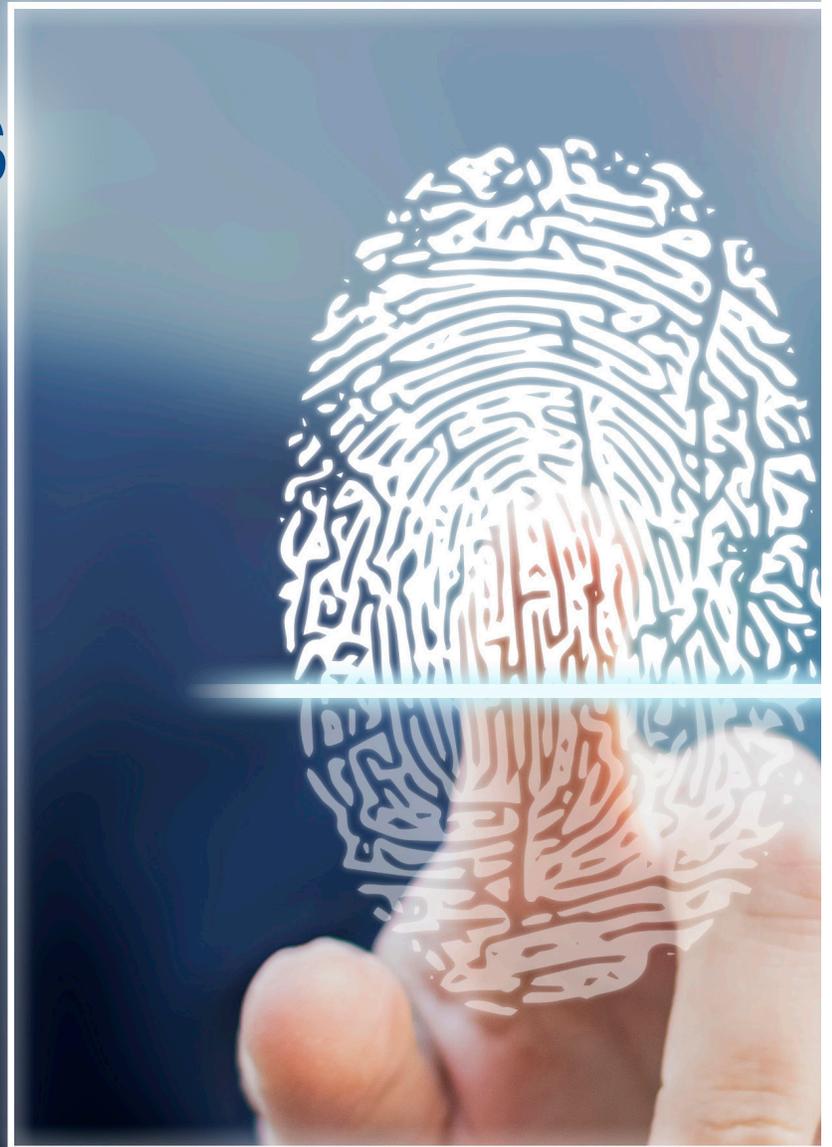


Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

Biometric Timekeeping in the Workplace



Texas Continues to Stay Competitive

Commissioner's Corner

Dear Texas Employer,

Welcome to our 2nd quarter issue of Texas Business Today! Texas employers continue to lead the way and keep our state's diverse economy strong. Together with our 28 local Workforce Development Boards, we work closely with employers and connect them with skilled labor. Our continued partnerships are helping provide the skills needed to keep Texas businesses competitive in the global marketplace.

In February, Texas Workforce Commission (TWC) announced the "Texas Internship Challenge," a joint partnership between TWC, the Texas Education Agency, and the Texas Higher Education Coordinating Board. The Texas Internship Challenge is a statewide campaign to increase and promote paid internships for Texas students. TWC has created a website where employers can post internships and students can apply for them. Through this challenge, we are addressing a workforce need heard from employers across the state that students need to acquire workplace skills. If you are interested in taking the challenge, please go to: TXInternshipChallenge.com.

In March, TWC awarded the first Texas Industry Partnership (TIP) grant in the amount of \$97,293 to Workforce Solutions Southeast Texas in partnership with Entergy. The grant supports collaborations between Workforce Solutions, private employers or corporate foundations, and addresses the skills needed for industry demands. This grant will help Entergy increase the region's training capacity for Energy, Petroleum, and Chemical Products industries in 13 high-demand occupations. For more information



Operation Welcome Home Texas Transition Alliance meets in Killeen in support of Texas veterans and their families.

on the TIP grant, please visit: www.twc.state.tx.us/texas-industry-partnership-program.

In April, Operation Welcome Home Texas Transition Alliance met in Killeen in support of Texas veterans and their families. Along with the Office of the Governor, Texas Veterans Commission, Texas Department of Licensing and Regulation, and local workforce boards located near military installations, the Alliance is tasked with reviewing and helping to enhance employment outcomes for transitioning service members who have expressed intent to stay in Texas upon separation. The goal is to provide outreach 180 days prior to or post separation. The Alliance combines best practices, resources, and expertise from regional and state partners to help ensure a seamless transition to employment. For more information about Texas Operation Welcome Home and the Transition Alliance, visit: www.texasworkforce.org/jobseekers/operation-welcome-home.

Each year, organizations across Texas and throughout the nation celebrate Small Business Week from April 30–May 6. Small businesses are the backbone of our Texas economy and play a key role in the success of the state. Texas has been listed as the most small business-friendly state in the nation, and also earned an A+ for entrepreneurs who started a business

in Texas. Our approach is simple: we make our quality talent pipeline a priority, we continue to focus on low taxes for our employers, and we have reasonable regulations for starting and maintaining a business. We want to make business smarter for Texas employers, not harder. The state has a lot to be proud of and your hard work and dedication has helped lead the way. Happy National Small Business Week!

Don't miss an opportunity to attend one of our Texas Business Conferences we hold throughout the year. These seminars provide an opportunity for employers and small business owners to connect directly with the state's preeminent employment law attorneys and learn about important legal updates and how to successfully manage their employees. For a list of upcoming conferences, see page 4.

We want to ensure all Texas employers have access to the resources they need to start, grow, and thrive their businesses right here at home. When Texas businesses prosper, Texans prosper! 🇹🇽

Sincerely,

Ruth R. Hughes
Texas Workforce Commission
Commissioner Representing Employers

Making Connections Across the State



1.



2.



3.



4.



5.



6.

1. Check presentation to Workforce Solutions Southeast Texas in partnership with Entergy in Beaumont.
2. Visiting with Tarrant County Delegation.
3. Texas Veterans Commissioner presented TWC with the Government Entity award for their efforts in hiring veterans.
4. Visiting with the El Paso Delegation.
5. Touring M&G Chemicals with their HR Manager and local leaders of Corpus Christi.
6. Visiting with Governor Greg Abbott at ceremony to mark the opening of the Charles Schwab & Co. Inc. new North Austin campus.
7. Touring the Workforce Solutions mobile workstation with local leaders in Laredo.



7.



TEXAS BUSINESS CONFERENCES EMPLOYMENT LAW UPDATE

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

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

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as: Hiring Issues, Employment Law Updates, Personnel Policies and Handbooks, Workers' Compensation, Independent Contractors and Unemployment Tax Issues, the Unemployment Claims and Appeals Process, and Texas and Federal Wage and Hour Laws.

The non-refundable registration fee is \$125 (one-day) and \$199 (two-days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. Also, attorneys may receive up to 5.5 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference, or 11 hours for the two-day conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Business Conference, please visit the Texas SHRM website. Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

To register, visit www.texasworkforce.org/tbc or for more information call 512-463-6389.

2017 CONFERENCE DATES

- TempleMay 19
- Bastrop-Lost PinesJune 2
- AlpineJune 8
- Fort Worth June 16
- Beaumont.....July 14
- Texarkana.....August 11
- Lubbock..... August 25
- Galveston September 8
- San Antonio.....Sept. 14-15



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Quick Basics of Texas Payday Law

Texas Payday Law (state law)

Every private employer must pay its employees in full and on time on regularly scheduled paydays. “In full” means the full pay that is due to the employee under the pay agreement that was in effect when the work was actually performed. “On time” means just that - employees are paid on the scheduled paydays. If the payday falls on a day the company is not normally open for business, the payday is extended

to the next business day. Employers must pay non-exempt employees at least twice per month and exempt employees at least once per month. “Exempt” means exempt salaried employees as defined under the Fair Labor Standard Act (FLSA) (high-level employees whose primary duty is exempt in nature and who receive a salary of at least \$455/week).

Three categories of deductions from pay are allowed under the Texas Payday Law:

1. Deductions ordered by a court (child or spousal support, bankruptcy garnishments);
2. Deductions required or specifically authorized under state or federal law (such as payroll taxes, IRS tax levies, guaranteed student loan wage attachments, administrative fees for certain required deductions);
3. Deductions made for a lawful purpose and authorized by the employee in writing.

Deduction Problems Under the Texas Payday Law

Under the Texas Payday Law, all deductions, other than payroll taxes, court-ordered garnishments, and other deductions required or specifically authorized by law, must be both lawful and specifically authorized in writing by the employee; the same applies to wages in kind.

Required or Specifically Authorized by Law – no further authorization needed:

- Court-ordered child support/alimony
- Guaranteed student loan wage attachment
- IRS tax levy
- Withholding tax
- FICA tax
- Any garnishments mandated by a federal court (such as in bankruptcy cases)
- Child support/alimony administrative fee*
- Student loan wage attachment administrative fee*

Lawful – Employee Authorization Needed:

- Meals, lodging, and other facilities
- Voluntary wage assignments
- Loans, including store credit account payments*
- Wage or salary advances
- Vacation pay advances
- Wage overpayments
- Uniform and uniform cleaning costs*
- Union dues
- Misappropriated cash*
- Payments toward a property return security deposit*
- Any other deduction for a lawful purpose*

* Potentially restricted as to minimum wage under the FLSA or court decisions (see www.twc.state.tx.us/news/efte/allowable_deductions.html).

Final Pay

The deadline for the final paycheck depends upon whether the work separation was voluntary or involuntary. If the employee was discharged or laid off, the final pay is due by the sixth calendar day following the effective date of the work separation. If the employee quit, i.e., left of his or her own free will while continued work was still available, the final pay is due

by the next regularly scheduled payday. Commissions, bonuses, and severance pay are payable according to their respective plans or agreements.

Fringe Benefits

Paid leave, paid holidays, and severance pay promised in a written policy or agreement are enforceable parts of the wage agreement under

the Texas Payday Law and are enforced according to the terms of such policies. 

*William T. (Tommy) Simmons
Legal Counsel to
Commissioner Ruth R. Hughs*

BIOMETRIC Timekeeping

Do you remember that spy action movie (any recent spy movie will do) where the protagonist hero has to break into a very secure, classified area and, in order to enter, has to overcome security measures such as a handprint scanner, a retinal scanner, and a voice recognition lock? These advanced security devices are no longer just found in movies or at secret military installations. Employers have begun using this type of biometric technology to replace traditional time clocks in order to track employees' work time.

Merriam Webster defines biometrics as “the measurement and analysis of unique physical or behavioral characteristics especially as a means of verifying personal identity.” Most biometric identifiers are related to the shape of the human body. Common biometric identifiers include, but are not limited to, fingerprints, face recognition, DNA, palm print, hand geometry, iris recognition, retinal scans, and voice patterns. For more information, see <https://en.wikipedia.org/wiki/Biometrics>.

The use of traditional time clocks allows employees to engage in the practice of “buddy punching,” or clocking in and out for coworkers when the coworkers are not physically present at work. This translates into a monetary loss for the employer, which could be substantial. Several workforce management web sites noted in 2014 that, according to the American Payroll Association (APA), over 75 percent of companies lost money from buddy punching, and that employees reported stealing roughly 4 ½ hours per week. That’s a total average of 234 hours—or almost six workweeks—per year! See: blog.thewfcgroup.com/2014/01/06/buddy-punching-costs/ and www.



Photo by iStock/Thinkstock

Employers have begun using biometric technology to replace traditional time clocks in order to track employees' work time.

inceptiontechnologies.com/blog/workforce-management/the-high-cost-of-buddy-punching/.

By using biometric timekeeping methods that require individuals to be physically present in order to clock in, employers could put an end to buddy punching. Biometric timekeeping may also reduce clerical errors and help employers defend against wage claims. In addition, because biometric data cannot be guessed or forgotten, like passwords can, or lost or stolen, such as ID badges, it can be used to control

entry to secure rooms or areas where businesses wish to monitor or limit access. For these reasons, employers have begun to embrace the use of biometric systems.

However, before implementing such a system, employers need to be aware of the legality of using biometrics for employee timekeeping. Federal law doesn't currently regulate a business' use of biometric data. Texas law addresses biometric identifiers in its Business and Commerce Code. Read

the full text of the statute at: www.statutes.legis.state.tx.us/Docs/BC/html/BC.503.htm.

Under Texas law, entities are allowed to use biometric data for commercial purpose, but must give notice and obtain consent before using such identifiers. Biometric data may not be sold without consent. In addition, entities are also required to protect such information in the same manner as any other confidential information. The law is enforceable by the state attorney general and permits civil penalties up to \$25,000 per violation. Bottom line, Texas employers may legally use biometric data for timekeeping purposes with prior employee notice and consent. *The National Law Review* recently compared Texas and Illinois laws addressing the use of biometric data. See: www.natlawreview.com/article/six-things-you-need-to-know-collecting-biometric-information.

Even though legal, some employees may object to an employer's use of biometrics. Some of these objections stem from privacy concerns. Many employees don't feel comfortable with the idea that their fingerprints or retinal images could be used by others for some unknown or unforeseen purpose. It may be useful to explain to employees that the majority of systems available to employers do not capture and store images of biometric data.

Biometric scanners review certain characteristics of each employee's data, and convert these into a unique number, or template of sorts, that represents an individual. This unique data representation is used for comparison in the future, but cannot be used to create an image of the original data scanned. In other words, there is no copy of the image stored in the system, just a code.

Despite these safeguards, some employees may still object because of religious reasons or due to concerns with a scanner's ability to detect some



Photo by iStock/Thinkstock

Even though legal, some employees may object to an employer's use of biometrics due to privacy, religious, or disability concerns.

medical issue or condition. Employers with fewer than 15 employees are free to handle these cases as they see fit.

Employers with 15 or more employees, however, are covered by the anti-discrimination statutes that cover religion and disability. If an employee refuses to use a biometric scanner citing religious or disability concerns, employers should follow the Equal Employment Opportunity Commission's (EEOC) guidelines and consider whether a reasonable accommodation would be appropriate. For religion see: www.eeoc.gov/laws/types/religion.cfm. For disability see: www.eeoc.gov/laws/types/disability.cfm.

Failure to explore an employee's request for reasonable accommodation can be costly to employers. In 2015, the EEOC won a suit in federal court in an employment discrimination lawsuit based on an employee's religious beliefs. According to the EEOC's lawsuit, Beverly R. Butcher, Jr. had worked as a laborer at an energy company in West Virginia for over 35 years. The company implemented a new biometric timekeeping system, a hand scanner, to track hours worked. Mr. Butcher informed the employer that the new system violated his

sincerely-held religious beliefs.

The employer refused to consider alternate means of tracking Mr. Butcher's time. He was informed that he could be terminated if he refused to use the new system. The EEOC alleged that the company forced Mr. Butcher to retire rather than provide a reasonable accommodation for his religious beliefs. The court awarded over half a million dollars in the suit. More information about this case can be found at www.eeoc.gov/eeoc/newsroom/release/8-27-15a.cfm.

Ultimately, the use of biometric data systems for tracking employee work time and controlling access to secure or private areas will continue to grow as the technology advances and becomes easier and less costly to use. While employers may enjoy the benefits of the latest technology, they must stay abreast of the relevant rules and applicable laws in order to prevent costly pitfalls. 🇺🇸

*Elsa G. Ramos
Legal Counsel to
Commissioner Ruth R. Hughs*

Unemployment Claim Rule for the Home Health Industry



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Under the standard rules, if a job assignment ends and no new assignment is immediately available, the employee will be considered to have been laid off due to a lack of work.

A common issue with unemployment claims involves determining who triggered the job separation. In order to answer this question, the Texas Workforce Commission (TWC) relies on two main sources: 1) the laws found in Texas Unemployment Compensation Act (TUCA); and 2) TWC precedent cases that interpret the TUCA. The precedent cases can often define the rules under which an unemployment claim is analyzed. Most industries fall under the same general rules, and our TWC precedent cases are available for viewing here: www.twc.state.tx.us/unemployment-benefits-appeals-policy-precedent-manual/.

These general unemployment laws establish some basic rules. First, the employee either quit or was discharged; there is no in-between. Layoffs fall under the discharge

category. If it is a discharge case, the employer will have to prove that the claimant was fired for misconduct connected with the work, because unemployment claims operate on a fault-based system. Misconduct is not established if the job ends through no fault of the employee, even if the employee knew that the job assignment was temporary.

These rules prove problematic for employers that provide home health services. Under the standard rules, if a job assignment ends and no new assignment is immediately available, the employee will be considered to have been laid off due to a lack of work. This means that employers will not be able to prove misconduct, and the employer's account could be subject to chargeback, resulting in an increased unemployment tax rate.

Luckily, however, a special

TWC precedent case applies to job separations involving employers in the home health industry. This precedent case can be beneficial to employers because it provides a chance to avoid a layoff situation when an employee's assignment ends. The following is the relevant language from that precedent: **Appeal No. 97-006341-10-060597**

In the home health care referral industry, either the worker or the referral service may initiate reassignment. . . . An employment relationship such as this one continues until one party clearly notifies the other party that the employment relationship has ended, even if there is some passage of time during which the employee performs no services and earns no wages.

Under this precedent case, the employee is no longer considered to be laid off when an assignment ends, even if a new assignment is not immediately available. Instead, this precedent case states that when an assignment ends, the employment relationship will continue until one party clearly notifies the other that the employment relationship has ended. The precedent case even allows employers to place the burden on the employee to initiate reassignment.

In order to enjoy the benefits of this precedent case, employers should develop a policy that is in line with the precedent. The policy should 1) let employees know that they are not laid off automatically at the end of an assignment; 2) explain that the employee must initiate reassignment; 3) describe the procedure by which an employee should request a new assignment; and 4) explain the

consequence of failing to adhere to the reassignment policy (the employee would be considered to have quit the job). By covering these four points, the employer can show that it never intended for the employment relationship to cease, and the employee's failure to request reassignment as required is what caused the job separation. If the policy is reasonable and clear, and the employee does not follow it, the employer can argue that the employee's failure to request a new assignment constitutes a voluntary resignation without good cause connected with the work.

The reporting procedure should outline whom to contact, how to contact, and when to contact after an assignment ends. Employers may also require employees to continue reporting on a weekly basis. This would further show that the employer wanted the employment relationship to continue. Staff should receive training on the procedures in order to ensure consistent enforcement of the policy. Failure to do so could result in the loss of an unemployment claim.

As an example, many employers will have a policy requiring the employee to report to a specific person, in writing, within 24 or 48 hours of an assignment ending. Employers should provide a reasonable way to report, such as in person, via e-mail, or by phone. Employers should clarify if certain days do not count towards the reporting deadline. For example, many employers with a 24-hour reporting policy clarify that if an assignment ends on a Saturday, the employee will have until Monday at 5:00 PM to request a new assignment.

Employers should take note that having proof of contact—or lack of contact—is crucial. If an employee reports in person, he or she should sign a log. If an employee reports by phone, the employer should implement



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The precedent case does not provide indefinite protection against chargebacks, but it does give the employer time to find the employee a new assignment.

a procedure for documenting each call and should maintain excellent phone records. If the employee reports in writing, preserve the document.

Many employers wonder how long the employment relationship can continue between assignments. The home health precedent states that the time between assignments is not a layoff, even if the employee is not performing services or earning any wages from the employer. However, there is no specific time limit mentioned. A lack of a new assignment after more than a week may still be viewed as a layoff, depending on the circumstances. Therefore, the precedent case does not provide indefinite protection against chargebacks, but it does give the employer time to find the employee a new assignment. In the event that the employee reports and no work is available, if the employee files for unemployment after only a few days, the act of filing for unemployment can trigger the job separation. This would be a voluntary

resignation and should protect the employer's account from charge.

The TWC home health precedent case can be very helpful to employers in the home health field in terms of preventing a layoff scenario in an unemployment claim. The key is to place the burden on the employee to initiate reassignment and to provide a clear procedure for doing so. If the policy shows that the employer did not intend to sever the employment relationship, the employer can have a better chance of prevailing on an unemployment claim. For further information, employers are encouraged to contact the TWC Employer Hotline at **1-800-832-9394**.



*Velissa R. Chapa
Legal Counsel to
Commissioner Ruth R. Hughs*

A Look Into Unemployment Claims: Chargeback Protection

The unemployment claim process is something that many employers have experienced. While the details behind the job separations in unemployment claims differ in many respects, there are some key components that are present in most unemployment claims. One of those components is a chargeback decision, and it notifies the employer whether it will be charged back for benefits on the claim. If the employer is charged back, its unemployment insurance (UI) tax rate can increase. This article will explore some of the types of job separations that can result in chargeback protection for the employer's UI tax rate.

Chargeback Protection by Statute

The controlling section in the Texas Unemployment Compensation Act (TUCA) dealing with chargeback protection is §204.022. This section is titled “Exclusions From Chargebacks” and outlines a number of circumstances that can spare the employer from being charged back for UI benefits. These circumstances can range from job separations that were the result of a natural disaster to those that resulted from an employee quitting to take care of a terminally ill spouse. Accordingly, an examination of some of the more common types of exclusions can assist the employer in identifying situations where chargeback protection may exist.

Separations Caused by a Medically Verifiable Illness

Sometimes we receive calls on our office's employer hotline (800-832-9394) from inquisitive employers wanting to know what to



Graphic by iStock/Thinkstock

Some types of job separations can result in chargeback protection for the employer's UI tax rate.

make of some of the unemployment claim decisions they have received. Some decisions can notify an employer that a claimant has been qualified for benefits, but that the employer will not be charged back as a result of the claim. As per §204.022(a)(5) of the TUCA, this can occur if the separation was caused by the medically verifiable illness of the employee or the employee's minor child. This could happen even if the claimant might have otherwise been disqualified from benefits.

For instance, let's say that the employer has a points-based attendance policy that calls for discharge after an employee accumulates eight points. If the employee's final absence under the policy was due to illness, the employee could be qualified for benefits, since absences due to illness are generally not considered misconduct connected with the work. However, if the separation was caused by the employee's medically verifiable illness, the benefits that the employee receives may not be charged back to the

employer. This is referred to as a “pay and protect” scenario; the claimant gets paid benefits, and the employer's UI tax account is protected from charge.

Separations Caused by Operation of Law

Another “pay and protect” scenario arises if the job separation was the result of operation of law. This type of exclusion from chargeback is often seen in professions that require a specific type of license to perform the work. As per §204.022(a)(1) and §204.022(a)(2) of the TUCA, benefits may not be charged back to the employer if the job separation was required by federal statute, Texas statute, or an ordinance of a Texas municipality.

For example, imagine that an employer has employed an individual in a position that requires a commercial driver's license (CDL). Imagine further that after several successful months on the job, the employee's CDL expires and is no longer valid. This could result in a situation where the employer is thoroughly satisfied with the employee's performance, but cannot

continue employment because the employee no longer meets the legal requirements for the job. Under these circumstances, the separation could be viewed as one that was caused by operation of law and may qualify the claimant for benefits, but protect the employer's UI tax account from charge.

Other Types of Chargeback Protections

There are additional types of scenarios that can result in chargeback protection for the employer. Among them are separations resulting from employees quitting part-time work to seek a higher-paying job, separations resulting from military duty, and separations relating to family violence. For a complete list of chargeback protections under §204.022 of the TUCA, please

visit www.statutes.legis.state.tx.us/Docs/LA/htm/LA.204.htm#204.022.

Provisions Regarding Chargeback Protection

Not all chargeback protections are available for all employers. First, non-profit employers who have elected to be reimbursing employers and governmental employers do not get the same protections that tax paying employers do. Reimbursing employers still get billed for benefits in many situations where the job separation is related to an event that would normally be associated with chargeback protection, such as the medically verifiable illness of the employee.

Second, if an employer has received three strikes for submitting late or inadequate responses on unemployment claims, the employer could be charged back even if the

merits of the case call for a “pay and protect” scenario. For more information on adequate response, please visit Section J, titled “Examples of Claim Protests,” at www.twc.state.tx.us/news/efte/ui_law_claim_notices.html.

Conclusion

Chargeback protection can be a curious aspect of the unemployment claim process because it can result in a guard against an increase in the employer's UI tax rate even where a claimant is qualified for benefits. However, the more employers know about the exclusions from chargeback, the better positioned they will be in approaching unemployment claims. 🇺🇸

*Mario R. Hernandez
Legal Counsel to
Commissioner Ruth R. Hughs*

TEXAS BUSINESSES
Connect, Share, & Learn
at the

Georgetown—Sept. 11-12
Sheraton Georgetown Texas Hotel

Dallas—Oct. 12-13
Renaissance Dallas Richardson Hotel

\$300 Early-bird registration

Texas businesses can learn how to successfully navigate the workers' compensation system at two upcoming Texas Workers' Compensation Education Conferences.

“Texas has a unique workers' compensation system that allows businesses to make decisions that best fit their companies,” said Commissioner of Workers' Compensation Ryan Brannan. “The conference is the perfect resource for

TEXAS
WORKERS' COMPENSATION
EDUCATION CONFERENCE
2017

CONNECT WITH US

businesses to get caught up on everything they need to know about workers' compensation. It is information that can help save businesses a lot of time, effort, and money.”

The conferences will provide helpful tips and the latest news on workers' compensation. It is a great chance to connect with business leaders, share advice and experience, and learn from industry experts.

GET EXPERT ADVICE ON:

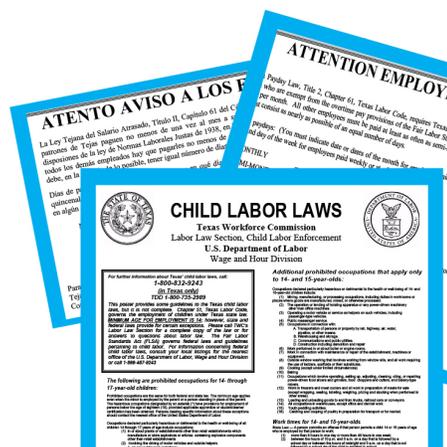
- Workers' compensation fraud
- Workplace privacy issues
- Return-to-work strategies
- Mental and behavioral disorders among injured employees

For more information: www.tdi.texas.gov/wc/events/edconference or
email OPC@tdi.texas.gov.

Portions of the conference will count as continuing education credit for attorneys, adjusters, human resource professionals, and rehabilitation providers.

Business and Legal Briefs

The following is a quick overview of important recent employment law developments and upcoming enforcement actions:



FREE WORKPLACE POSTERS can be downloaded at Texas Workforce Commission: www.twc.state.tx.us/businesses/posters-workplace.

Some of the notices are designed to look like official documents from government agencies.

Free workplace posters

Every year, many employers receive what look like urgent notices that they need to update their posters at the workplace or else face stiff fines and penalties. Some of the notices are designed to look like official documents from government agencies. In some cases, employers look at the notices they receive and believe that they must order the posters from the company that sent the notice. In reality, the notice is actually an advertisement, and the company sending the advertisement is one of many offering such posters. While it is true that posters should be updated as soon as the government agency issuing the poster issues a new one with information about new or amended laws, such changes do not occur on a yearly basis or regular schedule. The Texas Workforce Commission reminds employers that workplace posters are free of charge from the government agencies that publish them. For a copy of that reminder, visit: www.twc.state.tx.us/news/twc-reminds-employers-required-workplace-posters-are-free-charge.

Texas Workers' Compensation Education Conference

All employers interested in workplace safety and workers' compensation issues should try to attend the 2017 Texas Workers' Compensation Education Conference sponsored by the Division of Workers' Compensation of the Texas Department of Insurance (TDI). Attendees will hear from Texas and national experts on laws and best practices relating to workplace safety, risk management, and employee relations issues during the two-day conference. To enable as many employers as possible to attend, TDI is holding the conference on two separate occasions in different cities. The conference sites are Sheraton Georgetown Texas Hotel (discounted room rate – 1101 Woodlawn Avenue, Georgetown, Texas) on September 11-12, 2017, and Renaissance Dallas Richardson Hotel (discounted room rate - 900 E. Lookout Drive, Richardson, Texas) on October 12-13, 2017. Registration will soon open online. For more

information, visit www.tdi.texas.gov/wc/events/edconference.html, and on Facebook, visit www.facebook.com/TXEducationConference/.

Free Workplace Safety Resources for Employers

Texas Department of Insurance, Division of Workers' Compensation, OSHCON: www.tdi.texas.gov/oshcon/index.html.

Non-profit organization devoted to driving and traffic safety—Our Driving Concern: txdrivingconcern.org/upcoming-free-webinars/.

Where Does the DOL Salary Rule Stand?

There has been no change in the situation regarding the U.S. Department of Labor (DOL) overtime rule since we last mentioned it in this newsletter. For the benefit of the many new subscribers, we reprint the status report as it appeared in the first quarter issue of 2017, followed by an update from the DOL: As many of you have heard by now, in the case of *State of Nevada et al v. U.S. Department of Labor et al*, (No: 4:16-CV-00731), the federal district court in Sherman, Texas has issued a nationwide injunction against enforcement of the DOL's new overtime rule, which would have increased the minimum salary for a white-collar overtime exemption (executive, administrative, professional, or computer professional employees) from the current level of \$455/week by over 100% to a new minimum of \$913/week, up to 10% of which could have consisted of bonuses and/or commissions if non-discretionary and paid at least quarterly. The new regulations would have also increased the minimum

salary for a “highly-compensated employee,” which has an easier duties test to meet, to \$134,004 per year. DOL’s official announcement on the injunction and its appeal to the 5th Circuit Court of Appeals is at the following link: www.dol.gov/whd/overtime/final2016/litigation.htm. The court ruled that the drastic increase in salary was so high that it effectively deleted the duties test for the exemption, which was inconsistent with the intent of Congress when the law was first passed many decades ago. The court also held that the rule’s provision for automatic increases in the minimum salary every three years exceeded the agency’s authority. The bottom line is that as a result of the court ruling, employers do not have to do anything to increase anyone’s salary at this time. On December 8, 2016, the 5th Circuit Court announced that it would expedite the appeal and hold a hearing sometime toward the middle of February, 2018. As far as next steps for the salary increase are concerned, it is unknown whether the new administration will want to continue the appeal process in court, and another open question is whether a new Secretary of Labor would try to reissue a salary-related regulation, at least in the immediate future. Since that issue could be revisited at any time, and court actions can be difficult to predict, it would be a good idea to frequently check the latest developments on the U.S. Department of Labor’s Wage and Hour Division website at www.dol.gov/whd/.

Update from DOL as of February 22, 2017: “On February 22, 2017, the U.S. Court of Appeals for the Fifth Circuit granted a request by the Department of Justice for an extension of time of sixty days, until May 1, 2017, in which to file its reply brief. The additional time was requested on behalf of the Department of Labor “to



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The court ruled that the drastic increase in salary was so high that it effectively deleted the duties test for the exemption, which was inconsistent with the intent of Congress when the law was first passed many decades ago.

allow incoming leadership personnel adequate time to consider the issues.” *Nevada v. DOL*, No. 16-41606, Motion For Extension to File Reply (Feb. 17, 2017). Source: www.dol.gov/whd/overtime/final2016/litigation.htm.

EEOC Annual Report

On January 18, 2017, the Equal Employment Opportunity Commission (EEOC) released its year-end report showing its claim and enforcement activity for fiscal year 2016 online. The report contains valuable statistical data on the numbers and types of enforcement actions processed by the agency. For example, the report highlights the following numbers of types and claims filed:

- Retaliation: 42,018** (45.9 percent of all charges filed)
- Race: 32,309** (35.3 percent)
- Disability: 28,073** (30.7 percent)
- Sex (including LGBT issues): 26,934** (29.4 percent)
- Age: 20,857** (22.8 percent)
- National Origin: 9,840** (10.8 percent)
- Religion: 3,825** (4.2 percent)
- Color: 3,102** (3.4 percent)

Equal Pay Act: 1,075 (1.2 percent)

Genetic Information Non-Discrimination Act: 238 (.3 percent)

These percentages add up to more than 100 because some charges allege multiple bases. One can see that by far, the most common type of EEOC claim filed is the kind in which an employee alleges that the employer retaliated against him or her for complaining about alleged discrimination or for filing such a claim.

The press release is online at www.eeoc.gov/eeoc/newsroom/release/1-18-17a.cfm, and the full data set of statistics, including breakdowns by state, type of claim, year, and more, is at www.eeoc.gov/eeoc/statistics/enforcement/.

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Texas Legislation: 85th General Session – 2017

All bills effective September 1, 2017 unless otherwise noted.

The 2017 general session of the Texas Legislature that began in January, 2017 will end on May, 29, 2017. It will be very important for Texas employers due to the significant number of employment-related bills that have been and will be filed this year. Although not all bills make it into the law, all of the bills are important because they tend to reflect what is on the minds of the

members of the Legislature and of the voters who elect them. Moreover, some bills that do not pass in one session may pass in a future session, so they serve as predictors of legal trends in the state. With that in mind, here is a survey of some significant employment-related legislation that has been filed during the first three months of 2017 (the first quarter issue of *Texas Business Today* outlined

the bills that had been filed toward the end of 2016). As was done in the earlier issue, the list is organized into subject areas and shows the bill number, the sponsor, and the bill caption indicating the subject matter of the bill (companion or similar bills may be shown together).

Civil Rights – Discrimination

HB 876	Turner, C.	Relating to a prohibition against certain forms of employment discrimination by state contractors.
HB 1534	Farrar, J.	Relating to the prohibition of certain discrimination based on sexual orientation or gender identity or expression.
HB 1801 SB 472	Blanco, C. Lucio, Jr., E.	Relating to the prohibition of employment discrimination regarding military service members and military veterans.
HB 4246	Arevalo, D.	Relating to sexual orientation and gender identity or expression with regards to the rights of the elderly.
SB 1140	Zaffirini, J.	Relating to the prohibition against sexual harassment in the workplace.
SB 1160	Garcia, S.	Relating to a prohibition on sex discrimination in compensation.

Employee / Family Leave

HB 3041	Blanco, C.	Relating to the ability of a nonexempt employee to participate in certain academic, extracurricular, and developmental activities of the employee’s child.
HB 3483	Collier, N.	Relating to requiring certain employers to provide earned paid leave to employees.

Continued on page 15

Human Resources – General

HB 742	Farrar, J.	Relating to the promotion of breast-feeding and the prohibition against interference with or restriction of the right to breast-feed.
HB 863 SB 475	Hernandez, A. Rodriguez, J.	Relating to safety training for employees performing construction work under a contract with a governmental entity.
HB 1104	Hernandez, A.	Relating to sexual assault and domestic violence awareness training and reporting by cosmetology license holders.
HB 1981	Johnson, E.	Relating to the consideration of criminal history record information of applicants for public employment or an occupational license.
HB 2846 SB 1866	Miller, R. Taylor, L.	Relating to the employment of certain individuals at a sexually oriented business.
HB 2863	White, J.	Relating to confidentiality, sharing, sealing, and destruction of juvenile records.
HB 3477 SB 2181	Neave, V. Menendez, J.	Relating to prohibited adverse employment action against an employee who in good faith reports child abuse or neglect.
HB 3899	Neave, V.	Relating to rest breaks for employees of certain contractors with a governmental entity.
HB 4052 SB 745	Murphy, J. Kolkhorst, L.	Relating to the exemption of certain services performed by certain employees from the sales and use tax.
SB 1185	West, R.	Relating to criminal history record information obtained or disseminated by certain private entities.
SB 1262	Huffman, J.	Relating to the authority of a political subdivision to adopt or enforce certain regulations regarding whether a private employer may obtain or consider an employment applicant's or employee's criminal history record information.
SB 1772	Miles, B.	Relating to the right of an employee to time off from work to vote; creating a criminal offense.
SB 1891	Bettencourt, P.	Relating to a general employment review of persons who apply to school districts, open-enrollment charter schools, and certain independent contractors for employment involving direct contact with students or children.

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Immigration / E-Verify

HB 765	Shaheen, M.	Relating to requiring political subdivisions to participate in the federal electronic verification of employment authorization program or E-verify.
HB 1453	Bonnen, G.	Relating to requiring state contractors and political subdivisions of this state to participate in the federal electronic verification of employment authorization program, or E-verify, and authorizing the suspension of certain licenses held by private employers for the knowing employment of persons not lawfully present in this state; authorizing a fee.
HB 3792	Fallon, P.	Relating to a prohibition against the knowing employment of persons not lawfully present in the United States and the suspension of licenses held by certain employers for the knowing employment of those persons.

Pay / Benefits / Wages and Hours

HB 475	Reynolds, R.	Relating to the minimum wage. (HBs 475 / 992: \$15.00/hour; HBs 924 / 937, SB 229: \$10.10/hour)
HB 924	Turner, C.	
HB 937	Thompson, S.	
HB 992	Walle, A.	
SB 229	Menendez, J.	
HB 2510	Longoria, O.	Relating to employer retaliation against employees who seek recovery of unpaid wages by filing a wage claim with the Texas Workforce Commission.
SB 473	Rodriguez, J.	Relating to paid rest breaks for construction employees of construction contractors and subcontractors; providing an administrative penalty.
SB 476	Rodriguez, J.	Relating to claims for unpaid wages.

Public Accommodations

HB 3196	Cortez, P.	Relating to conciliation agreements under the Texas Fair Housing Act.
SB 827	Seliger, K.	Relating to procedures for asserting claims under the Americans with Disabilities Act.

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Regulatory Integrity / Enforcement / Criminal Penalties

HB 29 SB 1569	Thompson, S. Huffman, J.	Relating to prostitution and the trafficking of persons, civil racketeering related to trafficking, the prosecution of and punishment for certain sexual offenses and offenses involving or related to trafficking, reimbursement.
HB 1970	Krause, M.	Relating to obtaining information from the child abuse and neglect central registry regarding certain individuals who have or will have direct contact with public school students.
HB 2107	Lucio III, E.	Relating to authorizing the possession, use, cultivation, distribution, transportation, and delivery of medical cannabis for medical use by qualifying patients.
HB 2201 SB 283	Vo, H. Watson, K.	Relating to the offense of unlawfully prohibiting an employee from voting.
HB 3769 SB 7	King, K. Bettencourt, P.	Relating to improper relationships between educators and students.
SB 653	Taylor, V.	Relating to improper relationships between educators or certain other school personnel and students.

Unemployment Insurance

HB 1304 SB 592	Longoria, O. Lucio, Jr., E.	Relating to the classification of workers for purposes of the Texas Unemployment Compensation Act.
HB 3890	Neave, V.	Relating to a self-employment assistance program for unemployed individuals.



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Frequently-Asked Questions From Employers Answered

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

Q: What does “predetermined amount” mean in the regulations for salaried exempt employees?

A: The term “predetermined amount” refers to the agreed-upon salary for the position, as explained in the U.S. Department of Labor (DOL) regulation that defines what a true salary is for a salaried exempt employee. See 29 C.F.R. § 541.602(a) at www.twc.state.tx.us/news/efte/wh_part541.html#541_602. It is recommended to assure such employees that the employer will not affect their salaries for any non-allowable reason due to DOL guidance and court decisions that indicate that the salary basis for an overtime exemption can be lost if the employer has a policy or practice of reducing a salaried exempt employee’s salary below its predetermined level for any reason other than the exceptions allowed by law, such as payroll taxes, repayment of loans or advances, or to cover certain absences as outlined in the salary definition regulation linked above. For more information on absence-related allowable deductions from salary, see the following topic in the book *Especially for Texas Employers*: www.twc.state.tx.us/news/efte/salary_test_for_exempt_employees.html.

Q: My company has eleven different locations around the state of Texas. If we were to close one particular location and offered all the employees at that location the opportunity to transfer to another company location, would we be responsible to pay unemployment on any employees choosing not to transfer and stay with the company?

A: The following factors would be important in an unemployment claim:

1. In job transfer / office relocation cases, TWC always looks at the change in the commute for affected employees. Assuming that the eleven locations in Texas are fairly evenly

distributed throughout the state, or that the average distance between locations represents about 45 minutes’ drive time or more, there is a good chance that employees who are at the closed location and who choose not to transfer to another location would be considered “laid off” and would be able to qualify for UI benefits based upon a non-disqualifying work separation.

2. Such cases could also be analyzed as voluntary resignation cases. However, even though a former employee would have the burden of proving that he or she had good cause connected with the work to quit, i.e., not accept a transfer to another location, that might be a fairly easy thing to prove if they could show that accepting the transfer would essentially require them to move to another city.

3. Any employees who might qualify for UI benefits based upon an office closure like that would still be required to be available and actively searching for full-time work in order to be eligible to draw any benefits.

Q: We hired a young woman last week, and she filled out paperwork and did some training (a total of 5 hours). On the 4th day, she didn’t show up for work, didn’t call, didn’t return our calls. My question is... do we have to pay her for her 5 hours, if so, can I pay her minimum wage? How long can I wait to send her the check?

A: Here are the things to consider about that situation:

1. The five hours spent doing paperwork and training on her first day of work were compensable hours worked and would have to be paid.

2. The pay rate for the first five hours would be paid at the same rate that the company agreed to pay her for the job for which she was hired, unless the employee agreed to be paid at a different rate of pay for the orientation / training time.

3. Assuming that the company does not have any evidence of an agreement that the first day would be paid at a different rate, the company should go ahead and calculate the entire week’s paycheck at the normal rate of pay, whatever it was.

4. Under the Texas Payday Law, the final pay for an employee who quit is due on the next regularly-scheduled payday following the effective date of resignation. In a situation like the one described in your message, the effective date of resignation would be the day on which the employee was expected to show up, but failed to do so. Whenever the normal payday would have been for her and her coworkers for the days in question, that would be the final pay deadline for her.

5. Keep in mind that the Texas Payday Law also requires paychecks that are mailed to be mailed by registered mail (see Section 61.017(b) (3) at www.statutes.legis.state.tx.us/Docs/LA/htm/LA.61.htm#61.017). Get a return receipt and keep all documentation of mailing.

Q: How does my company calculate overtime pay for one of our non-exempt employees who is paid at two different rates (a salary for the primary duty and an hourly rate for another job)?

A: In an overtime workweek, the weighted-average method of calculating overtime pay would be used. The basic steps would be the following:

1. Determine the total straight-time pay by adding the salary for the main job to the hourly wages earned for the hours worked at an hourly rate.

2. Determine the total hours worked in both jobs that week.

3. Divide the total straight-time pay by the total hours worked that week – that will give you the regular rate of pay for that week. The overtime pay is based on that regular rate of pay.

4. Now, since the total straight-time

pay already compensates the employee at straight time for all hours worked, including the overtime hours, the overtime hours would need additional compensation at one-half of the regular rate of pay. Multiply one-half of the regular rate of pay by the number of overtime hours that week – that result will be the “overtime premium.”

5. Add the overtime premium to the total straight-time pay to get the total gross pay for the workweek.

6. You can find this method of calculating overtime explained in our book *Especially for Texas Employers* online at www.twc.state.tx.us/news/efte/i_employees_two_rates.html. That page also features an overtime calculation utility that you can use to derive an employee’s pay in such a situation.

Q: *I was hoping to obtain some useful information regarding providing medical equipment for a work station. What are we legally responsible to provide? For example, I have an employee requesting a foot stool for her back and a neck rest for her phone. Are we required to provide this hardware? If so, what do you recommend?*

A: Assuming that your company is large enough (15 or more employees) to be covered by the Americans with Disabilities Act (ADA) and that the employee who is requesting a foot stool and a neck rest for her phone has a protected disability, furnishing those items as a way of helping her minimize the effects of her disability could easily be considered a reasonable accommodation under the ADA. No particular equipment is required at any particular work station. When dealing with accommodations for disabilities, each situation will be different, and it is common to work out a customized solution for each employee who needs an accommodation. In terms of legal obligation to furnish an accommodation, the ADA would require the employer to furnish an accommodation if it makes sense for the job and can be done without undue hardship to the company. In the situation described in your inquiry, it sounds like the footstool

and the neck rest for the phone would be very inexpensive and simple accommodations to make. A good resource for researching potential workplace accommodations for various kinds of disabilities is the Job Accommodations Network, which is a joint project of the U.S. Department of Labor, the U.S. Chamber of Commerce and other business sponsors, and a university partner. Learn more at askjan.org/.

Q: *I’ve been looking for some answers in regards to a company’s ability to tell employees they have to deal with professional work e-mail on their personal phones. Are there any Texas laws on that?*

A: There is no Texas or federal law prohibiting employers from requiring employees to accept work-related messages on a personal e-mail, text, or social media account. That having been said, if the company requires employees to read, respond to, or otherwise process such messages during any off-duty time, the time spent by the employee in such an activity would be work time. Salaried exempt employees would not have to be paid anything extra beyond the agreed-upon salary to deal with work-related e-mails or texts during off-duty hours, but non-exempt employees should be paid for such work time at their regular rate of pay. If such work causes the non-exempt employee to go into overtime for the workweek in question, the company would need to do an overtime pay calculation for that week. Many HR professionals and personnel consultants are advising companies to limit off-duty work activities such as responding to messages from their bosses, since it often boils down to a quality of life issue that can affect employee retention and morale. One other potential issue involves minimum wage: if an employee is required to obtain a cell phone and pay data access fees just to get work-related texts and e-mails from the employer, and the employee’s pay is close enough to minimum wage to where the costs for the phone and data service would take the employee’s

gross pay below minimum wage, the employer would need to reimburse at least enough of the employee’s costs to where minimum wage would not be an issue.

Q: *I own a child care center and I pay unemployment taxes for my employees. My bookkeeper wants me to start paying myself; however, will I have to pay unemployment tax on myself? I would never fire myself from my own business, so I wanted to make sure I didn’t incur an unnecessary expense if I don’t have to.*

A: There are different possibilities, depending upon the type of entity that you operate:

1. If your company is a sole proprietorship and you are the owner, you should not report your wages to TWC or pay state unemployment taxes on your earnings. As a result, you would not be able to file an unemployment claim if the economy fires your company, i.e., you have to go out of business due to inability to stay in business.

2. If your company is a partnership and you are one of the partners, the same result would apply – no wage reporting, no unemployment tax, and no unemployment claim if your partnership has to close down due to inability to stay in business.

3. If your company is anything else, i.e., any kind of corporate entity, such as a corporation or a limited liability company, and you are a corporate officer or a member of the L.L.C., you would be an employee of the company and must report your wages to TWC as wages from employment. Your company would have to pay state unemployment tax on your wages. As a result, you would be able to file an unemployment claim if the economy fires your company, i.e., your company has to go out of business due to inability to stay in business, and you are laid off as a result of your company going out of business for such a reason.



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Texas Business Today

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