



# Texas Business Today

First Quarter 2012

Tom Pauken, Chairman  
Commissioner Representing Employers

TEXAS  
WORKFORCE SOLUTIONS



Common Reasons for Employee Termination Examined

• Quick Tips: UI Claims and Appeals • UI Claims' Impact on Employers •

# Texas' responsible governing policies foster job creation

In 2011, Texas added 261,200 private sector jobs. This three-percent gain in private employment exceeded the national increase of 1.9 percent, and allowed Texas to surpass its own pre-recessionary peak level of total nonfarm jobs. Over the past decade, Texas' private sector employment grew by more than one million jobs.

In terms of job creation and economic growth, Texas has weathered the worst economic crisis since the Great Depression better than any other large labor market state. Among those states, Texas continues to lead the way in job creation and having a favorable business climate. In a recent rebuttal to critics who solely attribute Texas' success to a burgeoning energy sector, Dallas Federal Reserve

## Chairman's Corner

Bank President Richard Fisher made reference to the growth in Texas' other economic sectors, which have outpaced employment gains at the national level over the last decade with the exception of the information industry. He remarked that the all-too-often overlooked factor contributing to Texas' economic success has been the prudent and responsible state governing policies, which foster opportunities for job creation and inspire "confidence in the future." Indeed, our status as an economic leader is no accident, but rather the result of a firm commitment by our state's leaders to keep government spending restrained, taxes low, and regulations both reasonable and predictable.

But we still face serious economic challenges. In order for Texas to remain an economic leader, we must continue to grow the private sector—especially the manufacturing industry which provides good-paying jobs and has undergone a severe decline over the past decade, both in the U.S. and even here in Texas. In the first decade of the 21<sup>st</sup> century, the United States has lost 5.5 million manufacturing jobs, or one-third of our manufacturing base. U.S.-based multi-national companies—which provide 20 percent of the private sector jobs in our nation—cut 2.9 million jobs in the U.S. while adding 2.4 million jobs overseas during the last decade. In order to rebuild our manufacturing base and bring jobs home to America, lawmakers in Washington should replace our onerous corporate income tax system with a revenue-neutral consumption tax to reverse the trend of American manufacturing jobs being shipped overseas or simply going away. Global conditions have provided a narrow window of opportunity for the U.S. to regain its former position as the manufacturing leader of the world.



Texas Workforce Commission Chairman Tom Pauken spoke at the Texas Manufacturers Summit in February at the San Marcos Convention Center. *Texas Workforce Commission photo*

According to the Census Bureau, population growth in Texas over the last 10 years has accelerated at a rapid pace due to a younger population in Texas and the migration of Americans from other states looking for work. Because of the unique demographic situation we face as a state, it is important that we have a long-term plan that begins educating young Texans in the skilled trades long before we find out that the local labor markets aren't meeting the needs of employers. Here in Texas, local school districts should be given the flexibility to address the high demand for skilled workers through increased emphasis on technical and vocational training at the secondary school level. Rather than this push for all secondary students to go to a four year university after high school, why not greater emphasis on opportunities for training in the skilled trades at the secondary and post-secondary levels? It's time for a whole new model of education in which Texans interested in working with their hands are provided with the skills and training to enter the workforce. The time for change is now, and I believe Texas can lead the way.

In this issue of *Texas Business Today*, Texas employers will have an opportunity to shore up their knowledge of employment laws and rules with a back-to-basics look at recommended policies and best practices which will assist in avoiding some of the common mistakes made in the workplace. Understanding the legal environment and unemployment insurance system is important for every business operation, and our office will continue to serve as a resource for Texas' employers. 🇺🇸

Sincerely,



Tom Pauken, TWC Chairman  
Commissioner Representing Employers

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Cover image: Bluebonnets along roadside. *Design Pics/ Thinkstock*

# Range of circumstances dictate UI claims' impact on employers

Unemployment insurance (UI) claims all have some effect on an employer, but the effect will be small or major, depending upon the circumstances. The main determinants of how a UI claim will affect an employer include:

1. the type of employing unit involved;
2. the type of worker involved;
3. the date of the initial claim;
4. the length of time worked by the claimant prior to the initial claim;
5. the amount of wages reported for the claimant prior to the initial claim;
6. whether the employer was the only base period employer;
7. the amount of benefits paid to the claimant;
8. the nature of the work separation; and
9. the number of employees the company has.

## Types of Employing Units

While anyone who pays a worker for personal services is an "employing unit" under the law, not all employers are liable for unemployment taxes. By the same token, not all money paid for personal services falls under the definition of "wages that are subject to reporting and UI taxation." For example, a person or company that engages an outside attorney to provide occasional legal advice is an "employing unit," but does not thereby become an "employer" liable to report the attorney's fees to the Texas Workforce Commission (TWC) as wages and pay UI tax on such earnings. Likewise, some organizations are exempted from wage reporting and tax liability by virtue of special exemptions in the law. Organizations that are liable for wage reporting and UI payments either pay quarterly UI taxes (determined by applying the employer's tax rate to the first \$9,000 of each employee's earnings in a calendar year) or have reimbursing status (they reimburse TWC dollar for dollar for any UI benefits paid out that are based on wages reported for the claimant). The following list indicates the most common categories of employing units and whether they are or are not liable for wage reporting and UI tax or reimbursement liability:

1. Customers/clients of independent contractors: such employing units do not report the money they pay to the independent contractors, owe no UI tax on such payments, and have no financial involvement in any UI claims that might be filed by such workers.
2. Some employing units are too small or pay insufficient wages to be liable under the UI system.

For example, a private-sector employing unit that pays less than \$1,500 in wages in a calendar quarter is exempt (for household/domestic employers, the threshold is \$1,000 in a calendar quarter). A tax-exempt non-profit organization with fewer than four employees is also exempt from liability. During the period of non-liability, such employing units are treated like the employing units in the first category.

3. Some employing units have some exempt and some non-exempt employees. For the exempt employees, they are treated just like the employing units in the first category above. For the non-exempt employees, they are treated like any other liable employer (see below). Some organizations, such as churches, have nothing but exempt employees and are non-labile. For a complete list of UI exemptions, see the Texas Labor Code, Chapter 201, Sections 201.042-201.078, starting at <http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.042>.
4. Private taxed employers report their employees' wages, pay quarterly UI tax on such wages (up to the first \$9,000 of each employee's earnings in a calendar year), and have potential financial involvement (chargeback liability) in any UI claims that might be filed by such workers.
5. Reimbursing employers report their employees' wages, pay no quarterly UI tax on such wages, and have potential financial involvement (reimbursement liability) in any UI claims that might be filed by such workers.
6. Taxed group account employers are in a large pool of similar governmental employing units and are treated like private taxed employers, except that any chargebacks are pooled and result in a pooled (shared) UI tax rate.
7. Non-profit organizations can elect either private taxed employer or reimbursing employer status.

## Type of Worker Involved

As noted above, some workers (independent contractors and employees whose services are exempt from the definition of "employment") will not involve their employing units financially in a UI claim. All other types of workers have the potential to involve their employing units financially, depending upon whether a particular employing unit reported wages for the claimant during the base period of the claim.

*Continued on page 12*

# Quick tips to combat UI claims and appeals, before and after they arise

## Before a claim arises:

1. If an employee is about to be fired, utilize a termination checklist; at the very least, ensure that the employee has been given the benefit of whatever termination procedures are outlined in the company policies and in whatever warnings they may have received. Before taking that final step, ask yourself whether termination would be fair and proper under the circumstances. If so, then proceed.
2. If an employee is quitting, do not have the person sign a boilerplate resignation form; have the person write their own letter, in their own handwriting if possible.
3. If an employee is quitting, do not let the person resign until and unless you are satisfied that the company has done everything appropriate to address any legitimate grievances they may have.



If an employee is quitting, do not have the person sign a boilerplate resignation form. You should have the person write their own letter, in their own handwriting if possible. *iStockphoto/ Thinkstock*

## After a claim arises:

1. Respond on time to any claim notice, ruling, or appeal decision.
2. Be as specific as possible.
3. Be consistent in your responses, appeals, and testimony.
4. Avoid name-calling or gratuitous derogatory comments toward the claimant.
5. In discharge cases, vague terminology such as “inability,” “incompetence,” “disloyal,” “accumulation of things,” and “bad attitude” are generally unhelpful in proving misconduct. Inability and incompetence are not misconduct if the claimant was trying his or her best (however, failing to do one's best is arguably misconduct); “disloyalty” is usually too subjective; “accumulation of things” is known as the “shotgun approach” and is understood to mean that the employer is not sure exactly why the discharge occurred when it did; and “bad attitude” often signals a personality dispute, which by itself is not misconduct.
6. Concepts such as “resignation in lieu of discharge” and “mutual agreement” are tricky, since both terms are generally interpreted as meaning that the company likely initiated the work separation and that the claimant did not have the option of remaining on the job. In such cases, the employer should be ready to prove misconduct.
7. In discharge cases, try to show four main things:
  - a. that the discharge resulted from a specific incident of misconduct close in time to the discharge;
  - b. that the claimant either knew or should have known that discharge could occur for the reason given;
  - c. that the employer followed whatever policies it has and whatever warnings were given; and
  - d. that the claimant was not singled out for discharge, but rather was treated the same as anyone else would have been under those circumstances.
8. In voluntary separation cases, avoid references to how bad the ex-employee’s work or conduct might have been, or comments on how glad the company might be that the claimant resigned. Instead, concentrate on the fact that the claimant left while continued work was still available and focus on how a reasonable employee otherwise interested in remaining employed would not have left for the reason given.
9. In all cases, have all your evidence and firsthand witnesses ready for the hearing.
10. Make your testimony brief, factual, and concise. Hearing officers like that.

*(Note: This article is a new version of an original in the book Especially for Texas Employers and is online at [http://www.twc.state.tx.us/news/efte/do\\_s\\_don\\_t\\_s\\_ui\\_claims\\_appeals.html](http://www.twc.state.tx.us/news/efte/do_s_don_t_s_ui_claims_appeals.html). From time to time, we will reprint topics from the book that are of particular importance to employers. For a much fuller discussion of employment law issues, see the entire book online at <http://www.twc.state.tx.us/news/efte/tocmain.html>.)* 🇺🇸

**William T. Simmons**  
Legal Counsel to TWC Chairman Tom Pauken

# Legal briefs: what you need to know

## *Agency enforcement, employee pay, work separation, appeals*

### Increased Agency Enforcement

Recent headlines and calls or emails from employers have made it clear that things are more difficult on the employment law compliance front than ever before.

### Legal Briefs

Where federal agencies in past years have used a mixture of education, warnings, and penalties to enforce the laws,

many employers and their attorneys have noticed that they now go straight to penalties. Here are just a few of the things noticed along these lines:

- The U.S. Department of Labor (DOL) and Internal Revenue Service (IRS) have teamed up for a major initiative to discourage misclassification of employees as independent contractors, and IRS has enlisted state employment security agencies such as the Texas Workforce Commission (TWC) to help intensify the crackdown on employee misclassification. Anecdotal reports show that arguments in favor of “safe harbor” protection under Section 530 of the Internal Revenue Act of 1978 are being met with increasing skepticism (on a very limited basis, Section 530 allows treatment of employees as independent contractors if consistent with IRS safe harbor guidelines—consult your legal advisor for details).
- DOL has hired hundreds of new wage and hour investigators to conduct strict Fair Labor Standards Act (FLSA) compliance audits regarding record keeping, minimum wage, and overtime pay requirements.
- In the Department of Homeland Security, the U.S. Customs and Immigration Services and Immigration and Customs Enforcement bureaus are ramping up their I-9 compliance audits. There is much less lenience toward I-9 violations (even clerical errors). In one recent call, a Texas employer with about 30 employees was hit with maximum per-occurrence penalties for first-time clerical errors such as lack of employee signatures, mismatch of hire and I-9 completion dates, failure to complete every box and field on the form, and the like. Even though every one of the company’s employees was legally authorized to work in the United States, the company still had to pay over \$18,000 in penalties. In past years, such first-time clerical violations were often dealt with via reminders and warnings.
- DOL’s Occupational Safety Health Administration (OSHA) division is getting more aggressive toward retaliation issues. We have received calls from employers who have been investigated and sanctioned for retaliation against employees who reported alleged safety problems at work, even though the companies had documentation showing that the employees who complained about retaliatory discipline had clearly violated company policies and had not been singled out for unfair treatment.
- The National Labor Relations Board (NLRB) has substantially increased its activism and aggressive enforcement of rights under the National Labor Relations Act (NLRA). There is a new NLRA rights poster from the NLRB that the agency will require employers to post by April 30, 2012—see <http://www.nlrb.gov/poster> for links to download the poster in various languages. In addition, the NLRB has become increasingly aggressive in enforcing employees’ rights to discuss their jobs and their feelings about their employers online in social media outlets.
- The Equal Employment Opportunity Commission issued new regulations for the Americans with Disabilities Act Amendments Act of 2008 that became final just last May. Under those new regulations, the focus in an Americans with Disabilities Act (ADA) case is not on whether something is a disability, but rather on whether the employer reasonably accommodated the employee. The Equal Employment Opportunity Commission (EEOC) is also looking closely at discrimination against the unemployed, reasoning that such discrimination tends to have a disparate impact on minorities.
- Here in Texas, TWC has intensified its enforcement of the laws regarding proper classification of workers and timely payment of unemployment taxes and wages for employees.

Given this new emphasis on compliance and penalties, it is more important than ever before to ensure that your company is following all of the Texas and federal laws regarding payroll taxes and the rights of employees. Companies that up to now have never performed a self-audit may want to consider investing in the services of an HR professional and/or employment law attorney to help review company practices and fix any compliance problems that may exist. Such preventive action would likely turn out to cost less in the long run than tax- or employment-related penalties and unnecessarily landing on the radar of government agencies’ compliance units.

### Common Mistakes in Paying Employees

Speaking of compliance and avoiding unnecessary scrutiny from government agencies, probably the best way to avoid most problems is to ensure that employees are paid properly and fairly. Employees who feel that they are being properly paid are much less likely to perceive grievances in other areas of employee relations as well. The main reason most people work is to get paid, so taking care of that will minimize the biggest source of hard feelings. Here are the major mistakes to avoid:

- *Not paying the agreed-upon wage:* Always follow the wage agreement. Always. Never cut someone's pay retroactively. Always give advance, preferably written, notice of changes in pay. Written notice is best because it can be the best evidence of what the wage agreement was.
- *Not putting wage agreements in writing:* Unwritten wage agreements are subject to uncertainty and interpretation. Don't let that happen; put wage agreements in writing and have them signed by the employee and a company representative, then follow them exactly.
- *Averaging hours worked over two or more workweeks:* The FLSA generally requires payment of overtime pay on a workweek-by-workweek basis. With only a few narrow exceptions, track and pay overtime pay for each seven-day workweek in which an employee works more than 40 hours.
- *Deducting money from pay without written authorization:* Other than court-ordered garnishments and deductions that are either required or specifically authorized under laws or regulations, all wage deductions must be authorized by the employee in writing to be valid under the Texas Payday Law.
- *Loaning money, advancing wages, or paying wages without maintaining clear, written documentation of the transaction:* Banks do not loan or advance money without a signed, written agreement for repayment—neither should an employer. If loans or wage advances are to be repaid via wage deductions, obtain written authorization for the deductions, specifying amounts and intervals, and do not forget to provide for deduction of any remaining balance at the time of a work separation. Never pay wages in cash without getting a signed, written receipt from the employee.
- *Allowing employees to work off the clock:* DOL and the courts do not recognize the concept of voluntary overtime without proper overtime pay. Agreements by employees to give up their rights to minimum wage and overtime pay are void and unenforceable.
- *Thinking that paying an employee a salary is enough to avoid having to pay overtime:* A salary alone does not make an employee exempt. An exempt-

sounding title alone is not enough to make an employee exempt. The executive, administrative, and professional overtime exemptions apply only to employees who are paid on a true salary basis and have an exempt duty as their primary duty.

### What to Tell Co-workers Remaining After a Work Separation

Explaining to remaining co-workers why a certain employee no longer works there can be a very ticklish issue, primarily because of privacy issues and the admirable reluctance of many people not to facilitate gossip about those who are no longer around to defend themselves. Employers are not obligated to give any particular explanation, although common sense supplies some guiding principles if an explanation is given at all: do not lie, "less is more," and remind others of company policy regarding privacy and gossip.

However, most companies train their managers to refer inquiries to a designated HR employee and to restrict any explanations to those who have a job-related need to know the information. In general, unless there is a truly compelling need to tell coworkers exactly why someone was fired, it is not a good idea to share everything about something like that. It is simply none of their business.

### New Appeal Status Screens Online

Employers now have an easier way to find out about the status of an appeal in an unemployment claim: TWC's website. Here is the path to the new appeals status information screens: On the TWC home page at [www.twc.state.tx.us](http://www.twc.state.tx.us), click on "Businesses and Employers," then on "Unemployment Claim Management," and finally on either "Employer Appeal Status" or "Non-Liable Employer Appeal Status," depending upon whether your company is liable for unemployment taxes in Texas (most employers will be liable and will have an employer account number as an identifier when signing up for a user ID and password for the appeal status screen). Here is the text for those links:

- Employer Appeal Status (employers who pay or are registered to pay TWC taxes and reimbursing employers) – the log-on requires a valid user ID and password.
- Non-Liable Employer Appeal Status (employers who are not registered to pay TWC taxes or are not Texas-reimbursing employers)—the log-on requires the last four digits of the claimant's social security number and the appeal/case number. 

*William T. Simmons  
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# Your questions answered: appeals, pay deductions, incentives, comp time and more

*From time to time, we like to publish questions and answers from our Texas Business Conferences, employer hotline (1-800-832-9394), and email (employerinfo@twc.state.tx.us). Here are some of the interesting questions that have come in lately:*

**Q: We recently received notice of yet another hearing in the case of a former employee who was fired for harassing co-workers. He has already missed two hearings in a row. Somehow, he has gotten another chance at an appeal. Is there a limit to how many times we have to gather our witnesses and be ready to call in?**

A: While there is no formal limit, the more hearings a party misses, the more difficult it becomes to obtain another one. A party who misses the first hearing can always get at least one new hearing opportunity by filing a timely request to reopen the hearing under Commission Rule 16, but the first issue at the new hearing will be whether the party had good cause to miss the previous hearing. Most parties who miss two hearings and allege some kind of factor outside their control for missing both hearings can get a third hearing, but will have to prove good cause for missing each of the two prior hearings. Starting at three missed hearings, the risk of an “on-the-record” decision denying a further hearing goes up markedly. After the on-the-record decision, the next appeal will be sent to the Commission, whose members will vote on whether the party will get a new hearing at that point. In the event of a new hearing granted by the Commission, the party will have to prove good cause to miss each of the prior hearings before getting a chance to testify about the merits of the case. That would be a considerable burden of proof.

**Q: We are thinking about instituting a bonus plan as an incentive for employees to pick up their sales efforts. Are there any things we should definitely do or avoid?**

A: Bonuses can be an enforceable part of the wage agreement under the Texas Payday Law. When drafting a bonus plan, be sure to specify all the important conditions and disqualifiers, such as being a current employee in good standing, or leaving employment in good standing, or avoiding any conflicts of interest—define as specifically as possible what those terms mean. Also, leave bonuses to the company’s discretion if economic conditions do not warrant such payments. With the exception of gift bonuses, which are generally considered purely discretionary and

are usually never promised in a policy, productivity or performance bonuses should be covered in a clear written plan. Changes to written plans should be in writing. Since the U.S. Department of Labor (DOL) recently opined that productivity bonuses, shift premiums, and other incentive payments are generally inconsistent with the fixed salary for fluctuating workweeks method of overtime pay, it would probably be best to check with an experienced wage and hour law attorney before proceeding to pay such employees a bonus on top of their fixed salaries. Finally, bonuses are part of the final pay owed under the Texas Payday Law, but are payable on the schedule and under the conditions specified in the bonus plan.

**Q: One of our employees recently told us that we are required to give employees a certain number of restroom breaks each day. That doesn’t square with what we’ve heard in the past, which is that it is up to a company to specify in its own policy. What does the law really require?**

A: Access to restrooms is covered in OSHA regulation 29 CFR § 1910.141(c)(1) (Table J-1), and further OSHA guidance appears in 29 C.F.R. § 1926.51. The following OSHA opinion letter concerns the number and duration of restroom breaks: [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=22932&p\\_table=INTERPRETATIONS](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=22932&p_table=INTERPRETATIONS). Regarding pay docking for restroom breaks, OSHA doesn’t take a position, but refers employers to DOL wage and hour regulation 29 C.F.R. § 785.18, which provides that ordinary rest breaks are compensable. The bottom line is to pay for such breaks—do not make employees clock out. Excessive breaks can always be handled with appropriate counseling and/or reasonable accommodation for medical issues. City ordinances may vary.

**Q: Does the new law covering firearms in employee vehicles prohibit our company from telling our security guards that they may not have firearms in their vehicles parked on client properties?**

A: No. The relevant language in new Labor Code Section 52.061 is as follows: “A public or private employer may not prohibit an employee who holds a license to carry a concealed handgun under Subchapter H, Chapter 411, Government Code, who otherwise lawfully possesses a firearm, or who lawfully possesses ammunition from transporting or storing a firearm or ammunition the employee is authorized by law to possess in a locked,

privately owned motor vehicle *in a parking lot, parking garage, or other parking area the employer provides for employees.*” The most important part of that section is at the end: “... *in a parking lot, parking garage, or other parking area the employer provides for employees.*” By its plain language, the new law applies only to firearms on the employer’s own parking lot. It does not apply to firearms stored in cars parked in spaces not provided by the employee’s employer. The bill’s caption is also important as an indicator of legislative intent, and the caption specifically refers to “property owned or controlled by the employee’s employer.” Thus, an employer has the right to tell its employees who have concealed-carry licenses, or who lawfully possess firearms or ammunition, that although they can have firearms in their locked vehicles while the vehicles are parked on the company’s own lot, they might not be able to do that if they park somewhere else, since that would depend upon the firearms policy of the owner of the property where they park their vehicles.

**Q:** *Our county employees earn compensatory time at time and a half when they work over 40 hours in a week. One of the employees is now on Family and Medical Leave Act (FMLA) leave. We read where we can apply his accrued paid leave to the time off, but he also has some comp time built up as well. If he runs out of paid leave, can we then apply his comp time until it runs out?*

A: Yes. Under the U.S. Department of Labor’s FMLA regulation 29 C.F.R. § 825.207(f), a public employer can apply available compensatory time to an employee’s FMLA-related absences. That regulation states in relevant part: “...if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee’s FMLA leave entitlement.”

**Q:** *One of my employees has had a federal student loan wage attachment taken from his pay for several months. Now I’ve received a child support order for him, but it looks like if I take both amounts out, his pay will go below minimum wage. I feel like we’re caught between a rock and a hard place. If I have to choose, which order takes priority?*

A: First, you might not have to choose at all, since both types of deductions may take an employee’s pay below minimum wage. See the topic titled “Allowable Deductions” in our book *Especially for Texas Employers*, online at [http://www.twc.state.tx.us/news/eft/allowable\\_deductions.html](http://www.twc.state.tx.us/news/eft/allowable_deductions.html), which includes information on limitations on the amount that can be deducted for various reasons. Second, child support orders always have the greatest

priority in a lineup of competing garnishment and wage attachment orders (see 31 CFR 285.11(i)(3)(i)). The only “exception,” a bankruptcy garnishment, is not really an exception, since the bankruptcy trustee is obligated under the Bankruptcy Code (29 U.S.C. § 507(a)(1)) to give family support orders the top priority in terms of claims that the trustee will pay. For more on the priority of support orders, call your local office of the Child Support Division of the Attorney General’s office using the contact information shown at <https://www.oag.state.tx.us/cs/fieldoffices.php>.

**Q:** *We are at our wits’ end with one of the charge nurses on our staff. Her bad attitude is getting everyone down. Several employees have come to us asking not to be scheduled with her, since she spends so much time complaining about conditions here and how much she wishes she would just be fired so she can file an unemployment claim. Of course, we are close to granting her wish, but would like to not have to worry about an unemployment claim. What can we do?*

A: Short of discharge, your practice could try to help her by having a respected peer-level staff member counsel her on the effect that her conduct is having on other people and on others’ perceptions of her professionalism. Such counseling could help her consider whether she really wants others to dread seeing her approach each day with more negativity, secretly wish for her to leave them alone, roll their eyes when she finishes and leaves, and wonder how a professional-level person like her could be reduced to that kind of conduct. If someone she respects could help her understand that turning her attitude around could let her complete her period of employment with some dignity, the situation might be salvageable. Perhaps the best “revenge,” if that is what she thinks she wants, would be to go with dignity to a new position and be a real success in it. For more on how to deal with a poor attitude problem, see the following in our book online: [http://www.twc.state.tx.us/news/eft/ui\\_law\\_the\\_claim\\_and\\_appeal\\_process.html#poorwork](http://www.twc.state.tx.us/news/eft/ui_law_the_claim_and_appeal_process.html#poorwork). 

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# Common punctuality reasons leading to employee termination examined

As we speak to Texas employers on our employer hotline, more and more employers are terminating employees for the same reasons. Provided in no particular order, here are some of the most common reasons employers tell us they are terminating employees: 1) absenteeism; 2) tardiness; 3) and “no-call, no-show.” Most of the employers who call our hotline ask how they can defend themselves in an unemployment insurance claim. Therefore, the following are some basic guiding principles.

Every Texas employer should know that when an employer terminates an employee and that employee files an unemployment claim, the employer must prove two things: 1) the employee was discharged due to a *specific act* (i.e., one final incident that caused the employer to discharge) of misconduct connected with the work that happened close in time to the discharge; *and* 2) the employer must explain how the employee either *knew or should have known* that he or she would be discharged for such a reason.

Many employers want to know how “misconduct” is defined; the non-technical definition is that misconduct can be defined as violating company policy. Here’s a link to our online book, *Especially for Texas Employers*, which provides the official definition: [http://www.twc.state.tx.us/news/eft/ui\\_qualification\\_issues.html#dq-mc](http://www.twc.state.tx.us/news/eft/ui_qualification_issues.html#dq-mc). Having a policy handbook is the foundation for defending the company in an unemployment claim.

In addition to having a policy handbook, an employer should establish a disciplinary process. Many employers who call the hotline ask whether there is a certain number of warnings an employee must receive before termination can occur and the answer is that there is none. There is no federal or Texas law requiring an employer to issue a certain number of warnings before it can terminate an employee. However, since an employer needs to prove the employee knew or should have known that his or her job was in jeopardy, a disciplinary process is very helpful.

An employer’s final warning should make it clear that the employee *will* be terminated if *any* policy is violated again (i.e., do not state “termination is *possible* in the future”). When issuing any type of warning to an employee, always have a firsthand witness present because he or she will be able to testify on your company’s behalf in an unemployment insurance claim (i.e., actually provide our agency a verbal statement and not a written statement). Here’s a link from our book discussing ideas in order to create a disciplinary process: <http://www.twc.state.tx.us/news/eft/discipline.html>. That same topic also provides a sample final warning.

## Absenteeism

*“She is absent all the time—if it’s not her child being sick, it’s that her car broke down. I can’t keep doing business when I don’t have someone at the office. What do I do if I terminate her and she files an unemployment claim? I don’t want my unemployment insurance tax rate to be affected.”*

In order for an employer to defend itself in an unemployment insurance claim, the employer should have a clear written absenteeism policy that is acknowledged by its employees in writing. For example, an employer on the hotline may say that it has allowed an employee to be absent 20 times in two months and now the employer cannot tolerate it and wants to terminate the employee. An employer has to inform its employees about the company’s limits on absenteeism (i.e., provide employees with a written absenteeism policy), because employees may not take the employer seriously if chronic absenteeism is unaddressed. Therefore, be sure that you have a clear policy covering these types of issues: How many days can an employee be absent in a two-month or three-month period (e.g., choose any period of time and stick to it)? Who grants permission for days off (i.e., supervisor, human resources representative, owner, etc.)? How should employees request a day off (i.e., are they allowed to submit a request in writing, via texting, email, and/or a Facebook message)? Whom should an employee call if he or she will be absent for work (i.e., should they call their supervisor? Is calling a co-worker allowed?). Some ideas from our book on creating an absenteeism policy can be found here: [http://www.twc.state.tx.us/news/eft/attendance\\_and\\_leave\\_policies.html](http://www.twc.state.tx.us/news/eft/attendance_and_leave_policies.html) and [http://www.twc.state.tx.us/news/eft/neutral\\_absence\\_control\\_policy.html](http://www.twc.state.tx.us/news/eft/neutral_absence_control_policy.html). A sample attendance policy from our handbook can be found here: [http://www.twc.state.tx.us/news/eft/attendance\\_policy.html](http://www.twc.state.tx.us/news/eft/attendance_policy.html).

## Tardiness

*“He is always late. If it isn’t one thing, it’s another.”*

Tardiness can be managed by providing your employees with a written policy explaining what you expect from them. For example, how much advance notice should the employee give you if he or she is going to be late? Should an employee contact your office an hour before his or her shift?

Another issue regarding tardiness is how an employee is supposed to contact the employer. For example, how should employees report tardy (i.e., can an employee

text his or her supervisor letting them know that he or she is going to be tardy? Is sending an email or a Facebook message allowed?). Addressing these issues in a written policy can be very helpful when it comes to an unemployment insurance claim.

Another issue in unemployment claims involving tardiness is when an employee reports her tardiness to a co-worker. In this type of situation, the employer usually argues that the employee should have called his or her supervisor and not a co-worker. However, the employer will then confirm that there is no written policy as to whom, exactly, the employee is supposed to call if he or she is tardy. Therefore, it is recommended that your policy clearly state whom your employees are supposed to contact in the event of tardiness. In addition, an employer may want to consider the following situations when creating a tardiness policy: What if a supervisor is unavailable when an employee calls to report tardy? Can an employee leave a message or must he or she speak to someone? Can an employee's spouse, relative, or friend call on behalf of the employee to report a tardy?

### No-Call, No-Show

*"She never showed up, so I assumed she abandoned her job."*

"No-call, no-show" situations are also another way employers lose unemployment insurance claims. Many employers who call the employer hotline believe that state law assumes an employee has abandoned his or her job if he or she has missed three days of work without notice. The truth is that there is no federal or Texas law establishing that an employee has abandoned his or her job after three days of being a "no-call, no-show." Therefore, employers must create a "no-call, no-show" policy that establishes when the employer believes the employee has abandoned the job.

The first major issue with "no-call, no-show" situations is that employers do not try to communicate with the employee. We have seen unemployment insurance claims where the employer has an employee who failed to report for work, for example, for two days, and therefore, assumes the employee has abandoned his job. However, in reality, the employee called a co-worker to report his absence, but failed to inform the employer (e.g., the supervisor). As one can see, communication and having clear absenteeism policies are important.

Therefore, if an employer believes an employee is a "no-call, no-show," the employer should try to contact that employee and ask the following questions: Did he or she quit? Has there been an emergency the employee could not avoid? When trying to find out why the employee was a "no-call, no-show," an employer may want to have a witness present who can hear the employee (e.g., place employee on speakerphone) because then you will have a firsthand witness



Some of the most common reasons employers tell us they are terminating employees are: 1) absenteeism; 2) tardiness; 3) and "no-call, no-show." *iStockphoto/ Thinkstock*

who can testify in case of an unemployment claim.

In all, there will always be many work separations employers will struggle with in unemployment insurance claims. However, keeping abreast of written policies, following a disciplinary process, and having firsthand witnesses present will help an employer with unemployment claims.

For more information on how employers can defend themselves in an employment claim, please read our Spring 2009 *Texas Business Today* article titled, "Easy Mistakes that are Easy to Avoid: The Most Frequent Ways Employers Lose Unemployment Insurance Claims," which can be viewed here (page 11): <http://www.twc.state.tx.us/news/tbt/tbt0509.pdf>.

*(Disclaimer: Please note that our sample policies are not meant to be taken and used without consultation with a licensed employment law attorney. Downloading, printing, distributing, reproducing, or using any policy or form in our book in any manner constitutes your agreement that you understand that you will not use the policy or form for your company or individual situation without first having it approved by an employment law attorney of your choice.)* 🇺🇸

**Marissa Marquez**  
Legal Counsel to TWC Chairman Tom Pauken

*Continued from page 4*

Here is a summary of the potential claim liabilities:

1. Independent contractors—no wage reporting; no tax, chargeback, or reimbursement liability
2. UI-exempt employees—no wage reporting; no tax, chargeback, or reimbursement liability
3. All other workers\*—wage reporting; tax liability if the employing unit is not a reimbursing employer; potential chargeback/reimbursement liability depending upon the base period

*\*The term “all other workers” includes anyone who is either (a) not accurately classified as an independent contractor or (b) not an employee whose services are specifically exempted under the UI law. Since there are so many names applied to workers who perform services for pay, it would be impractical to list them all. To illustrate, such a list would include, but not be limited to, probationary employees, new hires, trainees, trial employees, introductory employees, day laborers, casual employees, temporary employees who are not acquired through a staffing firm, “1099 employees,” “contract labor” workers who are really only misclassified employees, regular employees, full-time employees, part-time employees, PRN staff, “permanent” employees, and seasonal employees. The legal presumption in Texas is that all services are “in employment” and are subject to wage reporting and taxation or reimbursement liability, and the burden of proof is on the employer to show that a particular worker is not in employment.*

None of the three categories above affects the right to file an unemployment claim. Any worker who is no longer performing services for pay can file an unemployment claim. Of course, whether the claimant can actually go on from there and draw benefits depends upon whether the claimant meets the monetary eligibility, work separation, and continuing eligibility requirements under the law.

However, the term “all other workers” does not include employees of independent contractors, because those workers are employed by the independent contractor, and any UI claims they might file will involve the independent contractor. It also does not include temporary staff assigned by a temporary staffing firm or leased employees assigned by a professional employer organization (PEO, also known as an employee leasing firm), since such employees are employed by the staffing firms that assign them to clients, and any unemployment claims they might file will

be the responsibility of those firms. See “Alternatives to Hiring Employees Directly” in *Especially for Texas Employers* (online at [http://www.twc.state.tx.us/news/eft/alternatives\\_to\\_hiring.html](http://www.twc.state.tx.us/news/eft/alternatives_to_hiring.html)).

**Date of the Initial Claim**

The initial claim filing date determines two very important things: the benefit year during which the claimant may file weekly claims, and the base period of the claim. The base period in turn determines the wages that will be used to compute the claimant’s weekly and maximum benefit amounts and which employers will have potential chargeback or reimbursement liability for any benefits paid to the claimant. Below is a chart showing what the base period looks like. Only base period employers have potential financial involvement in a UI claim; non-base period employers have no such liability. (See table below.)

As an example, if ABC Company hires an employee for a job that begins and ends in the month of May, the employer will not be financially involved in the claim if the claimant files an initial claim before October 1 of that year. A claim filed between October 1 and September 30 of the following year would have the May wages in the base period of the claim, but even then, a chargeback based on only a few weeks of wages would be relatively small (see the next two topics).

**Length of Time Worked Prior to the Initial Claim**

The length of time worked by the claimant prior to the initial claim is important to an employer’s potential financial liability because it helps determine whether the employer falls into the base period of the claim. Generally, if an employee works a short period of time, and files a UI claim fairly soon after losing that short-term job, the employer will not fall into the base period of the claim. The longer the employee works for the employer, the greater the chance is that a subsequent UI claim will involve the employer in the base period. In addition, since an employer’s chargeback liability is directly proportional to the amount of wages it reported during the claimant’s base period, the longer the employee works, the more wages will be reported, and the higher the potential chargeback liability will be. That is why, as a general matter, it is better to separate a clearly unsuitable employee from the company as soon as it becomes clear that, despite your best efforts at counseling and retraining, the employee will not work out in the long term.

Base Period Quarter 1	Base Period Quarter 2	Base Period Quarter 3	Base Period Quarter 4	Lag Quarter	Quarter In Progress When Claim Is Filed
✓	✓	✓	✓	X	X

## Amount of Wages Reported for the Claimant Prior to the Initial Claim

This factor is very closely related to the length of time worked by the claimant prior to the initial claim. The higher the wage amount for the claimant during the base period is, the higher the potential chargeback liability will be.

## Whether the Employer was the Only Base Period Employer

Chargeback/reimbursement liability also depends upon whether an employer was the only employer that reported wages for the claimant, or was one of two or more base period employers. An employer's chargeback liability percentage is directly proportional to the amount of wages it reported for the claimant during the base period, measured against the total wages reported by all employers during the base period. As an example, if employer A paid 100 percent of the base period wages, it will have 100 percent of the chargeback/reimbursement liability. If A paid one-third of the wages, it will have one-third of the liability.

## Amount of Benefits Paid to the Claimant

This factor, along with an employer's chargeback percentage as explained above, determines the amount of the actual chargebacks. To determine the amount, TWC multiplies the chargeback percentage by the amount of benefits the claimant ultimately draws. If the claimant draws half of the potential maximum benefit amount, each base period employer's liability will be half of what it could have been, had the claimant drawn the maximum potential amount.

## Nature of the Work Separation

The nature of the work separation goes directly to the issue of whether the claimant will be qualified or disqualified for UI benefits. If the work separation was disqualifying, the claimant will not be able to draw UI benefits, which of course will affect the employer's financial liability for the claim. The first thing TWC does in every UI claim (after determining monetary eligibility) is determine the issue of whether the work separation was voluntary or involuntary, and then whether it was qualifying or disqualifying. A voluntary work separation is one that was initiated by the employee, and an involuntary work separation is one that was initiated by the employer. The burden of proof on the work separation issue depends upon who initiated the work separation.

In a case involving a voluntary work separation, the claimant will try to prove that he or she had good cause to quit, and the employer must be prepared to show that continued work was available when the claimant left and that a reasonable employee would not have quit for such a reason. In a case with an involuntary work separation, the employer has the burden of proving two main things: that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, and that the claimant either knew or should have known that discharge could occur for such a reason.

## Number of Employees

For private taxed employers, the number of employees is important because it determines the size of the employer's taxable wage base, which is generally the number of employees multiplied by \$9,000 (the figure could be lower if some employees do not earn at least that much in the calendar year). A small company will have a small taxable wage base and will experience a proportionally higher impact from a single UI claim than a larger employer with more employees and a higher taxable wage base. For details on how TWC calculates UI tax rates for private taxed employers (the vast majority of employers in Texas), see this web page: <http://www.twc.state.tx.us/ui/tax/uitaxrates.html>.

## Conclusion

It should be clear from the above information that there are many factors that determine how a given UI claim will impact a particular employer. While some are more under the control of employers, all of them are important to understand. Each claim has the potential to affect an employer's financial bottom line, and an employer interested in controlling its labor costs will pay attention to every detail.

*(Note: This article is reprinted from the book *Especially for Texas Employers* and is online at [http://www.twc.state.tx.us/news/efte/how\\_ui\\_claims\\_affect\\_employers.html](http://www.twc.state.tx.us/news/efte/how_ui_claims_affect_employers.html). From time to time, we will reprint topics from the book that are of particular importance to employers. For a much fuller discussion of employment law issues, see the entire book online at <http://www.twc.state.tx.us/news/efte/tocmain.html>.)* 

**William T. Simmons**  
Legal Counsel to TWC Chairman Tom Pauken

# In Memoriam: Renée Miller

We are sad to report that Texas employers lost a good friend on November 25, 2011, when Renée Miller passed away. Renée dedicated much of her 30-year career to assisting the citizens of Texas and employers in the employer commissioner's office at the Texas Workforce Commission (TWC). She will be missed dearly by her friends and colleagues, and thousands of the Texas employers she assisted over the years. She was known for her quick wit, strong work ethic, smiling disposition, and caring heart.

Before she came to TWC in January 1989 (when it was still known as the Texas Employment Commission [TEC]), Renée spent several years at the Railroad Commission, and later worked in the office of Jim Kaster, the employer representative at the Industrial Accident Board. She followed Kaster to TEC, where he started as chairman of the agency and later became the employer representative. Renée later served as legal counsel to the succeeding employer commissioners, Chairman Bill Hammond, Commissioner Ron Lehman, and Chairman Tom Pauken.

Renée was instrumental in the design and implementation of the Texas Business Conferences (TBC) sponsored by the employer commissioner's office at TWC and was the most popular speaker. TBCs have been attended by tens of thousands of business owners and managers over the years since Renée started producing them in 1993. For many years, she addressed employer policies and became known as a leading authority on how to design and implement effective workplace policies. Her influence in the area of employment relations was vast. More than one generation of business managers and HR specialists learned from her the art of handling employment issues in a fair, consistent, and legal manner that respects the rights of employees. Countless employees in this state have benefited as well from what Renée taught to employers over the years.

Starting in 2006, Renée managed the speakers and many of the arrangements for the TBCs, and she was editor-in-chief of this newsletter, *Texas Business Today*.



She responded to employers' email inquiries and helped answer hundreds of questions every week on the toll-free help line for employers. She helped train several law clerks and younger attorneys who worked in the employer commissioner's office over the years. Through them, her legacy will benefit employers and employees for years to come. 🇹🇽

Please join us for an informative, full-day conference to help you avoid costly pitfalls when operating your business and managing your employees. We have assembled our best speakers to discuss state and federal legislation, court cases, workforce development and other matters of ongoing concern to Texas employers.

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For more information, go to [www.texasworkforce.org/events.html](http://www.texasworkforce.org/events.html).

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