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Texas Business Today

Hope Andrade
Commissioner Representing Employers

TEXAS
WORKFORCE SOLUTIONS
* * * * *

Employment-related bills are hot topics in current legislative session

- Handling “No Match” letters • Workforce services for hiring needs, training •
- TWC Commissioner Andrade: Texas workforce is a “recipe for success” •

Texas workforce is a “recipe for success”

With a workforce that now tops 12.5 million, and more than 450,000 employers, Texas is considered an economic powerhouse across our nation and around the globe. Our “recipe for success” is simple, really—we work hard to cultivate an economic climate that creates jobs, promotes innovation, and opens the doors of economic opportunities for others.

Collaboration has played a big role in Texas’ many successes over the last several years, and TWC has been a proud partner in these efforts. Together with the 28 local **Commissioner’s Corner** Workforce Development Boards across our state, we work closely with employers and connect them with skilled labor. Our continued efforts are a vital part of connecting people to jobs and providing the skills needed to keep Texas businesses competitive in the global marketplace.

From February 2012-2013, Texas added the most jobs among all states, as well as the most private sector jobs. In fact, private sector employers added 347,200 jobs. This growth brought new demand for workers with a variety of skills. Programs such as the Skills Development Fund, Skills for Small Business, and Skills for Veterans help our state address these needs and our ongoing efforts are timely, as the state’s labor force continues to grow.

Our state’s leadership has put great effort into ensuring Texas entrepreneurs can access the tools they need to

successfully start, steadily nurture, and eventually expand their businesses right here at home. In fact, our business-friendly approach is likely why Newsweek described the Lone Star State as the “top destination for job-seeking Americans.” And others in the business world are noticing too:

- *The Wall Street Journal* called us the “job creation capital of the nation;”
- *CNN Money* named Texas as the #1 state in which to launch a small business; and
- *CEO Magazine* ranked Texas as the best place to do business, an honor which CNBC also awarded us in 2012.

Accolades such as these underscore the importance of maintaining positive policies towards business.

The word is out: In Texas, we work hard to welcome businesses—large and small—with open arms because we understand, when Texas businesses prosper...Texans prosper! 🇹🇽

Sincerely,



Hope Andrade
Texas Workforce Commission
Commissioner Representing Employers



(Left) Texas Workforce Commission (TWC) Chairman Andres Alcantar, Justice Don Willett, TWC Commissioner Representing Employers Hope Andrade and TWC Commissioner Representing Labor Ronny Congleton pose for a picture at the swearing in of Commissioner Andrade. (Right) Commissioner Andrade is officially sworn in by Justice Willett. *Photos courtesy TWC Communications*

Workforce services can help with hiring needs, training

When most employers think about the Texas Workforce Commission, the first thing that comes to mind is unemployment insurance. However, TWC offers employers a wide range of workforce services of which employers may be unaware. These services include helping employers fill open positions, offering monetary incentives for hiring individuals with certain characteristics, and providing funds to help employers train both new and tenured employees. Following is a brief description of the different programs and their requirements, as well as contact information you can use to find more information about the programs.

Job Posting Assistance

Hiring a new employee can be a stressful and time-consuming task. Did you know that the staff at local Workforce Solutions offices will assist employers to develop job postings, place the job announcements on WorkInTexas.com, screen potential candidates, and even provide a location where you can conduct interviews? They will also perform basic testing and assessments on your applications. All of these services are provided free of

charge. For a small fee, some Workforce Solutions offices will provide specialized training and assessment services to test applicants' proficiency on computer software products.

So, next time you have an open position, contact the nearest Workforce Solutions office with an employer services division. You can find them by going to the following website, entering your zip code, and checking the box to locate offices with an employer services department at www.texasworkforce.org/dirs/wdas/directory-offices-services.html.

Hiring Incentives

There are several tax credit and incentive programs to assist employers in hiring employees from targeted population groups. These programs include the following:

Work Opportunity Tax Credit (WOTC): This is a federal tax credit used to reduce federal tax liability for private, for-profit employers. If you hire from targeted population groups, including veterans, individuals receiving government assistance, and ex-felons, you could receive a credit of \$1,200–\$9,600 for each person hired. You must apply for the credit within 28 days of hiring the qualified employees, and the amount of the credit varies based on the length of employee retention. For more information, call the WOTC Unit at 800-695-6879, or visit www.texasworkforce.org/svcs/wotc/work-opportunity-tax-credit.html.

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Cover image: Business woman at meeting in conference room. Comstock Images/Comstock/Thinkstock

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State of Texas Tax Refund: Under this program, an employer of a person receiving Temporary Assistance for Needy Families (TANF) or Medicaid can receive up to a \$2,000 refund of state taxes per qualified employee. The application period for this refund is January 1–April 1 of the year following the year in which the taxes and wages were paid. For more information, contact the WOTC Unit using the contact information listed on page 3.

Skills Funding

The TWC offers several programs which will provide funding for employers to use to train their employees. The programs include the Skills Development Fund, the Skills for Small Business Program, and the Skills for Veterans program. Funding is available to train both new and incumbent employees and is available to businesses of all sizes. The requirements for and funding provided by these programs vary and are summarized in the chart below.

For more information regarding TWC’s skills training

programs, contact the Workforce Business Services Outreach and Project Development Department at 877-463-1777 or view more information online at www.texasworkforce.org/svcs/funds/sdfintro.html#resources.

Employee Assistance

In addition to the programs listed above, there are programs designed to help employees, which could also benefit the employer. For example, TWC provides funding for child care to qualifying working parents. Employees have to meet income and work hour requirements to qualify for child care assistance. If your employees have stable childcare, then they will be able to attend work on a regular basis and perform better. TWC also offers assistance in basic literacy and English comprehension, which could be helpful to your employees and your business. If you have an employee who could benefit from this assistance, refer the employee to the local Workforce Solutions office. 

Sonia Luster

Legal Counsel to Commissioner Hope Andrade

	 Skills Development Fund <i>Customized training to meet specific business needs</i>	 Skills for Small Business <i>Program for small business workforce training</i>	 Skills for Veterans <i>Training for returning veterans entering the workforce</i>
Applicant	Community College (Business partnership)	Business	Business
BUSINESS PARTNER Private, For Profit	Any size	Under 100 employees	Any size
COST TO BUSINESS	Trainee wages	Associated costs/trainee wages	Associated costs/trainee wages
TRAINEES Full-time employees Paid prevailing wage	Certain SOC restrictions	All qualified	Newly-hired Post-9/11 era veterans
GRANT AMOUNT Per Trainee	\$1,420 (new and incumbent)	\$1,450 (new), \$725 (incumbent)	\$1,450 (available per veteran for one 12-month period/not renewable)
COVERED COSTS	Curriculum, materials, limited equipment, administrative fee	Tuition and fees, administration	Tuition and fees, administration
PAID TO COLLEGE	Draw-Down/Fixed Unit Price	Draw-Down	Draw-Down; Amended SSB contract
APPLICATION	Proposal documents mailed to TWC	Business applies directly to TWC	Business applies directly to TWC
TRAINING COURSES	Customized; Delivered by college and third party	Work-related; Credit or non-credit from college catalog	Work-related; Credit or non-credit from college catalog

Source: TWC Workforce Business Services

Your questions answered: Employment topics covered from across the state

The following questions were compiled from past Texas Business Conferences around the state and questions from Texas employers on our Employer Hotline.

Wage and Hour

Q: In the energy field, workers must wear flame-retardant clothing and safety/hazmat attire. In what time increments do safety gear/uniforms/attire apply for compliant deductions? Would it be per 40-hour/seven-day workweek, per year, per pay period?

A: Under the U.S. Department of Labor's regulations, deductions for required items like that cannot take employees' pay below minimum wage. Minimum wage is determined on a workweek-by-workweek basis. Per Texas Payday Law, the deductions would need to be authorized in writing by each affected employee. The deductions would be made on a paycheck-by-paycheck basis. As to the amount,

keep in mind the minimum wage requirement mentioned above.

It would be best for purposes of the written wage deduction authorization agreement to have a specific authorization form

for required gear and uniform items, listing exactly what the employee is paying for and in what amounts each pay period. Remember to count time spent putting on and taking off safety clothing and gear as work time.

Q: We hired a new employee and she gets paid a salary. One day she took off in the morning to take her 24-year-old daughter to the doctor and was off the remainder of the day. She called our office later and we told her to use some of her personal time to make up the time off. If she neglects to complete the vacation form, am I in the right to deduct her pay for the absence?

A: Assuming that the employee is properly classified as a salaried exempt administrative employee (minimum salary of at least \$455/week, plus exempt-level supervisory duties as her primary duty), your company would not be able to dock her pay in units of less than a day at a time. Consistent with whatever written paid leave policy the company has, simply deduct the leave time from whatever paid leave balance she will accrue for the month, or if she is not yet eligible for paid leave, inform her that she will be given a paid leave advance of "x" hours for that day, which will be deducted from the next accrual of paid leave for which she is eligible.

Q: Are Texas employers required to give employees a paystub for each paycheck?

A: Paystubs are not required under federal or Texas law, but are recommended. For example, a paystub can help serve as one of the kinds of wage and hour records required under the Fair Labor Standards Act's (FLSA) recordkeeping requirements. Giving employees proof of how their wages were computed, including deductions from wages, can help minimize complaints and suspicions on the part of employees about whether their wages were properly paid. See the following topic in our online book, *Especially for Texas Employers*, at www.texasworkforce.org/news/eftedelivery_of_wages.html.

Q: Can you deduct for misappropriation of property (i.e., not cash) if (a) you can prove they are personally responsible, (b) you have written authorization to deduct for such a reason, and (c) it does not take the employee's pay below minimum wage?

A: Your company may carry out a wage deduction for misappropriation of non-cash property if you meet the conditions you listed, i.e., your company can prove that the employee was personally responsible for the loss, it has written authorization from the employee to deduct the replacement cost of misappropriated property from the employee's pay, and the deduction does not take the employee's pay below minimum wage for the workweek in question. The limitation on deductions for misappropriation of property is that such a deduction cannot take an employee's pay below minimum wage—only a deduction for misappropriated money can do that, pursuant to the following article in *Especially for Texas Employers* at www.texasworkforce.org/news/eftedeductible_deductions.html#misappropriation.

Workplace Issues

Q: Are employers allowed to monitor company-issued cell phone usage and require employees to reimburse for overage of minutes?

A: Employers may monitor an employee's use of a company-issued cell phone. This principle was clearly established in the U.S. Supreme Court case of *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010) (for details, see https://en.wikipedia.org/wiki/Ontario_v._Quon). You can find ideas for how to design a cell phone monitoring policy in *Especially for Texas Employers* at www.texasworkforce.org/news/eftedinternetpolicy.html.

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Q: How do you best handle a situation where the employee is making false charges against a co-worker or manager (i.e., claiming bullying if it is not the case)?

A: Bullying in a workplace is, of course, a serious problem if and when it occurs. It would be something that could constitute a hostile work environment if it gets to the point where it actually interferes with the victim's job performance or with that person's basic ability to function in the workplace and relate to others without fear or intimidation. From that standpoint, bullying would fall into the same general category as sexual or racial harassment. Particularly if there is a minority issue involved, bullying that goes unaddressed by the company could constitute a violation of Title VII of the Civil Rights Act of 1964 and could lead to an investigation and adverse ruling by the Equal Employment Opportunity Commission (EEOC). For that reason, any allegation of bullying merits the same kind of investigation and remedial action that a company would bring to bear if an allegation of discriminatory harassment arises.

We suggest that once an allegation of a hostile work environment comes up, job number one for the company is to move quickly to prevent any further unwanted conduct. Even if you believe the allegation is groundless, separating the alleged victim from the alleged perpetrator will make it more difficult for new allegations to arise. Job number two is to properly investigate the allegation. The third thing to do is document whatever action you take. In the interests of avoiding or minimizing the risk of an EEOC claim, regardless of how groundless the allegations appear to be, it is important to cover those steps.

Due to the danger of a retaliatory action lawsuit, taking adverse action against the alleged victim is not recommended unless the company has absolute, solid proof that the complainant has falsified the report. Such proof is notoriously difficult to come by. Usually, the safest way to handle someone you think has fabricated charges like that would be to explain to him or her, in front of at least two neutral witnesses, that the company investigated fully, but was unable to substantiate the allegations, and so has reminded the alleged perpetrator of the need to be respectful toward everyone in the future and to avoid any actions in violation of the company's anti-harassment/anti-discrimination policy.

Finish up by reminding the employee about his or her rights under the policy, that the company takes allegations of misconduct seriously, and that the employee is encouraged to alert the company to any future problems like that. If such a counseling session is held in front of witnesses, most people who might otherwise be inclined to make



When interviewing applicants, employers should use the same standards as those applied to job applications. That means employers should stick to asking only about things that are directly related to the job requirements for the position in which the applicant is applying. *iStockphoto/Thinkstock*

frivolous charges will be less likely to do so in the future.

Q: If a company-paid truck driver has a load to pick up for the company and through no fault of his own (due to the customer) can't pick up the load and has to wait and spend the night, is that considered work time?

A: Assuming that the driver is out of town when the overnight stay becomes necessary, the ordinary rule for an out-of-town trip involving an overnight stay would apply, as explained in *Especially for Texas Employers at* www.texasworkforce.org/news/efte/h_travel_time.html. Thus, only the time spent working would be payable. However, the time spent eating and sleeping in a hotel room would be non-compensable. It would be best to pay the trip expenses, though, to the extent that not paying them would take the employee's pay effectively below minimum wage for the workweek at issue.

Q: Are we required to pay employees for volunteering their time at a company-sponsored charity event?

A: The U.S. Department of Labor takes the general position that employees cannot volunteer their time on behalf of a for-profit company, so any time they might spend at a charity event on your company's behalf would have a good chance of being counted as work time, particularly if there is any indication that the company somehow solicited or encouraged such participation.

Q: One of my employees wants to work for herself and become an independent contractor. Can I change her into an independent contractor at any time?

A: No. Just because an employee wants to or agrees to be treated as an independent contractor does not mean he/she is an independent contractor under the law. The criteria used by TWC in determining a worker's status are found in *Especially for Texas Employers* at www.texasworkforce.org/news/efte/ics_contract_labor.html.

Unemployment Questions

Q: Can an employer appeal a late response to a Notice of Application of Unemployment Benefits?

A: It certainly can be appealed. If an employer successfully appeals such a ruling, i.e. proves that its protest should be considered timely, the employer also wins the right to appeal the decision to award the claimant benefits. Thus, if you decide to appeal the late protest ruling, you can also note in your appeal that the company would like to appeal the decision to pay UI benefits to the claimant. In the event of a successful appeal on the timeliness of protest issue, the employer could then proceed to offer evidence showing why the claimant ought to be disqualified from benefits.

Q: How long does an employee have to work for you before they are eligible to file for unemployment benefits? Doesn't the probation period prohibit them from filing?

A: There is no trial employment law period in Texas and there is no minimum amount of time an employee has to work for any particular employer before they can file a UI claim if they lose their job. What really matters is whether the employee has worked enough in the past (during the "base period") to be monetarily eligible to file a claim. TWC makes the determination via computer-based wage records. For more information, see section B of "Unemployment Insurance Law-Eligibility Issues" in *Especially for Texas Employers* at www.texasworkforce.org/news/efte/ui_law_eligibility_issues.html.

Q: What is the statute of limitations for filing an unemployment claim?

A: Generally, someone who is no longer performing personal services for compensation may file an unemployment insurance claim and try to draw benefits, but must meet various requirements, including monetary eligibility, continuing eligibility, and qualification requirements. These requirements for Texas claimants are found in the Texas Unemployment Compensation Act (i.e., Texas Labor Code Sections 201.001 et seq.). In order to be monetarily eligible, the claimant must have on record with the Texas Workforce Commission (TWC) a minimum level of earnings during the "base period" established by the claim; the base period is defined by each state, but is

generally a year-long period of time lagging behind the time that the initial UI claim is filed.

In Texas, the base period is defined as the "first four of the last five completed calendar quarters" prior to the date the initial claim is filed. An easier way to think of it is to take the calendar quarter in which the initial claim is filed (the "quarter in progress"), as well as the quarter immediately preceding that (the "lag quarter"), and disregard those quarters. The base period goes back in time four calendar quarters from that point, i.e., the base period is the year-long period preceding the lag quarter. See the base period explained in *Especially for Texas Employers* at www.texasworkforce.org/news/efte/ui_law_eligibility_issues.html.

Hiring Issues

Q: How many days is an employer required to post a job to the general population?

A: No specific law obligates private employers to post jobs in any particular way. For more information, please see this link from *Especially for Texas Employers* regarding job postings and recruitment at www.texasworkforce.org/news/efte/job_postings_and_recruitment.html.

Q: In a job interview, is it okay to ask about hobbies or things they "do for fun"?

A: When interviewing applicants, apply the same standard that is applied to job applications, which is to ask only about things that are directly related to the job requirements for the position under consideration. For more information regarding interviews, visit *Especially for Texas Employers* at www.texasworkforce.org/news/efte/interviews.html.

Q: When hiring a teenager, how do you get around asking their age on a job application?

A: It is permissible to ask for an applicant's birth date, social security number, and driver's license number in order to facilitate a job-related background check. Otherwise, it is not a good idea to ask about a job applicant's age, unless you want to know whether an applicant is old enough for certain duties. If you're worried about an age discrimination claim, the Age Discrimination Employment Act (ADEA) applies only to employers that have 20 employees or more and to employees who are at least 40 years of age. 🇺🇸

*Marissa Marquez, Deputy Senior Legal Counsel to
Commissioner Hope Andrade
William T. Simmons, Senior Legal Counsel to
Commissioner Hope Andrade*

Meeting deadlines ensures proper handling of unemployment claims

Failure to meet deadlines or be aware of certain dates can be fatal to an unemployment insurance case. It is one of the easiest ways for an employer to lose an otherwise winnable case. We're going to discuss some of the most common deadlines employers are likely to encounter during an unemployment claim. But before we do, let's take a look at some of the applicable timeliness rules. The Texas Workforce Commission rules on timeliness can be found in Chapter 815, Section 32 of Title 40 of the Texas Administrative Code. Below is an excerpt from the TWC timeliness rules which addresses the presumption of receipt and good cause exceptions. All parties to an unemployment claim should be familiar with these rules.

§815.32. Timeliness

- (b) Presumption of receipt. A document mailed to a party is presumed to be received if the document was mailed to the complete, correct address of record unless:
- (1) there is tangible evidence of non-delivery, such as the document being returned to the agency by the United States Postal Service; or
 - (2) credible and persuasive evidence is submitted to the Agency to establish non-delivery, delayed delivery, or misdelivery of the document.
- (i) Exceptions. The substantive nature of certain cases causes, or creates, exceptions to the general timeliness rules, even where notice is proper or response is clearly late.
- (8) There is no good cause exception to the timeliness rules.

After a job separation, usually the first deadline an employer faces is the response to the notice of application for unemployment benefits. This notice is generated when a claimant files a claim for unemployment benefits and names his last employer. The deadline to respond to the notice of claim is short—14 calendar days, not business days. The 14 days are measured from the date the notice is mailed, not from the date the notice is received. An employer's failure to timely protest the notice of claim results in the employer losing appeal rights to the case. Employers interested in preserving appeal rights, and being considered a party of interest to the claim, must protest the notice of claim within the designated time period. Employers can respond to the notice of application for unemployment benefits in four ways: via Internet, by calling TWC, by fax, and by mail. When faxing a response, remember that TWC will use the date that the

notice is received by TWC to determine whether the response is timely. If an employer chooses to respond by fax, it should retain the fax confirmation of a successful transmission as proof of a timely protest. Proof of an unsuccessful attempt will not be considered timely. However, with a mailed response, TWC will use the date of the postmark to determine whether a response is timely. Regardless of the method used, make sure that you are aware of the response deadline and that you respond within the appropriate timeframe.

The next deadline usually faced by an employer is the deadline to appeal a determination on payment of unemployment benefits. This determination usually sets out whether the claimant is qualified for the receipt of benefits and whether the employer's tax account will be charged back for those benefits, or in case of a governmental employer, whether the employer will be financially liable for benefits. There are other types of determinations that address other unemployment-related issues, but this is the one most commonly received by employers. Like with the notice of initial claim already discussed, the deadline to appeal a determination is also 14 calendar days. Again, the 14 days are measured from the time the determination is mailed, and not from the date the employer receives it. An appeal to a determination must be in writing, which means that employers may hand-deliver, fax, or mail their appeals. As before, if using fax as a method to file an appeal, TWC will use the date that the appeal is received by TWC to determine whether the response is timely. Be sure to keep a copy of the fax confirmation page to prove a successful transmission. If appealing by mail, TWC will use the date of the postmark to determine whether the appeal is timely. It is important to appeal an unfavorable determination within the statutory appeal deadline. If you do not appeal within the deadline, TWC does not have jurisdiction to consider the merits of your appeal, and your appeal will be dismissed. As you can see, it's imperative to file any appeal in a timely manner.

Once an appeal is filed, the next important date for employers is the date of the Appeal Tribunal hearing. Although this is not a deadline that requires a party to submit a response, it is a date that requires party participation. When an appeal hearing is scheduled by the Appeal Tribunal, the parties receive a notice of hearing that sets out the date and time of the appeal hearing. It is crucial that employers note the correct date and

time of the hearing on a calendar. Failure to correctly and accurately note the date and time can result in an employer failing to participate in the hearing. If that happens, and the employer is not able to effectively put on its case and present its evidence, the claimant will most likely win the case, which could then result in the employer bearing some financial responsibility for benefits paid to the claimant.

After an appeal hearing, the Appeal Tribunal mails a decision to the parties. This decision can be appealed to the Commission by either party. The appeal must be in writing. Once again, the deadline to appeal is 14 calendar days from the date the decision was mailed, and not from the date it was received. No special or specific language is required in the appeal. An appeal to the Commission does not result in another telephone hearing. It results in review of the prior recorded hearing testimony, as well as review of the prior documents admitted into the record. Similar to filing a late appeal to the initial determination, if a party files a late appeal to the Commission, the Commission does not have jurisdiction to consider the case and will dismiss the appeal, even though there is not a new hearing when a case gets appealed to the Commission. If the appeal is dismissed, the prior Appeal Tribunal decision will remain in full force and effect.

Remember that under TWC rules, there is no good cause exception to the timeliness rules. A late response or a late filing for a good reason is viewed just like a late response or a late filing for a bad reason or for no reason at all.

After the Commissioners consider and vote on an appeal, they issue a written decision. At this point, the parties may file a Motion for Rehearing. The deadline for this is 14 calendar days from the date that the Commission decision was mailed to the parties. Unlike the prior appeals, where no specific language was required in the appeal document in order for TWC to take some action on the appeal, very specific criteria must be satisfied in order for the Commissioners to grant a motion for rehearing. The party requesting a rehearing must submit new evidence that has not been previously offered, state a compelling reason why this new evidence was not submitted earlier, and indicate how consideration of this new evidence would change the outcome of the case. If these three factors are not met, the motion for rehearing will be denied. After the motion for rehearing level, there are no more agency appeals left in an unemployment

claim. A party who is still dissatisfied with the outcome of the case can always take its case to court and use the judicial process to try to achieve a different result.

In addition to the deadlines already discussed, private-taxed employers could also be faced with a deadline to respond to a Notice of Maximum Potential Chargeback (NMPC). This notice is sent to employers who are in a claimant's base period and who could potentially be charged for benefits paid to the claimant. Employers receiving this type of notice are not the last employer prior to the claimant filing an unemployment claim. The deadline to respond to a Notice of Maximum Potential Chargeback is 30 calendar days measured from the date the decision was mailed. A response to an NMPC must be in writing. If after responding to this notice, an employer receives a Charge Liability Decision which notifies an employer that its employer tax account is going to be charged for benefits paid to the claimant, the employer has the option of filing an appeal to that decision. This appeal would follow the same process and guidelines as an appeal to a determination set out above. Any subsequent appeals would follow those of a regular unemployment claim. More information about these and additional TWC claim notices, and how to respond to them, can be found in Part IV: Post-Employment Problems in *Especially for Texas Employers*.

In summary, be aware of your deadlines. Make sure to respond to the notice of initial claim in a timely manner. Appeal in a timely manner if a determination or decision is unfavorable. Respond within 30 calendar days to a Notice of Maximum Potential Chargeback. Remember that under TWC rules, there is no good cause exception to the timeliness rules. This means that if an employer received a document from TWC, and failed to respond in a timely manner due to a very good reason, the reason will not matter. A late response or a late filing for a good reason is viewed just like a late response or a late filing for a bad reason or for no reason at all. Responding late anywhere along the unemployment claim or appeal process will result in the employer losing certain rights and will hamper its ability to effectively represent its case. Responding late is one of the easiest ways for an employer to lose an unemployment claim. Don't let it happen to you. 

*Elsa G. Ramos
Legal Counsel to Commissioner Hope Andrade*

How to handle “No Match” letters from the Social Security Administration

by Sheila Gladstone

What to do when you receive a “No Match” letter from the Social Security Administration?

Like most employers, you probably do a good job of making sure all your workers present the necessary I-9 documentation at hire, to demonstrate they are eligible to work in the United States. The documents may look very legitimate and you are quite comfortable with the employees’ legal status. What happens, though, if you later receive a letter from the Social Security Administration stating that the Social Security Number reported for one of your employees does not match the employee’s name in the SSA database?

This is happening to employers more frequently than ever. What do you do next? Do you have to fire this employee?

First, don’t panic. Although the Social Security Administration (SSA) has resumed its practice of sending out “No Match” letters, the Department of Justice has emphasized that the receipt of a SSA no-match letter does not necessarily mean that the employee is not authorized to work in the U.S. In fact, the government does not want you to fire an employee based solely on the receipt of such a letter. The no-match letter simply means there

is an error in either the employer’s records or the SSA’s records, and seeks the employer’s and/or the employee’s assistance in trying to make the two records match. There are other reasons besides questionable immigration status that could cause the problem—a simple typing error when the employee, the employer, or the SSA recorded the name or social security number, an unreported name change due to marriage, or even identity theft. We recently saw a no-match letter that was issued because the middle and last name of the employee were reversed based on cultural differences.

You still must take the letter seriously and respond quickly. Employers or employees who ignore no-match letters are often investigated by Immigration and Customs Enforcement (ICE), as sometimes the reason for the no-match is that the employee provided a false SSN. Ignoring a no-match letter will be used as evidence that the employer knowingly hired an illegal worker, leading to fines of up to \$10,000 per worker/per incident. When ICE audits, it is common to see a request for all no-match letters received by the employer.

If you get a letter, the first thing to do is check your employment records to determine if the information provided to SSA matches those records. If not, you can contact SSA for an easy correction. If you need the employee’s help in verifying the records, ask as a second step. The employee may be able to show you an original social security card, or explain an unreported name change. If the answer is not evident, then require that the employee contact the SSA. It is not advised that you terminate or otherwise retaliate against the employee at this time, as doing so could be seen as national origin discrimination. You should give the employee a reasonable time to resolve the matter, normally about 120 days. If, after that time, it appears that the employee is not permitted to legally work in the U.S., termination may be appropriate. 🇺🇸

Sheila Gladstone chairs the Employment Law Practice Group at Lloyd Gosselink. She has spent the last 25 years helping employers navigate through the complex laws governing the employment relationship, including establishing the right policies, forms, contracts, wage payment practices, and workplace training. She is committed to keeping employers out of trouble, and defending them during governmental investigations and worker complaints. Sheila can be reached at 512.322.5863, or at sgradstone@lglawfirm.com.



When an employer receives a “No Match” letter from the Social Security Administration (SSA), it simply means there is an error in either the employer’s records or SSA’s records, and the SSA is seeking the employer’s and/or the employee’s assistance in trying to make the two records match. *iStockphoto/Thinkstock*

Employment-related legislation tackled by lawmakers could impact Texas businesses

The following bills represent a portion of the employment-related legislation filed so far in the current general session of the Texas Legislature. Those listed here would have the greatest impact on Texas employers if enacted into law. In the second quarter issue, Texas Business Today will include a listing of all employment-related bills that passed and were signed into law, along with a description of their significance for employers. 

William T. Simmons
Senior Legal Counsel to Commissioner Hope Andrade

Civil Rights – Discrimination

HB 207/SB 121/SB 746	Expanded whistleblower protection (SB 746 relates to Medicaid only)
HB 238/SB 237 (similar to HB 1146)	Relating to the prohibition of employment discrimination on the basis of sexual orientation or gender identity or expression.
HB 298	Relating to prohibiting employer retaliation against employees who seek recovery of unpaid wages and procedures in wage claim hearings conducted by the Texas Workforce Commission (TWC). (This law would cover all forms of wage dispute-related retaliation, not just disputes based on Chapter 61. Provides right to file suit with a presumption of retaliation if adverse action occurs within 90 days of taking a protected action. Remedies include reinstatement, actual damages, two weeks' additional pay, an additional \$500, court costs, and/or attorney's fees. Also provides right to file administrative complaint with TWC: potential penalty of up to \$1,000 for each violation, best evidence rule codified with respect to earnings records, refers to Sec. 62.003 (earnings statement).
HB 318/SB 118 (similar to HB 451 and SB 416)	Would amend Chapter 21 to limit online searches for employee/applicant information and prohibits demanding personal user ID, password, or other means of accessing personal e-mail account or social networking website; does not limit policies on personal use of company equipment, use of personal devices during working hours, monitoring employee usage of company electronic equipment, or obtaining online information that is in the public domain.
HB 321	Deferred adjudication may not be used as a factor in employment decisions, housing, or issuance of state licenses.
HB 667	Puts leave for foster children on same basis as leave for biological or adopted children.
HB 741	Public employees are entitled to breast-feed, or express breast milk for, the employee's child at the workplace. Written policy required; policy must require the employer to support and encourage breast-feeding and accommodate employees' breast-feeding needs. No limits on time, or age of child, or accommodations. Employer must provide a "reasonable amount" of break time for such purposes; no definition of "reasonable" or "accommodation;" discrimination prohibited; Bill unclear whether the statute would entitle a mother to bring her young child to the workplace.
HB 881	Relating to the creation of a cause of action for an employee prohibited from or penalized for voting. (Suit must be filed within one year; court can award compensation damages, including back pay, front pay, and interest on both, punitive damages (for malice or reckless indifference) with limits from \$50,000–\$300,000 depending upon company size, reasonable attorney's fees, and "additional equitable relief," including reinstatement; compensation damages can be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and "other non-pecuniary losses," workers' compensation, interim earnings, and unemployment insurance benefits offset the damages; sovereign immunity is waived for suits against public employers.
HB 950/SB 248	Incorporates federal law in the Lily Ledbetter Fair Pay Act of 2009 into Chapter 21 of the Texas Labor Code (ongoing pay discrimination relates back to original act of discrimination).
HB 1829	Relating to safe patient handling and movement practices at hospitals and nursing homes. (No retaliation or discrimination toward staff members who refuse to participate in unsafe handling of patients.)

Human Resources – General

HB 586/SB 296	Relating to the waiver of sovereign immunity for certain claims arising under written contracts with state agencies. (No waiver of immunity for employment contracts.)
HBs 700/1194	Amends various statutes to put open-carry on par with concealed-carry; no change in employers' or property owners' rights to control presence of firearms on their premises.

HB 1031/SB 399	Relating to the confidentiality of certain communications involving an ombudsman program established by an employer as an alternative dispute resolution service. (Promotes confidentiality for internal company ADR processes.)
HB 1188 (similar to HB 1121)	Relating to limiting the liability of persons who employ persons with criminal convictions. (Tightens up on standards for proving negligent hiring and supervision of employees with prior convictions.)
HB 1302	Sex offenders may not operate a bus, taxi, or limousine, provide any service in another person’s residence, or, if the victim was younger than 17, operate an amusement ride.
HB 1524/SB 674	Relating to election through secret ballot of a labor union as the exclusive bargaining representative.
HB 1939	Hiring manager of public entity must offer a job interview to any qualified veteran entitled to a preference.
HB 1955	Relating to the employment of domestic workers and hotel workers. (Minimum wage required; no more than 8 hours of work per day, unless overtime (OT) pay is given for time in excess of 8 hours/day; at least one 24-hour rest day per week; work on rest day must be paid at OT rate; worker is entitled to 7 days of paid time off per year for sick leave and 5 paid days per year for vacation; part-time (20 up to 40 hours per week) employee is entitled to 3 days’ paid vacation each year; employer must give at least 14 days’ advance written notice of termination, unless the employer has a good-faith belief that the employee committed a violation of law (burden of proof on the employer); employer must give written notice of work schedules, paid leave/holiday policies, rates of pay for regular and OT hours, and pay periods; “reasonable breaks” must be provided; hotel workers may not be required to clean more than 15 rooms in an 8-hour shift, or the pro-rated equivalent in a shorter shift; workplace injuries presumed to be caused by unsafe working conditions in case of violations of Subchapter C; workers’ compensation required for full-time employees; disability insurance required for full-timers unless an employee waives such coverage.)
HB 2015	TWC must develop rules for classification of workers on public works contracts; \$200/worker penalty for misclassification; three-year statute of limitations.
HB 2073	Person with sleep apnea must notify employer of the diagnosis and related treatment when applying for a job as a truck driver, or if employed, as soon as the diagnosis arises; driving not allowed if the condition is left untreated.
SB 86 (see HB 400)	Relating to the elimination of smoking in certain workplaces and public places. (No more smoking in places of employment.)
SB 473 (see also HB 1950)	Relating to the regulation of temporary common worker employers. (Repeals Chapter 92 of Labor Code (as does HB 1950); allows local governments wide latitude in regulating labor halls within their jurisdictions; minimum standards for licenses to operate within cities and counties; sets minimum standards for cleanliness and safety of areas for workers to assemble; maintains current limits on wage deductions under §92.025, allowing only deductions required by law or to recover wage advances – no other deductions permitted.)
SB 990	Relating to criminal history record information obtained or disseminated by a private entity. (FCRA-like requirements for employers under Texas law.)

Immigration/E-Verify

HB 181	Relating to a prohibition against the construction or operation by a local governmental entity of a day labor center used to facilitate the employment of aliens not lawfully present in the United States.
HB 615	Relating to a prohibition against the knowing employment of unauthorized foreign nationals and to a biennial report regarding reported violations.
HB 676, HB 954, HB 1730	Relating to requiring state contractors to participate in the federal electronic verification of work authorization program, or E-verify. (HB 954 requires those receiving public subsidies to use E-verify.)
HB 1117	The Texas Workforce Commission (TWC) would have a central role in resolving E-Verify-related complaints; also amends Chapter 21 to make failure to comply with E-Verify requirements a cause of action; E-Verify still voluntary, but employers using E-Verify must comply with TWC rules.
HB 1447	Relating to requiring governmental entities to participate in the federal electronic verification of work authorization program or E-verify.
SB 738	Relating to the establishment and administration of the Texas Essential Workers Program. (TWC would set up what amounts to a guest worker program, but employers would have to try to hire local workers first.)

Pay/Benefits/Wages and Hours

HB 494/SB 741	Extends to two years the time limit for filing a wage claim with TWC.
HB 495	Relating to the requirement that certain health benefit plans provide coverage for supplemental breast cancer screening. (Applies to virtually all employer-sponsored health plans.)
HBs 626/651	Relating to the number of hours certain employees must work to be eligible to participate in the Texas Municipal Retirement System. (Eligibility requirement goes from 1,000 hours/year to 1,500 hours/year.)

FIRST QUARTER 2013

HB 731/SB 341	Public works contractors must give construction employees a paid 15-minute rest break per four-hour increment of time worked each day; workers can go no longer than 3.5 hours without a break; \$100 penalty per violation. (A similar ordinance is already in place for Austin construction workers.)
HB 1065	Relating to the right of an employee who is a victim of a crime to time off from work to attend court proceedings related to that crime. (Employee must give employer at least 24 hours' notice; deductions from pay only in increments of a full day at a time; paid leave may be applied in any amount of time; employer may require employee to provide court documentation, unless the state's attorney notifies the employer of the need for the employee's appearance; remedies for violations include reinstatement, lost wages, lost benefit rights, lost seniority, court costs, and attorney's fees; TWC will prescribe by rule the design and content of a required notice to employees.)
HB 1131	TWC must post online a database with the names of companies and company owners for any company convicted of wage theft under Labor Code Section 61.019 or Penal Code Section 31.04.
HB 1207	Relating to the repeal of public prevailing wage rate laws.
HB 1369	Relating to the ability of a nonexempt employee to participate in certain academic, extracurricular, and developmental activities of the employee's child. (New Chapter 83; after 90 days on the job, non-exempt employees get up to 8 hours in a month and 40 hours in a year of unpaid leave for activities with their children; employer cannot require use of paid leave; remedies for violations include reinstatement, lost wages and benefits, court costs, and attorney's fees; TWC must prescribe a required workplace poster.)
SB 340	If TWC finds bad faith on employer's part for failure to pay wages, it "shall" impose a penalty (instead of "may").
SB 442	Veterans returning to state employment may, within one year, use up to 15 days' paid leave to deal with military/civilian life reintegration issues.

Public Accommodations

HB 489	Applies to all public accommodations, including offices and modes of transportation; civil and criminal penalties for discrimination against disabled individuals using assistance animals; inquiries limited to nature of service provided by animal.
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Open Records/Data Sharing

HB 1468	Workers' compensation-related communications between an insurance carrier and an employer are not subject to open records laws.
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Regulatory Integrity/Enforcement/Criminal Penalties

HB 757	Relating to the eligibility requirements for occupational licenses issued to applicants with military experience. (The Texas Department of Licensing and Regulation must credit military experience toward licenses.)
SB 249	Relating to the prosecution of the offense of breach of computer security. (Penal Code prohibition against computer hacking or unlawful access expanded to include benefit fraud.)

Unemployment Insurance

HB 26/SB 51	No disqualification if claimant left job due to sexual assault of claimant or immediate family (parent, spouse, or minor child), or family violence involving same; chargeback protection for employer.
HB 372 (similar to HB 1925 and SB 676)	Relating to establishing the Workplace Fraud Prevention Act. (Requires construction contractors to properly classify workers as employees or independent contractors; independent contractors are those who perform a construction service, under contract, for another person free from control or specific direction of that person, and who is registered with the Secretary of State and has a filing number, or possesses a valid tax ID and has unique skills or owns and operates a "significant investment in equipment;" TWC ruling on employment status is controlling; prohibits sham business entity formations for purpose of concealing violations, as well as assisting others to do the same; first-time violations cost \$500/misclassified worker, while subsequent violations cost \$5,000/misclassified worker; TWC hotline for reporting violations; poster requirement; annual report by TWC; rulemaking authority for TWC; disbarment for up to three years, plus rescission of contract, for violations with regard to public works; compliance affidavit requirement for public contractors.)
HB 585/HB 982 / SB 432	Service on an appraisal review board does not constitute employment for the purposes of Chapter 201, Labor Code, and does not authorize a person to receive unemployment benefits by virtue of such service.
HB 916	Relating to the amount of a chargeback (CB) for unemployment compensation benefits paid to a person who is partially unemployed. (Provides CB protection to base period employers who continue to employ claimants for their regular part-time hours and gives proportional CBs in the event of partial cuts in hours.)
HB 983	Relating to the eligibility of temporary election officers for unemployment compensation. (Unemployment insurance tax exemption for temporary election workers, officers, or officials.)
HB 1095	Would exempt school bus drivers from the reasonable assurance provisions that otherwise exclude school employees from UI benefits based on school district wages between academic terms.

HB 1212	25% discount on UI tax for wages paid to veterans honorably discharged within five years of the tax being paid.
HB 1281/HB 1583/SB 21	Drug testing for certain UI claimants, as per new federal law.
HB 1550	Relating to unemployment compensation chargebacks regarding certain persons who are involuntarily separated from employment. (Provides additional chargeback protection for employers who are not responsible for certain work separations. TWC-initiated bill)
HB 1580 (same as SB 689)	Relating to excluding certain short-term employment from unemployment compensation chargebacks and grounds for benefit disqualification. (Allows claimants who gave otherwise-unsuitable work a try before quitting to have an easier time of qualifying for UI benefits.)
HB 1914	Relating to certain required notices under the Texas Unemployment Compensation Act, including employer liability arising from failure to provide the notice. (TWC-initiated bill pursuant to a federal mandate; loss of chargeback protection for a pattern of late or inadequate responses to UI claims; TWC will adopt rules.)
HB 1925/SB 676 (similar to HB 372)	Relating to the classification of certain construction workers and the eligibility of those workers for unemployment benefits. (Creates a new nine-point independent contractor test within Chapter 301 of the Labor Code; \$100 penalty per misclassified worker – \$1000 penalty if later violations occur.)
HB 1987/SB 959	Relating to the payment of unemployment taxes under a staff leasing services contract. (Professional employer organizations must report clients' employees' wages under the clients' TWC account numbers and using the clients' UI tax rates.)
HB 1995/SB 920	Relating to the requirement that an unemployed individual be actively seeking work to be eligible for unemployment compensation benefits. (Tightens work search requirement as per federal law -- HR 3630.)
HB 2034/SB 844	Relating to unemployment compensation eligibility and chargebacks regarding certain persons who leave work to attend training. (TWC-initiated bill; no disqualification and chargeback protection if employees quit to attend Commission-approved training.)
HB 2035/SB 919	Relating to the shared work unemployment compensation program. (Additional information required for <i>shared work</i> applications; some slight additional restrictions regarding loss of fringe benefits.)
HB 2141/SB 658	Relating to the imposition and collection of a penalty for fraudulently obtaining unemployment compensation benefits. (Federal mandate; 15% penalty on willful fraud; penalties collected shall be deposited into the UI trust fund.)
SB 547	Declares open-enrollment charter schools to be political subdivisions and units of local government.

Workers' Compensation

HB 475/SB 740	Workers' compensation coverage required for each employee of a contractor and each employee of any subcontractor.
HB 1155	Relating to suspension of payment of certain income benefits under the workers' compensation system for failure to submit to a designated doctor examination.
HB 1468/SB 926	Relating to confidential and privileged communications between an insurance carrier and an employer under the Texas Workers' Compensation Act.
HB 1762	Temporary help firm may obtain workers' compensation and is covered by the exclusive remedy provisions of the Texas Workers Compensation Act.
SB 548	Relating to the abolishment of the office of public insurance counsel.
SB 907	Workers compensation non-subscribers would have injury-reporting duties similar to those of subscribers.
SB 1020	Workers compensation non-subscribers must provide at least \$200K in life insurance for each employee; employer cannot be a beneficiary; right to sue unaffected by receipt of insurance proceeds.

Workforce Miscellaneous

HB 45/SB 162	Expedited occupational licensing for military members.
HB 87	A state agency rule, policy, or practice may substantially burden an individual's right to engage in an occupation only if the agency demonstrates that the rule, policy, or practice is necessary to fulfill the purpose and intent of the statute authorizing the regulation of the occupation.
HB 249/SB 11	Relating to the drug testing of certain persons seeking financial assistance benefits. (Drug testing for recipients of aid under Chapter 31 of Human Resources Code.)
HB 751	No junk food or sugary drinks with SNAP benefits.
HB 1150/SB 64	Relating to a policy on vaccine-preventable diseases for licensed child care facilities. (Employer must have policy allowing exemption from vaccine requirements for CDC-covered contraindications and for religious beliefs.)

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