connection to a request for employment verification or a job reference is defamation (see Point #3 at [https://twc.texas.gov/news/efte/other\\_employment\\_litigation.html](https://twc.texas.gov/news/efte/other_employment_litigation.html)). At times, an employer may have very strong feelings about a former employee who the employer feels had wronged the company in some way or had parted with on bad terms. The temptation may exist to speak poorly about former employees when asked about their previous job performance. Watch out. Resist the temptation of badmouthing former employees. Consequences that can arise from defamation are things such as lawsuits and



*Be cautious over the phone since someone with ill will could be masquerading as a benign entity.*

the expending of money and resources to deal with those lawsuits. As such, the employer should avoid inflammatory language if information is provided about a former employee. For more information on defamation, please visit: [https://twc.texas.gov/news/efte/workplace\\_investigations\\_basics.html#defamation-investigations](https://twc.texas.gov/news/efte/workplace_investigations_basics.html#defamation-investigations) and [https://twc.texas.gov/news/efte/job\\_references.html](https://twc.texas.gov/news/efte/job_references.html).

## Best Practices

To avoid potential liability that could be tied to employment verification requests and job references, it is useful to establish policies and procedures designed to properly control the release of information.

First, it is not advisable to release information over the phone. Instead, the employer should ask the party seeking the information to obtain a written release from the former employee authorizing the employer to release information connected with the job. You can view an example of such a release at the following links: [https://twc.texas.gov/news/efte/authorization\\_to\\_release\\_information.html](https://twc.texas.gov/news/efte/authorization_to_release_information.html) and [https://twc.texas.gov/news/efte/job\\_references.html#referencewaiver](https://twc.texas.gov/news/efte/job_references.html#referencewaiver).

Second, the employer should only provide truthful information. As mentioned previously, the employer can be held liable for defamation if it provides a “verbal or written publication of false information about a person with intent to harm



*The employer should ask the party requesting a current or former employee's information for written authorization from that current or former employee allowing the employer to release the requested information.*

the person's reputation or with reckless disregard for the consequences of the falsehood.” (See again Point #3 at [https://twc.texas.gov/news/efte/other\\_employment\\_litigation.html](https://twc.texas.gov/news/efte/other_employment_litigation.html)). Accordingly, the employer should stick only to the facts. In addition, the employer should only provide the information that is being requested. Do not volunteer information that has not been asked; keep it within the scope of the request.

Third, assign a designated individual at the company to handle employment verification requests. Such an individual should be knowledgeable about the consequences that can result from the unauthorized release of information, and aware of the high importance of protecting employee information. Other employees should also be trained on not releasing information over the phone, and instead direct any call dealing with an employment verification request to the proper individual designated by the company. For more guidance, please visit: [https://twc.texas.gov/news/efte/employee\\_privacy\\_rights\\_and\\_identity\\_theft.html#eeprivacy\\_callrouting](https://twc.texas.gov/news/efte/employee_privacy_rights_and_identity_theft.html#eeprivacy_callrouting).

Fourth – document, document, document. If someone calls with an employment verification or job reference request, notate the name of the person making the request, the entity that they are affiliated with, their phone number, the time and date of the call, and the purpose for which the call was made. Good recordkeeping is a best practice in many aspects of running a business, and employment verification and job reference requests are no different.

## **Conclusion**

In summary, what might be viewed as a routine phone call to the employer could possibly turn out to be something entirely different. Careful business practices that are instituted to protect employees' (both current and former) information can go a long way towards minimizing potential liability associated with that information. By being familiar with best practices in this area, the employer will be better equipped to deal with situations involving employment verification and job reference requests should they arise. For more information, please feel free to call our employer hotline at 800-832-9394. 🇹🇽

# To Ask or Not to Ask: Criminal History Inquiries During Hiring

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

“Ban the Box” or “Fair Chance Hiring” is the name of a movement that seeks to remove questions about an applicant’s criminal history from job applications. The purpose is to give individuals who have been previously arrested or convicted of a crime a chance of being considered for employment based on their qualifications, rather than being automatically excluded from consideration.

## Across the Country

[Many states](#) have implemented statewide laws or policies which prohibit employers from asking about an applicant’s criminal history on job applications. Ban the Box requirements in other states vary. Some delay asking about an applicant’s criminal record until the job interview. Some prohibit background inquiries until a job offer has been made. Others allow employers to consider convictions after reviewing the application and discussing employment with the applicant. Texas is not among these states. Diagrams A and B show the states with Ban the Box laws or policies affecting public employers, as well as those with laws which extend to private employers.

## In Texas

Except for the city of Austin, which has an [ordinance](#) prohibiting employers with at least 15 employees from asking about criminal histories or running a criminal background check until a conditional job offer has been made, Texas does not ban these types of inquiries during the hiring process or employment. In fact, during the 2019 legislative session, proposed [Senate Bill 2488](#) attempted to prohibit local jurisdictions from enacting their own Ban the Box ordinances. The bill sought to prevent political subdivisions of the state, such as cities and towns, from adopting or enforcing any law, rule, regulation, or policy that “prohibits, limits, or otherwise regulates a private employer’s ability to request, consider, or take employment action based on the criminal history record information of an applicant or employee.” The bill was not successful.



*Except for the city of Austin, Texas does not ban inquiries into an applicant’s criminal history during the hiring process.*

## Federal Law

The federal government does not have a statute that specifically prohibits employers in any state from asking about an applicant’s criminal history. However, the Equal Employment Opportunity Commission (EEOC) has noted that disqualifying applicants from consideration for employment, or making adverse employment decisions of current employees, **based solely** on their criminal history, may have a disparate impact on certain minority groups. This could result in claims of employment discrimination, under [Title VII](#) of the Civil Right Act, based on the legally protected characteristics of race and national origin. Title VII, which applies to employers with at least 15 employees, prohibits discrimination in employment based on [certain characteristics](#).

## EEOC Guidelines

In evaluating disparate impact discrimination claims based on race or national origin, the EEOC looks at an organization's policies and/or actions, related to investigations or inquiries into background checks, to determine whether the organization's hiring practices are "job related and consistent with business necessity." The EEOC has established some guidelines for employers to follow:

1) Arrests and convictions should not be treated the same. Arrests alone are not proof of criminal conduct. Convictions, on the other hand, are usually sufficient evidence that individuals engaged in specific conduct or behavior. Because of this difference, employers should not make employment decisions based solely on an arrest record.

2) In determining whether specific criminal conduct is job-related and consistent with business necessity, employers should consider: the nature of the offense or conduct, the length of time that has passed since the offense or disposition of the case, and the nature of the job in question. The EEOC's website includes detailed [explanations and examples](#) of these factors. Employers are not required to hire people with criminal convictions, but the EEOC recommends that employers individually assess an applicant using these three factors before deciding to deny employment based on a prior criminal record.

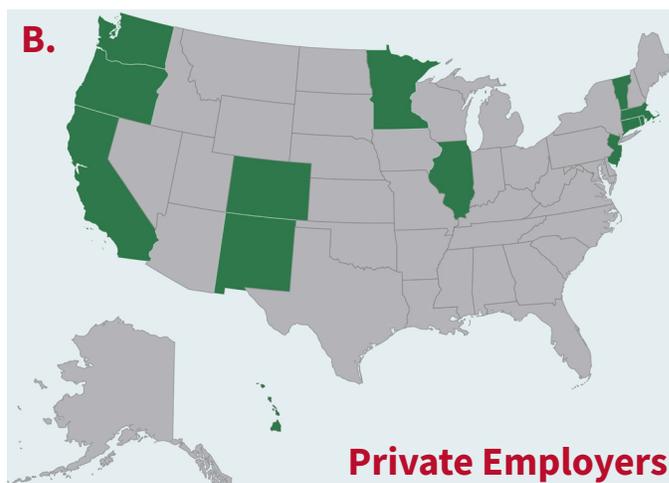
3) If state and local jurisdictions have laws or regulations that prohibit employers from hiring or employing individuals with certain criminal

convictions, such as the licensing requirements for nursing homes and child care facilities in Texas, then these businesses should follow these requirements. However, employers covered by these regulations should draft policies in line with the principle that any exclusion from employment be job-related and consistent with business necessity.

## In Conclusion

Most employers in Texas are free to ask about, and consider, criminal histories during any point of the hiring process or employment relationship. However, to minimize the risk of discrimination claims for employment decisions made on the basis of an individual's criminal record, employers should refrain from asking about criminal histories in job applications.

A best practice would be to wait to inquire about an applicant's criminal background until the employer is ready to make a job offer. Employers can make job offers conditional on applicants agreeing to, and passing, a criminal history check. At that time, if the applicant's criminal background reveals any incidents that are of concern to the employer, applying the EEOC's guidelines before taking any adverse employment action will assist the employer in showing that its decision was made on factors which were job-related and consistent with business necessity. 🇹🇽



Diagrams A & B show the states with Ban the Box laws or policies affecting public employers, as well as those with laws which extend to private employers.

# Frequently Asked Questions from Employers

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

**Q** ● A highly-qualified applicant whom we would like to hire has told us that the only way she will do the job is as an independent contractor. We asked her why, but all she would say is that she values her independence and would rather handle her taxes herself. Can we accommodate her demand, if she signs a written agreement that she will not be an employee?

**A** ● Unfortunately, achieving independent contractor status is not as simple as agreeing to handle things that way, with or without a written agreement to that effect. All of the major employment laws define “employee,” “employer,” and “employment” in such a way that the legal presumption is always in favor of employment status. Basically, if you are paying a worker to do the work that your company produces, or the work performed is related to your company’s primary business, the law will presume that the worker is in your company’s employment. For more information, please see the article “Independent Contractors / Contract Labor” in our book *Especially for Texas Employers* at [https://twc.texas.gov/news/eft/ics\\_contract\\_labor.html](https://twc.texas.gov/news/eft/ics_contract_labor.html).

**Q** ● Our home care agency does not want to discriminate based on gender, but is a client within their right to ask for a female or male to come in to their home, especially when it comes to bathing them and helping them with the bathroom? Is there something that says they are not discriminating if they request a female and do not prefer a male, for example?

**A** ● You are talking about a gender-based preference for assignments, which, like any kind of discrimination, can be risky, but is possible under very narrow circumstances if there is a bona fide occupational qualification (BFOQ) for such a preference. An example of a BFOQ for gender would be the preference or wish of a member of a vulnerable population, such as children or the elderly, to be served by employees of certain genders for reasons of privacy and bodily contact. Since the burden of proving a BFOQ is on an employer claiming one, it would be a good idea to have documentation from a patient concerning privacy-based requests for caregivers of a specific gender. Be careful, though - EEOC guidelines and court decisions show that a customer’s preference cannot excuse discrimination based on a person’s race or color.

**Q ● We are a new company and will need employees who can supply their own vehicles to drive to and from customer and supplier locations. Are we allowed to ask applicants whether they own a car?**

**A ●** Under EEOC guidelines, it is best to avoid questions during the application process that might discourage people with financial challenges to apply. If the goal is to hire employees who can supply a vehicle to perform driving-related tasks, then all that really matters is that the employee can show up with a vehicle in a safe and serviceable condition that can be used for business purposes. Whether they actually own that vehicle is beside the point – they can supply a vehicle by owning, renting, leasing, or borrowing it. Any of those methods would work, but it would be a good idea to let the applicants know that if hired, the job would be contingent upon them being able to provide a vehicle in which to drive around. Thus, the best way to ask the question on the job application would be something like: “If hired, do you have the use of a vehicle to perform delivery and other work-related tasks?”

**Q ● How many warnings does TWC require an employer to give before discharging someone?**

**A ●** TWC has no specific requirement on the number of warnings necessary to discharge an employee. Some misconduct is so serious and so obvious that no prior warnings are necessary, such as use or possession of illegal drugs at work, theft from the company, coworkers, or customers, or initiating a physical altercation at work. Other forms of misconduct may involve prior warnings, though, such as tardiness, absence without notice, failing to follow instructions, and the like. The number of warnings depends upon how a company decides certain problems should be handled. TWC’s main concern with the policy on warnings relates to how an employer can prove an essential element of a misconduct case: the evidence must show that the claimant either knew or should have known they would be discharged for whatever problem was involved in the final incident. The other essential element, of course, is proving that the claimant was at fault in whatever final incident led to the discharge. More information on what TWC looks for in a misconduct case is in the book at [https://twc.texas.gov/news/efte/ui\\_law\\_qualification\\_issues.html#dq-mc](https://twc.texas.gov/news/efte/ui_law_qualification_issues.html#dq-mc).

# Business and Legal Briefs

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

## New Regulation Expected Regarding Salary Definition

The U.S. Department of Labor (DOL) has issued a proposed regulation updating the salary requirement for a salaried exempt employee. Under the current regulation, 29 C.F.R. § 541.602, the minimum salary for the so-called “white collar” exemptions (executive, administrative, professional, and computer professional employees) is \$455 per week, which equates to \$23,660 per year. The proposed new salary amount is \$679 per week, or \$35,308 per year. A very new feature of the proposed regulation is that up to 10% of the required salary amount could come from commissions or non-discretionary bonuses. DOL has stated that no changes to the duties tests for the various exemption categories are expected. A final rule is anticipated from DOL this year. More official information from DOL can be found at <https://www.dol.gov/whd/overtime2019/index.htm>.

## New Statute Will Allow Payrolling for Texas Employers

Traditionally, the Texas Workforce Commission (TWC) has never recognized the concept of payrolling, whether done by an unrelated company for clients outside of a relationship with a licensed professional employer organization (PEO), or by a related company sharing ownership and employment responsibilities with one or more payrolled entities (otherwise known as a “common paymaster” arrangement). That will change beginning January 1, 2020, which is the effective date of SB 2296, a bill passed during the 2019 general session that allows a common paymaster to be considered the employer of, and report the wages for, the employees of the related entities for which the paymaster is performing payrolling duties. To come under the new law, the arrangement must satisfy the requirements of Section 3306(p) of the Federal Unemployment Tax Act. TWC is considering rules for applying the new statute and will likely issue them later in 2019. For more information, consult your CPA or tax attorney, or call the Employer Commissioner’s office at 800-832-9394.

## Important Title VII Ruling from the U.S. Supreme Court

In *Fort Bend County, Texas v. Davis* (June 3, 2019), the U.S. Supreme Court held that the Equal Employment Opportunity Commission (EEOC) charge-filing requirement in Title VII of the Civil Rights Act of 1964 is not a jurisdictional prerequisite, but is merely procedurally required. On a practical basis, if an individual charging employment discrimination under that law

files a lawsuit directly in federal court, without first filing a discrimination charge with the EEOC, the lawsuit would not be subject to automatic dismissal, but could be dismissed if the employer raises the issue as an affirmative defense to the charge. In this respect, the *Fort Bend County* decision is similar to the Supreme Court’s decision in *Arbaugh v. Y & H Corporation*, which held that the 15-employee threshold for coverage under Title VII’s non-discrimination provisions is not jurisdictional, but rather is an affirmative defense that the employer must plead and prove in order to avoid liability under that law (546 U.S. 500 (2006)).

## Get the W-4 Before Anything Else

All new hire paperwork is important, but if any of it can be considered the most important, it would be the Form W-4, because the information on that form will enable your company to report the employee’s name and SSN when it comes time to submit quarterly wage reports to the IRS and TWC and to pay federal payroll taxes and the state unemployment tax. A missing W-4 is found most often in the case of employees who “ghost” the company after working one or two days, i.e., they mysteriously disappear, and the company is left wondering how to handle final wages and wage reports. So, have a brand-new employee complete the W-4 before anything else. Item number two would be the Form I-9. For more information on new hire paperwork, see [https://twc.texas.gov/news/efte/new\\_hire\\_paperwork.html](https://twc.texas.gov/news/efte/new_hire_paperwork.html) in our book *Especially for Texas Employers* online.

## Planning Regulations and Licensing Requirements Are Still in Effect

Although the proposed legislation to disband the Texas State Board of Plumbing Examiners and give its responsibilities to the Texas Department of Licensing and Regulation did not pass during the recently-ended legislative session, Governor Abbott issued an executive order on June 13, 2019 to extend the TSBPE through May 31, 2021 and keep its licensing and plumbing safety regulations in place. The Governor’s action was predicated on public safety and facilitating disaster recovery efforts and will help ensure that Texans can rely on qualified plumbers working in the many plumbing-related occupations in this state. The Governor’s order is online at <https://gov.texas.gov/news/post/governor-abbott-takes-action-to-keep-texas-state-board-of-plumbing-examiners-active>. 

# Survey of Employment-Related Legislation From the 86th Texas Legislative Session

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

This article is a brief survey of the most significant employment-related bills that passed during the 86th general session of the Texas Legislature in 2019 and will become law. Some listings include comments where employers will be affected soon. In the next issue of *Texas Business Today*, we will highlight a few of the bills that will have the greatest impact on the majority of Texas employers.

\*\*All bills were signed by the Governor and are effective September 1, 2019 unless otherwise noted.

## Civil Rights - Discrimination

|         |  |
|---------|--|
| HB 1074 | Relating to the prohibition against age discrimination in certain employment training programs. The new law removed the age 56 cap with regard to job training programs (consistent with federal law), meaning that participation in job training programs cannot be limited according to a person's age.  |
| SB 212  | Relating to reporting requirement for certain incidents of sexual harassment, sexual assault, dating violence, or stalking at certain public and private institutions of higher education. University employees must report sexual harassment, sexual assault, dating violence, or stalking by or against students or other employees to the institution's Title IX coordinator or deputy Title IX coordinator; failure to report is a terminable offense; failure to act upon a report is a terminable offense; an institution of higher education is subject to an administrative penalty of up to \$2 million for failure to comply with the reporting requirements; retaliation for making such reports is prohibited; employees who make reports have immunity for good-faith reporting and testimony in proceedings. |
| SB 1978 | Relating to the protection of membership in, affiliation with, and support provided to religious organizations. This amendment to the Government Code will prohibit a governmental employer from taking any adverse action against "a person", i.e., an applicant, an employee, or a contractor, based on that person's membership, affiliation, contribution, or activities with a religious organization; this is in addition to the existing right under Chapter 21 of the Labor Code to be free from discrimination based on religion.   |

## Employee/Family Leave

|       |  |
|-------|--|
| HB 41 | Relating to paid leave for a state employee who is a search and rescue volunteer. Such volunteers may have up to five days' paid leave per year from their agencies, in addition to any other paid leave under other laws. |
|-------|--|

## Human Resources - General

|         |   |
|---------|---|
| HB 504  | Relating to employment protections for a person serving as a grand juror. The new law extends job protection for jurors under Section 122.001 of the Civil Practice and Remedies Code to grand jurors.  |
| HB 541  | Relating to the right to express breast milk. The new law permits a mother to breast-feed her baby or express breast milk wherever she is otherwise authorized to be.   |
| HB 621  | Relating to prohibited adverse employment action against an employee who in good faith reports child abuse or neglect. The amendments broaden the job protections for employees who are licensed or certified to work with children and who report child abuse or neglect to authorities. |
| HB 1342 | Relating to the consequences of a criminal conviction on a person's eligibility for an occupational license. The new law makes it easier for a convicted person to re-qualify for an occupational license.  |

## Immigration/E-Verify/Pay/Benefits/Wage and Hour

|         |   |
|---------|---|
| HB 1584 | Relating to health benefit plan coverage of prescription drugs for stage-four advanced, metastatic cancer. This bill makes it easier for late-stage cancer patients to receive prescription drugs needed for such treatment.  |
| HB 2240 | Relating to the payment of wages by an employer through a payroll card account. The bill requires 60 days' advance written notice of using payroll debit cards for paying employees, disclosure of any fees for the payroll card, and for those who opt out of the payroll card plan, a form for requesting a different method of delivering wages. |

## Regulatory/Finance/Enforcement/Criminal Penalties

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| HB 2624 | Relating to the prosecution of certain criminal offenses involving fraud. Unemployment benefit or payroll card theft or fraud can be prosecuted in any county where the fraud occurred or in the county of the victim's residence.   |
| HB 3703 | Relating to the prescription of low-THC cannabis for medical use by certain qualified physicians to patients with certain medical conditions. This bill expands upon the limited use of medical marijuana currently permitted for certain types of epilepsy, allowing the drug to be prescribed for other conditions, including seizure disorders, multiple sclerosis and other serious or incurable nervous system conditions, autism, or terminal cancer. However, the bill does not limit an employer's right to maintain a drug-free workplace policy. (Effective immediately) |
| SB 27   | Relating to recovery of damages, attorney's fees, and costs related to frivolous claims and regulatory actions by state agencies. An individual or company that successfully defends itself against a state agency's regulatory action is entitled to take the agency to court and potentially recover up to \$1,000,000 in fees and costs if the agency's action was frivolous.   |
| SB 64   | Relating to cybersecurity for information resources. Cybersecurity employees preparing for or responding to a cybersecurity event are not required to be licensed as private security officers.  |
| HB 459  | Relating to the placement and use of video recording equipment in certain child-care facilities.   |

|        |  |
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| SB 370 | Relating to employment protections for jury service. The prohibition against termination of employees for missing work to serve on a jury has been extended to the threat of discharge, intimidation, or coercion of such an employee.   |
| SB 621 | Relating to the transfer of the regulation of plumbing to the Texas Department of Licensing and Regulation, following recommendations from the Sunset Advisory Commission requiring an occupational license and authorizing a fee. Although this bill did not pass, Governor Abbott extended the Texas State Board of Plumbing Examiners by executive order until May 31, 2021 for reasons of public safety and disaster recovery; licensing requirements for plumbers will continue during that period. |

### Unemployment Insurance

|         |  |
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| SB 2296 | Relating to definition of a common paymaster. Consistent with existing federal law (26 U.S.C. § 3306(p)), companies related by common ownership may now have one of the companies serve as a common paymaster for all of them. (Effective January 1, 2020) |
|---------|--|

### Workforce Development

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| HB 918 | Relating to providing certain discharged or released inmates with documentation to assist in obtaining employment. To help former inmates find work upon release from prison, the prison must provide the releasee with documentation needed for finding new work, including his or her job training record, records of work done while incarcerated, a résumé, a practice interview completion certificate, and, if the release does not already have a birth certificate or Social Security card, the prison must submit requests for such documents on the releasee's behalf. (Effective January 1, 2020) |
|--------|--|



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We're enhancing WorkInTexas.com to improve your hiring experience.

WorkInTexas.com will be unavailable while we transition to the new and improved site from August 9 at 6 p.m. to August 19.

The new website will offer a responsive design, improved talent matching, access to real-time labor market data, and a Virtual Recruiter to connect you with qualified talent to drive your business forward.

# Texas Business Today

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