

# Texas Business Today

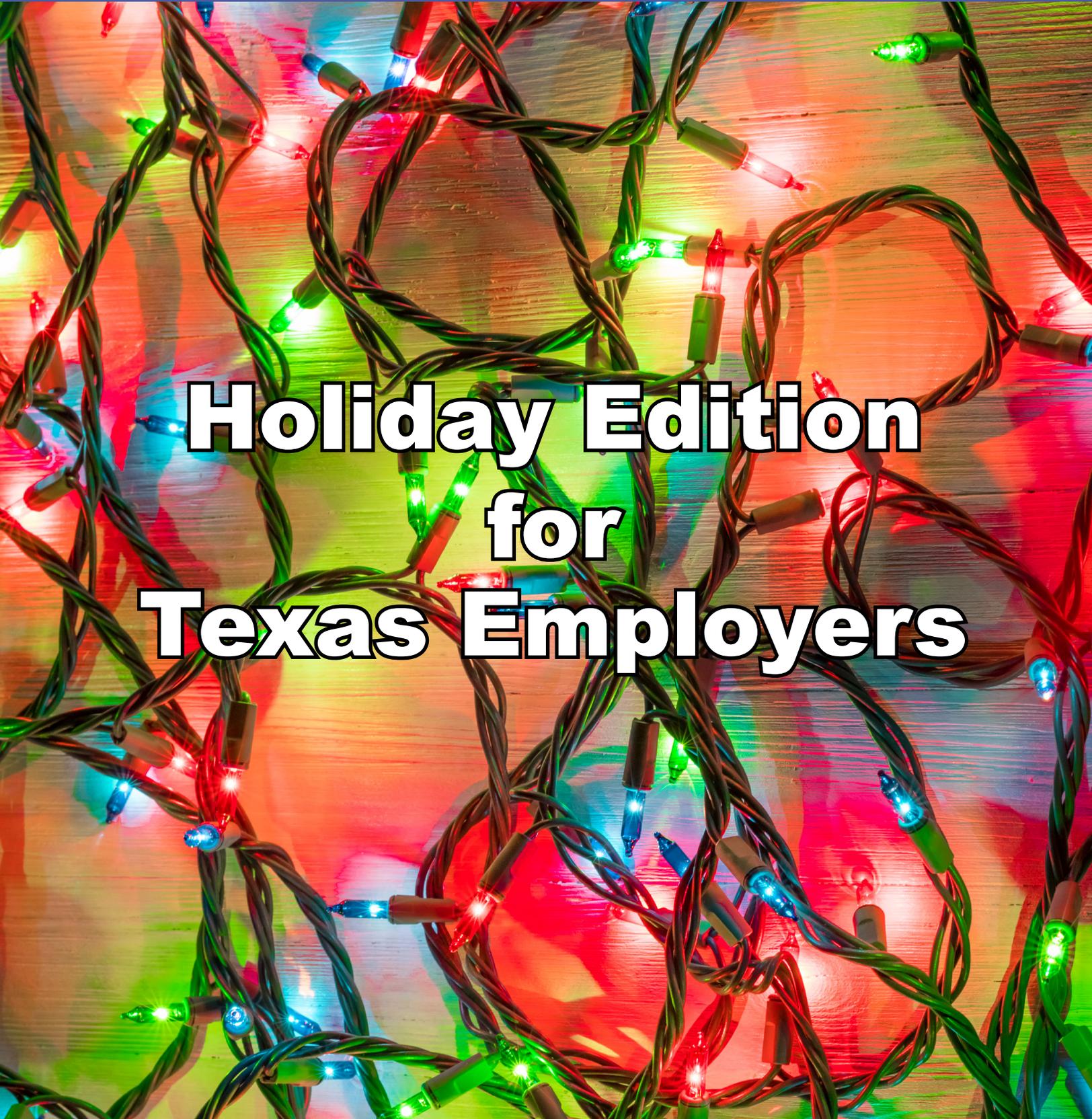
Aaron S. Demerson  
Commissioner Representing Employers

Fourth Quarter 2019

Best Practices for Retaining,  
Supporting, and Advancing  
Employees with Disabilities

Holiday Tidbits- Employer Issues  
Related to Holidays

Differences Between Public and  
Private Employers



## Holiday Edition for Texas Employers



Top row pictured left to right: Mario Hernandez, Kimberly Bradford-Brown, Aaron Demerson, Bonnie Downs, Elsa Ramos  
Bottom row pictured left to right: Laike Todd, Cassandra Medrano, Tommy Simmons, Velissa Chapa, Brian Owens

## Commissioner's Corner: Committed to Serving All Texas Employers

Dear Texas Employer,

Welcome to our 2019 4th quarter issue of *Texas Business Today*! I am proud to serve as the representative for the over 560,000 Texas employers and 2.6 million small businesses. I am dedicated to helping businesses start, grow, and thrive in Texas.

Prior to my appointment, I served as the Director of the Office of Employer Initiatives at the Texas Workforce Commission (TWC). In that position, I provided leadership and direction to engage employers, business and educational organizations, and the economic development community in the ongoing development of a customer-focused, market-driven workforce system.

Before TWC, I was a Senior Advisor to Governor Rick Perry and Executive Director of the Economic Development and Tourism Division in the Office of the Governor, leading a team that marketed the State of Texas as a premier destination for both business and travel.

In my new role, I plan to focus on the needs of Texas employers while highlighting opportunities around foster youth, internships, veterans, and small and women-owned businesses.

Since starting this position, we have been off to the races. October was National Disability Employment Awareness Month where we celebrated the contributions of workers with disabilities and educated workers about the value of a workforce inclusive of their skills and talents. I encourage all Texas employers to look at this talent pipeline and know they are the true problem solvers of our community.

We also hosted our third annual Texas HireAbility Forum in El Paso, TX and announced our new We Hire Ability Employer Recognition Program, which recognizes Texas employers whose workforce is made-up of 10% people with disabilities.

As we recognized Veterans Day, I wanted to highlight our eighth annual Hiring Red, White & You (HRWY!) Statewide Hiring Fair. Over the past seven years, HRWY! has connected more than 84,153 job seekers, including 35,485 veterans and 48,668 spouses, to 14,420 employers and over 2,027 same-day hires. Thank you to our Texas employers for their participation in this

event in order to meet, hire and work firsthand with our nation's heroes. This event is just one way we honor our Texas veterans by creating new opportunities for them to contribute to our great state after their service in uniform. We also continue to recognize our Texas employers whose workforce consists of 10% veterans. For more information, go to: <https://twc.texas.gov/jobseekers/texas-operation-welcome-home#WeHireVets>.

In conclusion, we have announced our 2020 Texas Business Conference (now known as the Texas Conference for Employers) list of cities. We will be traveling to 16 cities throughout the state, offering employers and human resource professionals the opportunity to learn about new employment law updates. For more information, please see page 4.

In this issue of *Texas Business Today*, we provide helpful articles discussing how to manage the upcoming holiday season, how to retain employees with disabilities, and U.S. Department of Labor updates that will be helpful to your business.

As we approach 2020, I look forward to meeting you in your respective communities and serving as your Commissioner Representing Employers. Please know that we are here for you as your first line of resource and do not hesitate to contact me or my office if you need assistance.

Sincerely,

Aaron S. Demerson  
Texas Workforce Commission  
Commissioner Representing Employers

# Making Connections Across the State



- 1.** Ribbon Cutting Ceremony for the You Choose! Career Expo in Corpus Christi, TX hosted by Coastal Bend Workforce Solutions.
- 2.** Attending the Industry Discovery Expo sponsored by Workforce Solutions Tarrant County in Dallas, TX to support our youth in finding their careers at an earlier age.
- 3.** In honor of National Women's Small Business Month, visited Soul Popped Gourmet Popcorn located at Barton Creek Mall in Austin.
- 4.** Visiting with a representative from H-E-B during the White Cane Day celebration in Austin, TX.
- 5.** Launching our newly upgraded WorkinTexas.com job-matching website to better connect our job seekers and Texas employers.
- 6.** Check signing for FIRST Robotics to help support robotic competitions for our young scholars.
- 7.** Meeting with employers at our 3rd annual Texas HireAbility Employer Forum to focus on recruiting, hiring, and retaining individuals with disabilities.



# Texas Conference for Employers

(Formerly known as the Texas Business Conference)

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

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



## 2020 Conference Locations

The Woodlands	El Paso
Kilgore	Frisco (2 day)
Amarillo	Beaumont
New Braunfels	Laredo
Mission (2 day)	Midland
Waco	Sherman
Abilene	Galveston
Del Rio	Georgetown

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

### Topics include matters such as:

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

The non-refundable registration fee is \$175 (one day) and \$225 (two days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. For more information on how to apply for these Professional Development Credits upon attending the Texas 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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# Holiday Tidbits- Employer Issues

**Elsa G. Ramos**/ Legal Counsel to Commissioner Aaron S. Demerson

The holiday season is full of fun and festive activities, both at home and at work. However, often this is also the season for employers to encounter a myriad of questions surrounding all sorts of workplace issues, many unique to the holidays. Hopefully the baker's dozen of common issues addressed below will provide employers with helpful tips to successfully navigate the holiday waters through the end of the year and the beginning of the next.

## 1. Paid Holidays

No federal or Texas law requires employers to provide any paid holidays to employees. Paying employees for holidays, whether worked or unworked, is a matter of policy for each employer, which means that employers are free to make all decisions about this issue. Learn more: [https://twc.texas.gov/news/eftc/holiday\\_policies.html](https://twc.texas.gov/news/eftc/holiday_policies.html)

## 2. Requests For Time Off

Requests for time off during the holidays are not unusual. Since no general law requires employers to grant requests for time off, granting or denying these requests is usually a matter of employer policy. However, depending on the reason for the request, certain legal protections may apply. For example, around the holidays, religious considerations are common. For employers with at least 15 employees, the law requires that they reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations

of the employer's business. According to Equal Employment Opportunity Commission (EEOC) guidance, common religious accommodations related to requests for time off include flexible scheduling and voluntary shift substitutions. Learn more: <https://www.eeoc.gov/laws/types/religion.cfm>

## 3. Seasonal Employees

Many employers find themselves busier during the holiday months and hire short-term or seasonal workers to handle the extra work. Employers should note that these seasonal employees are treated the same as regular employees for purposes of **new hire paperwork** and tax liability. This means that in Texas, employers must satisfy all of the usual new hire requirements and report wages to the Texas Workforce Commission and the Internal Revenue Service.

## 4. Holiday Bonuses

Many employees look forward to a holiday or end of year bonus. While not required by law, if employers choose to give monetary or non-monetary gifts or bonuses, the general rule is that, whether cash or not, they are considered additional W-2 wages and subject to payroll and income taxes. Cash, regardless of the amount, is always considered wages subject to payroll taxes. The same is true for gift certificates and gift cards with a cash equivalent. Some non-cash gifts and awards can be tax free if they are considered a "de minimus" fringe benefit deemed to have little



*While not required by law, if employers choose to give monetary or non-monetary gifts or bonuses, the general rule is that, whether cash or not, they are considered wages subject to payroll taxes.*

value. For more information, review the [2016 4th quarter issue](#) of the *Texas Business Today* newsletter.

## 5. Seasonal Decor

Decking the halls may be half the fun of the holiday season, but employers should ensure that common sense is followed by all. Employers can place limits on when, where, and the general type of decorations employees may display in their individual work spaces. If employees bring items with religious or cultural connotations, employers should not discriminate against employees based on religion, race, or national origin. As to common areas that are used by all employees, if employers choose to decorate these areas, it might be best to avoid the appearance of favoring or endorsing only one religion. Finally, as to that holiday perennial—mistletoe—a strict prohibition is recommended to avoid sexual harassment claims.

## 6. Holiday Parties

Holiday celebrations may be a great way to foster team building and camaraderie in the workplace. However, employers will want to be sensitive to religious and cultural differences among employees. Making attendance at holiday parties strictly voluntary is a best practice, and avoids certain liabilities for employers. For example, even if a company party occurs after hours, if attendance is required, then the time spent at the party is compensable time for which hourly employees must be paid. In addition, depending on the religious nature of the event, compulsory attendance may lead to a claim of religious discrimination. And one last thing, as illustrated in the accompanying “Twas the Eve of the Party” on page 8, serving alcohol at employer sponsored parties is not recommended.

## 7. Weather Related Absences

Winter weather can be severe in all parts of Texas and may result in employees missing work because of it. The requirements for paying employees for weather-related absences depend on the type of employee. For hourly employees, employers are required to pay only for those hours worked. For salaried exempt employees, employers may deduct a full day’s absence from the employee’s pay if an employee chooses not to come in to work because of inclement weather on a day when the employer is open for business. However, deductions from salaried exempt employees’ salaries are tricky, so a careful review of [this topic](#) is important.

## 8. Business Closures

During this time of year, temporary business closures are common for a couple of reasons: 1) involuntarily due to an inclement weather event, or 2) voluntarily because the employer closes its doors in observance of a holiday. Are employers responsible for paying their employees for these days off? The answer depends on the type of employees. Employers are required to pay their hourly employees only for time worked. Of course, an employer may choose to pay or allow



*As to that holiday perennial -mistletoe- a strict prohibition is recommended to avoid sexual harrassment claims.*

employees to use available paid time off hours to compensate them for the time they missed. As for salaried exempt employees who have worked any part of the week containing the closure dates, employers are required to pay them for the days not worked.

## 9. Extra Holiday Pay/Hours

Since no federal or Texas law requires employers to observe or celebrate any holidays, there is no requirement that employees receive extra or premium pay for working on a holiday. That is a matter of policy for employers, which means that employers make the rules on this issue. Employers with policies outlining special rules on holiday pay, should follow the policy, as under Texas Payday Law, a wage agreement will be enforced as written.

## 10. Flu Season

The traditional holiday season happens to coincide with the cold and flu season. To minimize absences, some employers may choose to require that employees get vaccinated for the flu. While allowed under the at-will doctrine in Texas, such a mandate could expose employers to liability under various laws. For example, for employers with at least 15 employees,



*The ugly holiday sweater is practically a holiday staple nowadays. Employers may allow, or even encourage, festive dress during this time of year.*

an employee who refuses to comply with the flu shot requirement based on a religious belief or a medical reason may be protected under Title VII of the Civil Rights Act of 1964. For more information, review the [2018 1st quarter issue](#) of the *Texas Business Today* newsletter. Bottom line: mandating the flu shot is not recommended.

If despite everyone's best efforts, an employee falls victim to the flu, employers may require medical documentation excusing an employee's absences or releasing an employee to return to work.

## 11. Gift Exchanges

At this time of year, it is better to give than to receive, unless an employee does not wish to participate in a workplace gift exchange. Holiday gift exchanges are common, and enjoyed by many. However, due to some of the reasons discussed herein, such as religious or cultural differences, some employees would prefer to opt out of participation. Gift exchanges should be voluntary, and those who choose not to participate should suffer no negative repercussions for their choice. In addition to potential discrimination claims, requiring employees who are paid at minimum wage, or close to minimum wage, to participate in a gift exchange could have the effect of reducing the employees' pay below minimum wage, which is a violation of the Fair Labor Standards Act.

As for those who choose to participate in some form of gift-giving at work, employers should stress the use of common sense and good judgment when making gift selections for co-workers in a culturally diverse and inclusive work setting to avoid claims of harassment.

## 12. Dress Code and Grooming Standards

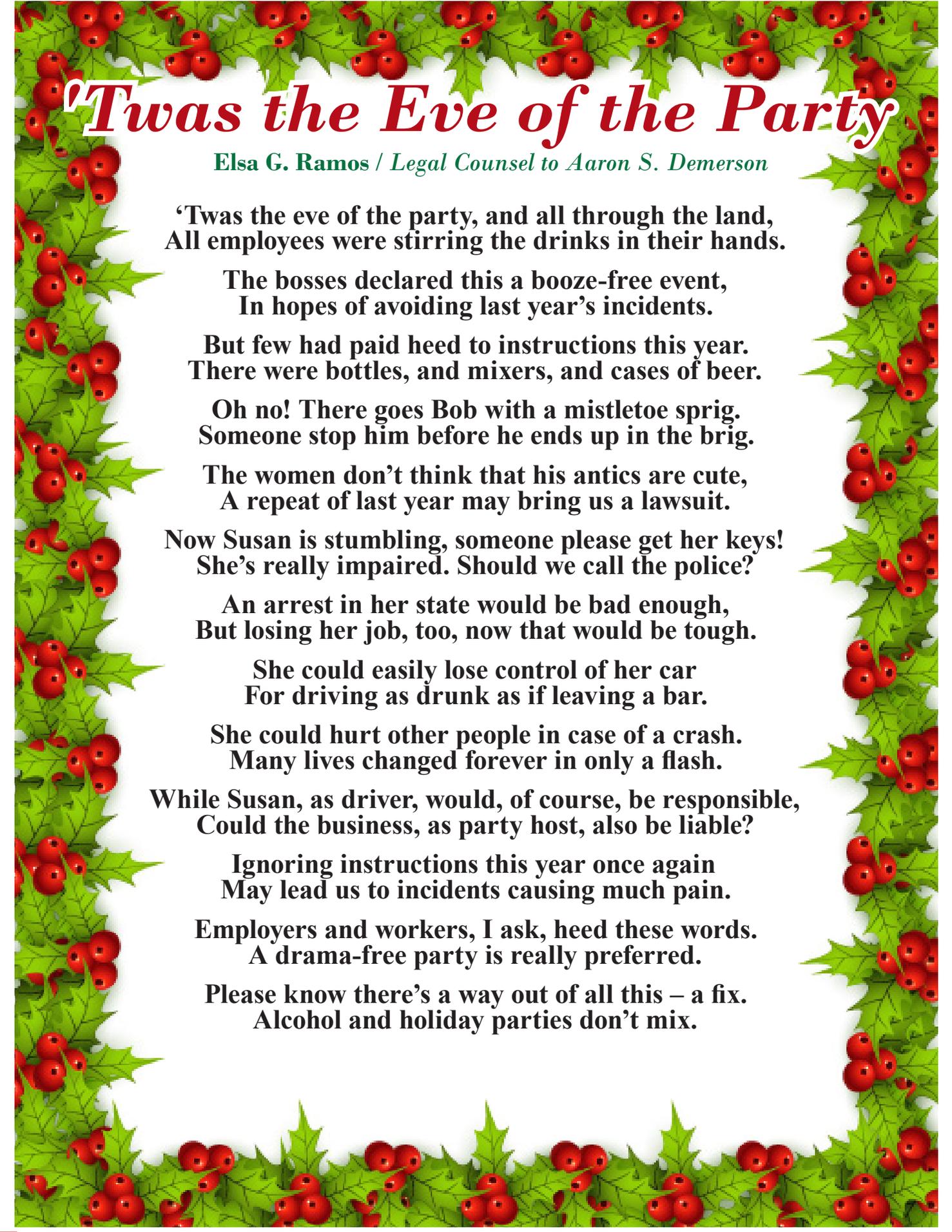
The ugly holiday sweater is practically a holiday staple nowadays. Employers may allow, or even encourage, festive dress during this time of year. However, as with gift exchanges herein, it is important for employers to insist that employees use common sense and good judgment when expressing holiday spirit by way of their wardrobe. This helps prevent harassment claims and ensures that all feel comfortable at work.

## 13. Toy Drives/Charity Drives

Rather than engaging in gift exchanges, and sometimes in addition to them, some businesses choose to contribute to charitable organizations during this time of year by organizing toy drives, food drives, or other similar enterprises to help others in need. The sentiment is admirable, and many employees may want to contribute, but for the reasons mentioned under gift exchanges, it is best to make participation voluntary, not mandatory.

## Finally

These thirteen tidbits briefly address only some of the common scenarios that employers experience during the holidays. For questions about these, or other employee-related topics, do not hesitate to call the employer hotline at 1-800-832-9394, option 4, to speak to one of our staff attorneys. 📍



# *'Twas the Eve of the Party*

*Elsa G. Ramos / Legal Counsel to Aaron S. Demerson*

**'Twas the eve of the party, and all through the land,  
All employees were stirring the drinks in their hands.**

**The bosses declared this a booze-free event,  
In hopes of avoiding last year's incidents.**

**But few had paid heed to instructions this year.  
There were bottles, and mixers, and cases of beer.**

**Oh no! There goes Bob with a mistletoe sprig.  
Someone stop him before he ends up in the brig.**

**The women don't think that his antics are cute,  
A repeat of last year may bring us a lawsuit.**

**Now Susan is stumbling, someone please get her keys!  
She's really impaired. Should we call the police?**

**An arrest in her state would be bad enough,  
But losing her job, too, now that would be tough.**

**She could easily lose control of her car  
For driving as drunk as if leaving a bar.**

**She could hurt other people in case of a crash.  
Many lives changed forever in only a flash.**

**While Susan, as driver, would, of course, be responsible,  
Could the business, as party host, also be liable?**

**Ignoring instructions this year once again  
May lead us to incidents causing much pain.**

**Employers and workers, I ask, heed these words.  
A drama-free party is really preferred.**

**Please know there's a way out of all this – a fix.  
Alcohol and holiday parties don't mix.**

# Differences Between Public and Private Employers

**Mario R. Hernandez** / *Legal Counsel to Commissioner Aaron S. Demerson*

Texas is home to a tremendous number of employers. With such a vast amount of business taking place in the state, it is not hard to believe that employers provide a wide array of products and services. Contained within the broad category of employer are public-sector and private-sector employers. This article will explore some of the differences in laws and regulations between these two types of employers.

## The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) is a law that has differences between public-sector and private-sector employers. Private-sector employers are covered by the law if they employ 50 or more employees. Public-sector employers are covered by the FMLA regardless of the number of employees they employ. This includes public agencies, public school boards, and public elementary and secondary schools. Private elementary and secondary schools are also covered by the FMLA regardless of the number of employees they employ. For more information about the FMLA, please visit: <https://www.dol.gov/whd/fmla/employerguide.pdf>.

## Personnel Files

Questions sometimes arise over the subject of personnel files. If an employee requests to see their personnel file, must the employer allow the employee to view it? Does the employer have to provide a copy of the personnel file to the employee upon request? In Texas, an employer is not required to give an employee access to the employee's personnel file. However, there is an exception to this general rule for public-sector employees. Under the Public Information Act, public-sector employees may request copies of their personnel files.

Another exception exists regarding OSHA-related documents on injuries and illnesses of employees. These types of documents would need to be accessible to employees. For more information on personnel files, please visit: [https://twc.texas.gov/news/eftc/personnel\\_files\\_details.html](https://twc.texas.gov/news/eftc/personnel_files_details.html).

## Compensatory Time

Many employers are aware of the concept of compensatory time or “comp” time. The basic idea is that an employee is awarded leave time instead



*Different laws and regulations can affect different types of employers.*



*The Texas Payday Law contains many requirements including, but not limited to, when wages are delivered, how to deliver them, and the consequences for failure to properly do so.*

of overtime pay. For private-sector employers, it is not permissible to substitute a non-exempt employee's overtime pay with compensatory time. The section in the U.S. Code dealing with compensatory time is 29 U.S.C. 207(o) and refers specifically to public-sector employers – you can view it at the following link: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title29-section207&num=0&edition=prelim>.

Keep in mind, if a public-sector employer uses compensatory time as a substitute for overtime pay, it must be on a time-and-a-half basis. For more information on compensatory time and its requirements, please visit: [https://twc.texas.gov/news/eft/advanced\\_flsa\\_issues.html](https://twc.texas.gov/news/eft/advanced_flsa_issues.html).

## **Texas Payday Law**

The Texas Payday Law is found in Chapter 61 of the Texas Labor Code and deals with the payment of wages. The Texas Payday Law contains many requirements including, but not limited to, when wages are to be delivered, how to deliver them, and the consequences for failure to properly do so. The Texas Payday Law covers private-sector employers. Governmental entities, which are a type of public-sector employer, such as the federal government, the state, or a political subdivision of the state, are not covered by the Texas Payday Law. For more information on the Texas Payday Law, please visit: <https://twc.texas.gov/jobseekers/texas-payday-law>.

## **National Labor Relations Act**

The National Labor Relations Act (NLRA) was enacted by Congress in 1935, and is enforced by the National Labor Relations Board (NLRB). Under the NLRA, employees are allowed to engage in protected concerted activity and discuss workplace conditions. It is this aspect of the NLRA that makes some types of employer policies illegal, such as those that prohibit employees from

discussing their pay.

The NLRB's jurisdictional reach is vast, but not infinite. Most private-sector employers will fall within the NLRB's bounds. However, there are exceptions, some of which are found in the public sector. For instance, federal, state, and local governments are not within the jurisdiction of the NLRB. In addition, public schools, libraries, and parks are also outside the scope of the NLRB. For more information on the NLRA and the NLRB, please visit: <https://www.nlr.gov>.

## **Workplace Posters**

There are workplace posters that employers are required to display at their places of business. Poster requirements apply to both private-sector and public-sector employers. In fact, there are posters that apply specifically to public-sector employers. For instance, public-sector employers are required to have a poster dealing with the Whistleblower Act in a prominent location at their workplaces. In addition, public employers are required to have posters regarding the Texas Hazard Communication Act and the Job Service Complaint System as well.

More information and links on required posters for private-sector and public-sector employers can be found at the following link: <https://twc.texas.gov/businesses/posters-workplace>.

## **Conclusion**

There are many differences between private-sector and public-sector employers. While this article is by no means an exhaustive list of all such differences, it provides insight to the concept that different laws and regulations can affect different types of employers. For more information, please feel free to call our employer hotline at 1-800-832-9394. 🇹🇽

# TWC Expands Employer Benefits Services

## Unemployment Insurance Operations & Customer Support

Employer Benefits Services (EBS) is the Texas Workforce Commission's (TWC) free online system that allows you to access your unemployment benefits information. You may already use EBS to receive TWC correspondence and manage your appeals. Now you can use EBS to submit Mass Claim Requests and Shared Work Plans, respond to Notices of Potential Chargeback, and update your designated addresses.

EBS online is fast, easy, secure, and available 24/7. You must have an Employer Benefits Services account to take advantage of the new services. For more information on EBS and how to create a free account, see [Employer Benefits Services](#).

### Mass Claim Requests

Are you facing a temporary or permanent layoff? The Mass Claims program streamlines the unemployment benefit claims process for employers faced with either temporary or permanent layoffs. Employers can submit basic worker information on behalf of their employees to initiate claims for unemployment benefits.

EBS makes the Mass Claims process even easier and reduces the amount of time and paperwork required to submit a Mass Claim Request. You can submit your Mass Claim Request on EBS up to 30 days in advance of the layoff. If you decide to add or remove employees from the mass claim, you simply log on to EBS and change the information online. In addition, you can:

- Submit the worker's final week of earnings, helping to ensure proper payment
- Submit information on severance pay or wages in lieu of notice of layoff, reducing subsequent contact by TWC

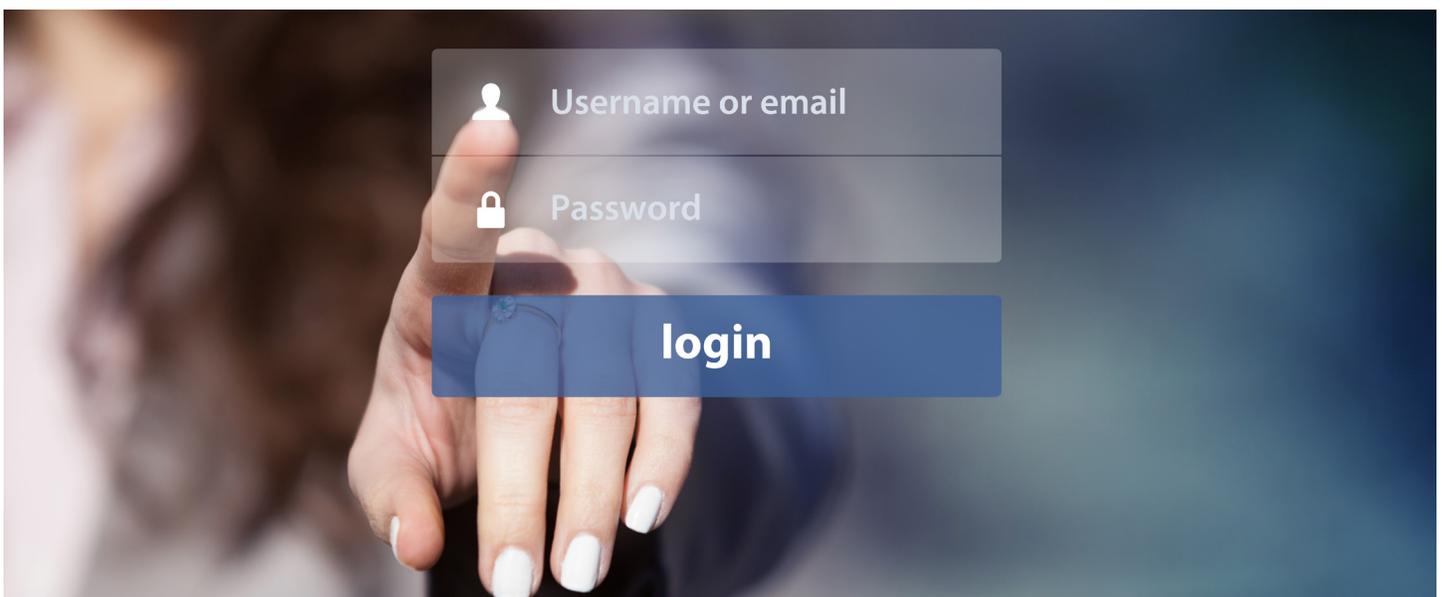
For more information, see [Mass Claims for Unemployment Benefits](#).

### Shared Work Plans

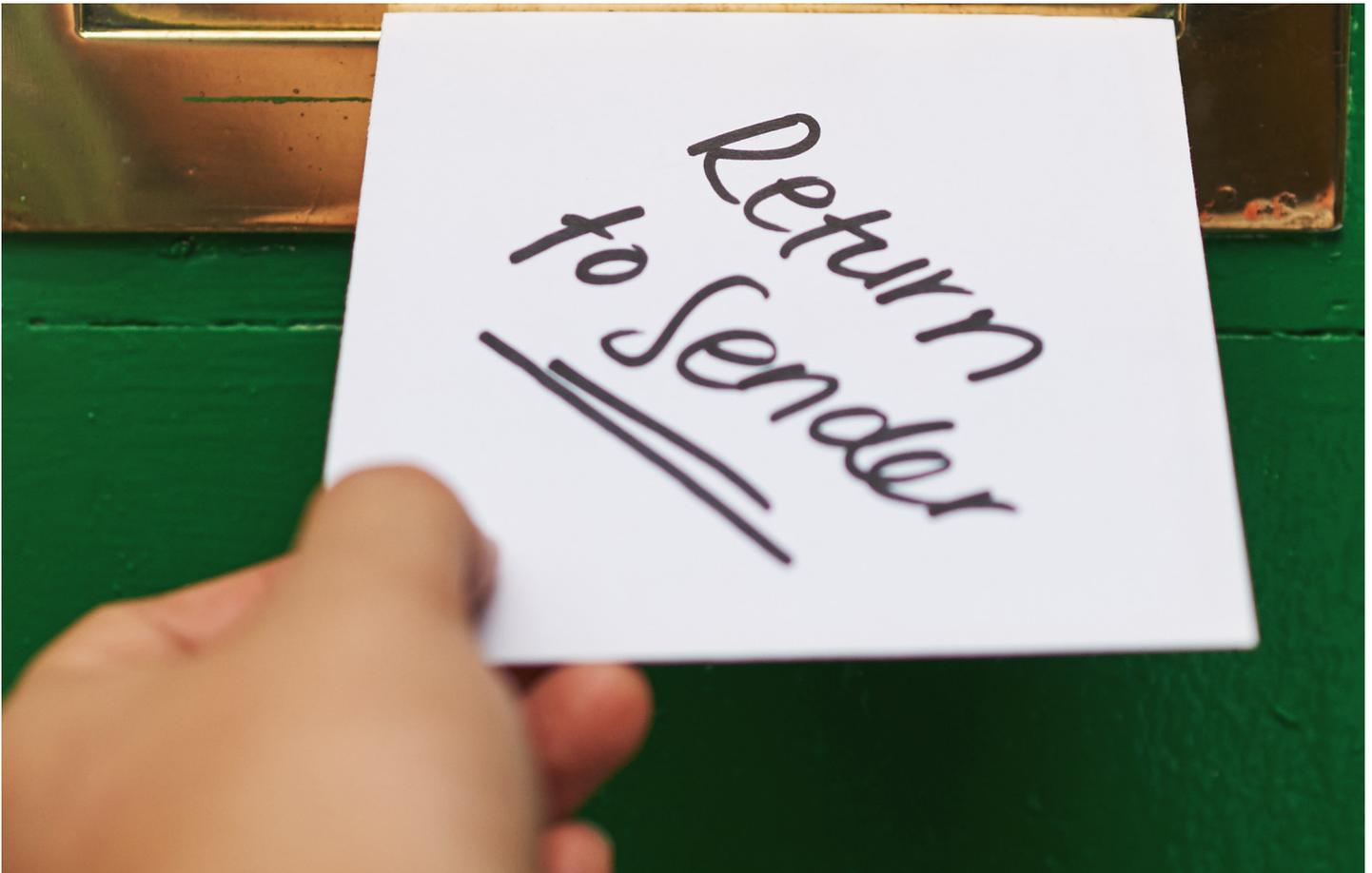
Are you concerned about a business slowdown? The Shared Work program provides an alternative to layoffs by providing employees partial unemployment benefits. You submit a Shared Work Plan to TWC detailing how you will reduce the hours of some employees rather than laying them off. This allows you to retain highly skilled and trained workers, while workers continue to receive the employee benefits you offer. If TWC approves your plan, your employees will receive partial unemployment benefits to supplement their lost wages. Now you can manage your entire [Shared Work Plan](#) on EBS.

### Notices of Potential Chargebacks

After claimants receive their first unemployment benefits payment, TWC mails a Notice of Maximum Potential Chargeback to their base-period taxed employers, except the last employer, showing the maximum amount of benefits TWC may potentially



*Employer Benefits Services (EBS) is the Texas Workforce Commission's (TWC) free online system that allows you to access your unemployment benefits information.*



*Setting up a designated address ensures your notices are mailed to the correct address, thus reducing the risk of misrouted or lost mail.*

charge to the employer's account.

If you disagree with the chargeback amount, you have 30 days to respond to the chargeback notice. If you use EBS, your return date will be the date you respond online. You do not need to worry about missing a deadline because of lost or delayed mail. For more information, see [Employer Unemployment Benefit Chargebacks](#).

### **Updated Designated Addresses**

Texas law allows Texas employers with a TWC tax account number to designate mailing addresses for unemployment claim notices and/or chargeback notices. Setting up a designated address ensures your notices are mailed to the correct address, thus reducing the risk of misrouted or lost mail. EBS is the fastest way to establish or change a designated and/or chargeback address. When you use EBS to designate or change an address, the change goes into effect the next business day. For more information, see [Designate an Employer Mailing Address](#).

### **Electric Correspondence**

Electronic Correspondence on EBS offers you fast, online access to your unemployment benefits correspondence 24/7. You will receive most, but not

all, of your unemployment benefits correspondence in a secure, email inbox, including TWC:

- Statements
- Determinations
- Benefits forms and notices

We send emails to notify you when we send correspondence to your inbox. For more information, see a [user guide on how to use Electronic Correspondence](#).

### **Appeal Online and View Status**

An appeal is your written notice that you disagree with a TWC decision and want your case decided through the appeal process. Filing an appeal through EBS is fast, easy, and secure. After your appeal is submitted, you can use EBS to view your appeal status. For more information, see a tutorial on how to appeal online at <https://twc.texas.gov/files/businesses/how-to-submit-an-employer-appeal-online-twc>. 🇹🇽

# Best Practices for Retaining, Supporting, and Advancing Employees With Disabilities

**Velissa R. Chapa** / *Legal Counsel to Commissioner Aaron S. Demerson*

From an early age, we are told to be “well-rounded” students, taught to excel at every subject. However, as the years pass, we quickly discover that we have weaknesses: English is easy, but Math is a struggle, or maybe you were great at Biology but disliked History. Over time, we learn that everyone carries a unique set of strengths and abilities, and only when combining our skills can we hope to evolve into something greater than ourselves.

Employers around the world have begun to appreciate how these lessons can apply to the workplace. It is no secret that disability diversity is good for business. Studies have routinely shown that employing people with disabilities leads to more innovation, productivity, increased revenue, enhanced reputations, and a competitive market advantage. We have addressed these benefits and more in past issues of Texas Business Today: <https://twc.texas.gov/files/twc/texas-business-today-3rd-quarter-2016-twc.pdf>.

However, merely employing individuals with disabilities is not enough; we must also remember to support and advance. One in every four Americans has a disability, and many of us will likely obtain some type of disability during our lifetimes. In short: we can do better. The following information should help employers engage and empower employees with disabilities.

## 1. Leave Assumptions at the Door

According to a report by Accenture, “companies that embrace best practices for employing and supporting people with disabilities in

their workforces consistently outperform their peers, including having, on average, 28 percent higher revenue, double the net income[,] and 30 percent higher economic profit margins” (<http://www.askearn.org/earns-primer-on-disability-inclusion/>). The facts speak for themselves: employees with disabilities can significantly contribute to a company’s overall success.

However, many employers do not see this. Instead, they assume that employing individuals with disabilities is too difficult and that such applicants are not as capable. This, in turn, inhibits innovation and growth, because the talent pool has been cut and different perspectives will not have a voice.

Assumptions also affect employees. Company leaders often assume that they understand a disability because either themselves or someone they know has a similar disability. They can forget that disabilities vary in number and degree. Common examples include issues such as anxiety, depression, PTSD, and even pregnancy. The result? Employers can become dismissive, judgmental, inflexible, and even cruel.

That is why it is important for employers to avoid assumptions. If we really want to be supportive of others, we must address each issue on a case-by-case basis. Doing so is also good for business; it increases employee retention and reduces the likelihood of a disability discrimination lawsuit under the Americans with Disabilities Act or the Rehabilitation Act (<https://www.eeoc.gov/laws/types/disability.cfm>).

“We are different, but we share the same human spirit. Perhaps it’s human nature that we adapt and survive.” - Stephen Hawking

## 2. Be Inclusive

Focusing on diversity is a good start, but it is not enough. Employers should also promote an inclusive business culture. What is the difference between diversity and inclusion? Diversity is having a seat at the table; inclusion is feeling welcome at that table.

Too often, employees with disabilities can be made to feel like they are the “other,” that perhaps they should be grateful to have a job and be in the room. By creating that environment, employers have just created a toxic, stifling workplace. This attitude fosters an uneven playing field, disgruntled workers, and lost opportunities for growth.

Instead, employers should think about ensuring that all voices are not only heard but are comfortable and confident in being heard. One way to do this is to create an inclusion council, where a select group of employees could design and implement strategies, monitor progress, and evaluate the working environment. This group, of course, should involve input from employees with disabilities. There are many ways to foster inclusivity, and the remainder of this article focuses on several proven ways to achieve that end.

## 3. Address Diversity and Inclusion in the Company’s Mission Statement

Success means building from the ground up. Individuals with disabilities should know that the company is committed to diversity and inclusion efforts. Including this information in the mission statement and company website shows careful thought and attention, which will attract a wider net of interested applicants and consumers. It also serves as an important reminder for those in charge.

## 4. Think About Accessibility, Accommodations, and Potential Barriers

Employers should strive for all employees to have access to company materials, information, and physical spaces. Accessibility is important and can apply to the company website, training materials, work tools, and environment. Consider the need for large font, closed captioning, braille, etc., or assistive technology that is already available. As an example, the Job Access With Speech screen reader (JAWS) is an excellent tool for assisting blind or visually impaired workers with computer work. Other accommodations, such as modified work schedules and job restructuring, are also useful.

Also consider the working environment itself. Are the spaces wide enough for individuals who need more room to move around the office? Is there a ramp outside to allow for easy access? Are there any hazards that can be eliminated? Thinking about creating a disability-friendly environment supports inclusivity and has the added bonus of attracting a large market of consumers.

## 5. Create Policies, Procedures, and Practices, and Address Issues Immediately

Employees need to feel like they have support, especially when dealing with issues such as discrimination and harassment. **Employer policies addressing harassment and disrespect toward others** is a good start, and a sample policy can be found here: [https://twc.texas.gov/news/eft/harassment\\_disrespect.html](https://twc.texas.gov/news/eft/harassment_disrespect.html). Employers should **also consider implementing a grievance procedure** for employees: <https://twc.texas.gov/news/eft/grievances.html>. (Note: employers should never discipline an employee for skipping steps in the grievance procedure).

If a complaint is made, employers must take swift action to investigate. Do not delay. Investigations should be thorough, confidential, and well-documented. Make sure to interview all witnesses (that includes the accused), take detailed notes, and determine any changes to the working environment that may be necessary while you conduct your investigation. Employers may also want to keep the alleged victim apprised as to the status of the investigation, so that he or she knows that their complaints are being taken seriously and are not being ignored.

Once a determination has been made, employers must choose the remedy. Will anyone be warned, suspended, or discharged? Will there be additional training?

## 6. Conduct Diversity and Inclusion Training

A well-known saying is that “traveling is the antidote to ignorance.” The more we immerse ourselves in the worlds and lives of others, the better we are at recognizing, accepting, and appreciating our differences.

That is what diversity and inclusion training does: it allows people a chance to understand what life is like in someone else’s shoes. Training can have a positive effect on attitudes and behaviors, thereby reducing the risk of workplace discrimination and harassment. Remember: such training should apply to everyone in the business, from entry-level employees to the CEO. The Employer Assistance and Resource Network’s (EARN) website on disability inclusion provides an online training center to assist employers in this endeavor: <http://www.askearn.org/training-center/>. There are various other training tools available online as well.

## 7. Think About Advancement

Many companies pride themselves on hiring and retaining workers with disabilities. While that is something to celebrate, employers should be careful not to simply focus on “diversity by numbers.” It is not enough to employ workers with disabilities; employers should also be looking at whether these individuals



*What is the difference between diversity and inclusion? Diversity is having a seat at the table; inclusion is feeling welcome at the table.*

are being overlooked for advancement opportunities. Statistics show that individuals with disabilities rarely occupy managerial positions within a company. Too many employers leave talent on the table when they focus on the disability, rather than the employee's abilities. A diverse workforce leads to diverse ideas and solutions.

## 8. Go All In

A half-hearted plan will only produce half-hearted results. Diversity and inclusion efforts must be threaded throughout the entire business to be successful. This means that all departments should be involved in the effort, from the bottom to the very top. This includes owners, officers, and even board members. Consider taking internal polls to see how employees feel about the employer's disability-inclusive efforts. Look for areas of improvement. Listen and adjust. Develop a disability engagement plan, follow it, critique it, and make any necessary changes. Train and be open to feedback.

## 9. Tap Into Existing Resources

There are a variety of helpful resources out there for employers to utilize. Take a look at the following websites, and as always, feel free to contact the Texas Workforce Commission's (TWC) Office of the Commissioner Representing Employers for further assistance at 800-832-9394. 🇹🇽

**U.S. Department of Labor's Office of Disability Employment Policy:** <https://www.dol.gov/odep/#TWC's>

**Vocational Rehabilitation Services:** <https://twc.texas.gov/jobseekers/vocational-rehabilitation-services>

**EARN on Disability Inclusion:** <http://www.askearn.org/>

**Corporation for National & Community Service:** <https://www.nationalservice.gov/resources/disability-inclusion>

**The American Psychological Association's Office on Disability issues in Employment:** <https://www.apa.org/pi/disability/resources/employment>

# Frequently Asked Questions from Employers

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

**Q:**

**A TWC tax auditor just told us in a letter that our contractors are employees. The auditor not only ignored the contracts we have everyone sign, but also the fact that all of the other companies in our industry treat their 1099 workers the same way. How can TWC make such a ruling?**

**A:**

Independent contractor status is not determined by the preference of either the worker or the company using him or her, by whether it is a common practice in an industry, or by anything specified in a contract standing alone. It is determined under specific laws or legal standards pertaining to whatever program or employment right is involved. For unemployment tax liability purposes, TWC applies the Texas Unemployment Compensation Act (TUCA), the provisions of which were enacted by the Texas Legislature. The TUCA, in turn, is based upon and must comply with federal laws, primarily the Federal Unemployment Tax Act (FUTA), which is part of the Internal Revenue Code, and Section 503 of the Social Security Act, all of which were enacted by the U.S. Congress. Basically, if your company is 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:**

**How do I calculate overtime pay for an employee paid on a piece-rate basis?**

**A:**

First, the basic rule for overtime pay: with only very few exceptions, if the employee's total actual work hours exceed 40 for the workweek, they will be entitled to overtime pay. For piece-rate pay, first determine the total straight-time pay by multiplying the number of pieces produced by the piece rate. Then, figure out the regular rate of pay by dividing the total straight-time pay by the number of hours worked. To calculate the overtime premium, keep in mind that the total straight-time pay compensates the employee at straight-time for all hours worked, including overtime. To bring those overtime hours up to time and a half, simply multiply one-half of the regular rate of pay by the number of overtime hours. Finally, add the overtime premium to the total straight-time pay to determine the gross pay for that workweek. Other overtime calculation methods are outlined in our book *Especially for Texas Employers* at [https://twc.texas.gov/news/eft/calculating\\_overtime\\_pay.html](https://twc.texas.gov/news/eft/calculating_overtime_pay.html).

**Q:**

**We have an employee who is currently off collecting work comp. She has 5 days of PTO left. She had requested her vacation prior to her injury, but was off due to injury already. Do we need to pay this out to her? We are nearing the end of the year and have a use it or lose it policy.**

**A:**

Under federal and Texas law, paid leave is an optional benefit of employment, but under the Texas Payday Law, if paid leave is promised in a written policy or other form of agreement, it is an enforceable part of the wage agreement. In such a case, the paid leave would be enforced according to whatever the written policy provides. Whether the employee would be entitled to a payout of her accrued PTO at year's end would depend upon whether your company's written PTO policy promises or provides for such a payment. If the policy is silent on that point, the law would not require a payout. If the policy provides that unused leave remaining at year's end is forfeited, i.e., the policy does not allow carryover of unused leave from one benefit year to the next, then the company would be allowed to consider the accrued but untaken PTO forfeited.

**Q:**

**If I offer severance pay to an employee I want to fire, will that prevent me from disputing her unemployment claim?**

**A:**

No - paying severance pay will not affect your company's ability to argue that the discharge was for misconduct connected with the work, or that there is some other kind of eligibility issue with that claimant.

**Q:**

**My company recently lost an unemployment claim because the employee told the hearing officer that he had never been warned he might be fired for repeatedly showing up late. Although it is true that we never sat him down and told him face-to-face that he would be fired if he did not start coming to work on time, he should have known that he would not last long with such a poor habit. Do we have a chance for an appeal?**

**A:**

Last question first – yes, you can definitely appeal, and be sure to follow the directions for appealing that were included with the ruling. Concerning the reason your company might have lost the case, prior warnings can be very important, particularly in cases involving performance or attendance problems. See the topic “Discipline” in our book at <https://twc.texas.gov/news/eft/discipline.html> (particularly item 12). More information on what TWC looks for in a misconduct case is in the book at [https://twc.texas.gov/news/eft/ui\\_law\\_qualification\\_issues.html#dq-mc](https://twc.texas.gov/news/eft/ui_law_qualification_issues.html#dq-mc).

**Q:**

**How long should my company keep copies of job applications? Our previous HR person never threw anything away, and I've found boxes of applications for positions that no longer even exist. Are there any laws on that?**

**A:**

Equal Employment Opportunity Commission regulations require an employer to keep all documentation relating to job vacancies and hiring for at least one year after the successful candidate was selected for the position. The documentation relating to the one who was hired should be kept as long that employee remains with the company, and for at least one year after the employee leaves employment. That is only the minimum, though – other laws may apply that have longer record retention periods for specific purposes, so it might help to review the following article in our book *Especially for Texas Employers* online: [https://twc.texas.gov/news/eft/general\\_recordkeeping\\_requirements.html](https://twc.texas.gov/news/eft/general_recordkeeping_requirements.html). Once you have determined that the company is no longer obligated to retain certain HR records, they should be securely disposed of by shredding and complete destruction past any possibility of restoration. That would include secure “wiping” of the contents of HR-related data storage devices, such as hard drives, CDs / DVDs, USB drives, and so on. The company is responsible for ensuring that private, confidential information about employees and former employees is never disclosed to outside parties unless there is a legal mandate to do so.

# Business and Legal Briefs

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

## DOL Final Rule Regarding Exempt Salary Threshold

The U.S. Department of Labor issued its long-awaited rule regarding the minimum salary level for salaried exempt employees on September 24, 2019. Effective January 1, 2020, the minimum salary for such employees will increase from \$455 per week to \$684 per week (which represents an almost-exactly 50% increase). \$684 per week corresponds to an annual salary level of \$35,568. That figure is based upon “the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South), and/or in the retail sector nationwide,” meaning that 80% of salaried employees earn above \$684 per week. The new rule will for the first time allow employers to use non-discretionary bonuses and commissions for up to 10% of the required salary amount. The minimum salary for the so-called “highly-compensated employee (HCE)” exemption will increase from \$100,000 per year to \$107,432 per year, which can include non-salary pay as long as the employee receives at least \$684 per week on a salary basis. The HCE annual compensation minimum amount may not include “payments for medical insurance, payments for life insurance, contributions to retirement plans, and the cost of other fringe benefits.” The duties tests for exempt salaried employees has not changed, i.e., the salaried exempt employee categories are reserved for the small minority of employees whose primary job duty includes, in very rough terms, true executive authority, i.e., hiring and firing authority; responsibility for management of a significant aspect of a company’s operations; licensure as a degreed professional; or the expertise to engineer computer networks and program software applications. The DOL’s fact sheet regarding the new salary requirements is online at [https://www.dol.gov/whd/overtime2019/overtime\\_FS.htm](https://www.dol.gov/whd/overtime2019/overtime_FS.htm), and the full rule is at [https://www.dol.gov/whd/overtime2019/overtime\\_FR.pdf](https://www.dol.gov/whd/overtime2019/overtime_FR.pdf).

## DOL Announces Final UI Drug Testing

On October 4, 2019, the U.S. Department of Labor (DOL) released the text of its final rule on the issue of drug testing for unemployment benefit claimants, which states are allowed to do under a 2012 federal law. The official announcement, summary, public comments, and text of the rule are online at <https://www.federalregister.gov/documents/2019/10/04/2019-21227/federal-state-unemployment-compensation-program-establishing-appropriate-occupations-for-drug>. A PDF



*DOL released the text of its final rule on the issue of drug testing for unemployment benefit claimants.*

version of the rule is at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-21227.pdf?1570106717>. The main change of the new final rule from an earlier version that was invalidated in early 2017 is that the definition of occupations that require pre-hire or post-hire drug testing as a standard eligibility requirement has been expanded. Where the 2016 rule limited such occupations to those in which the testing was required by law, the 2019 rule expands the list to include occupations determined by a state to be ones in which drug testing is a standard eligibility requirement among employers seeking such workers. The state’s determination must have a “factual basis.” As noted in the Comments for § 620.3, the DOL considers the following to provide a factual basis for such a determination: “[l]abor market surveys; reports of trade and professional organizations; and academic, government, or other studies.” In Texas, the Texas Workforce Commission will likely publish its own guidance on how the corresponding state law will be administered in light of the new DOL rule. The effective date of the new rule is November 4, 2019.

## IRS Tax Credit for Paid FMLA Leave

Employers that provide paid leave to employees for family and medical leave may qualify for a tax credit, according to the Internal Revenue Service. To qualify, “an employer must have a written policy in place that provides ... at least two weeks of paid family and medical leave annually to full-time employees (prorated for part-time employees), and such leave pay must equal at least 50 percent of the wages normally paid to the employee.” This credit is available for qualifying paid leave paid to eligible employees, even if the employee is not individual eligible under the actual FMLA. For

the official IRS notice, see IRS Publication 5327, “New tax credit for employers who provide paid family and medical leave,” which is online at <https://www.irs.gov/pub/irs-pdf/p5327.pdf>; additional detailed guidance is at <https://www.irs.gov/pub/irs-drop/n-18-71.pdf>.

## New Statute Will Allow Limited 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 concurrently-employed 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. The main thing to keep in mind is that “concurrently-employed” refers to employees who actually perform services for at least one of the related companies and the entity that is the common paymaster. Not every employee who is on the payroll for a payrolled entity will fit that requirement, and the new statute will not apply to an employee who does not actually work for the paymaster and the payrolled entity. TWC issued a proposed rule for applying the new statute on October 11, 2019 and will accept public comments through November 11, 2019. For more information, consult your CPA or tax attorney, or else call the Employer Commissioner’s office at 800-832-9394.

## DOL Proposes New Rule for Tipped Employees

The U.S. Department of Labor’s website at <https://www.dol.gov/whd/flsa/tipcreditnprm.htm> discusses the most important aspects of DOL’s proposed rule governing pay practices for tipped employees. The proposed rule is online at <https://www.federalregister.gov/documents/2019/10/08/2019-20868/tip-regulations-under-the-fair-labor-standards-act-flsa>. The proposal changes nothing about the existing rules that tipped employees must understand before they do the work that they will be paid on that basis, that the minimum cash wage must be at least \$2.13 per hour, that the tip credit for overtime hours be no greater than it is for non-overtime hours, and that owners, managers, and supervisors should not be getting a share of tips earned by the waitstaff under any circumstances. The new items in the proposed rule include allowing non-management employees who do not traditional-

ly receive tips from customers, such as dishwashers and cooks, to share in a tip pool if the employer pays the waitstaff a cash wage of at least minimum wage, i.e., the employer does not take a tip credit, and a new provision allowing employers to take a tip credit for time spent performing non-tipped duties, as long as the non-tipped duties are related to the tipped duties and happen more or less in the same time frame as the tipped duties (examples of such non-tipped, but related, duties given in the draft rule include cleaning and setting tables, toasting bread, making coffee, short-order preparation for orders taken, and occasionally washing dishes or glasses, in addition to tasks listed in connection with tip-producing occupations at <https://www.onetonline.org>). Employers would be well-advised to consult DOL’s FAQ page on the proposed rule at <https://www.dol.gov/whd/flsa/tipsFAQ.htm>.

## Be Careful About “Banter”

Does this sound familiar? You and your employees sometimes poke fun at one another and engage in playful banter about each other’s personal characteristics and lives, and everyone seems to be all right with it – at least, no one has actually complained. This is a good example of something that can be fine, until it’s not. Many Equal Employment Opportunity Commission (EEOC) discrimination claims and lawsuits have been filed by employees who seemed to be all right with what seemed like innocent fun, but later felt that they were the victims of a hostile work environment based on a minority characteristic. Equal employment opportunity agencies and employment law attorneys agree: with almost any banter, there is always a risk that someone will feel as if their rights have been violated. As a general matter, such things are based on workplace culture and ethics, and employees take their cues from management. If employees see that company leaders treat each other and those who work for them as individuals who are respected, and do not base such treatment on any kind of minority characteristics, and do not ever let minority-related banter come up in conversation, it is much less likely that employees will feel that it is acceptable to poke “fun” at others based on minority status. It’s not that employees are not allowed to enjoy themselves, but rather that what strikes one person as enjoyable may strike another as a put-down and a sign of disrespect. Simply follow the Golden Rule and consider how you would perceive a comment if someone else were directing it to you in front of others. Do you want employees to be supportive of and encouraging toward each other? Then ensure that your words are supportive and encouraging toward your employees and your co-managers and let gratuitous put-downs become a thing of the past. 🇺🇸

# Texas Business Today

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