

# Texas Business Today

Second Quarter 2018

Ruth R. Hughes  
Commissioner Representing Employers

**SMALL BUSINESS  
IS  
BIG BUSINESS**

*Come In*  
**WE'RE  
OPEN**

# Commissioner's Corner: Focusing On Our Quality Talent Pipeline

Dear Texas Employer,

Welcome to our 2nd quarter issue of *Texas Business Today*.

As we move throughout the year, Texas continues to lead the way in economic development and job growth. Texas ranked first in terms of total nonfarm employment over the 10 largest states, and first for most private sector jobs added over the month. In addition to these statistics, for the 14th straight year in a row, CEOs across America voted Texas as the #1 state in which to do business.

Texas is a "can do" state and we want to make business smarter for Texas employers, not harder.

We know that a strong economy begins with a strong, well-educated workforce, and we want to continue to have employer and industry-led training initiatives, which are the cornerstone of our talent development strategy.

To continue these efforts, we are excited to partner with Governor Abbott on the Texas Talent Connection Grant, and help connect our Texas employers to a skilled workforce.

Through this grant, we will promote internship opportunities for our Texas students to gain exposure to high-demand, middle-skill, STEM occupations.

I want to congratulate Workforce Solutions Greater Dallas, Workforce Solutions of West Central Texas, Workforce Solutions for the Heart of Texas, Workforce Solutions Texoma, Workforce Solutions Lower Rio Grande Valley, and Workforce Solutions of East Texas for receiving this grant and piloting these regional models that will expand access to work experiences.

We look forward to tracking the results of the Texas Talent Connection grant and making sure



*In partnership with TWC, Governor Abbott announced the Texas Talent Connection Grant at the Samsung Austin Semiconductor to help connect our Texas employers to a skilled workforce.*

it provides more employer-driven, work-based internships.

Another way we continue to support these efforts is through our Texas Internship Challenge, a statewide campaign to increase and promote paid internships for Texas students. For more information, visit [www.txinternshipchallenge.com](http://www.txinternshipchallenge.com).

In support of hiring our nation's heroes, remember our We Hire Vets employer recognition program for those employers whose workforce is comprised of 10% military veterans. I want to congratulate Workforce Solutions Capital Area as the first Workforce Solutions office to receive the recognition.

If you know an employer with a workforce comprised of 10% military veterans, nominate them today! You can also self-nominate: <https://texaswideopenforveterans.com/wehirevets-2/>

From April 30-May 7 we celebrated National Small Business Week. Currently, there are 2.6 million small businesses in Texas which make up 99.8% of our workforce. Small businesses are a critical component to our Texas economy and it is vital that we recognize the efforts of those

contributing to our economic stability and growth. Small businesses continue to present new employment within their local communities which brings opportunities for growth and innovation. Congratulations to all small businesses on your hard work and perseverance.

In this issue of *Texas Business Today*, we highlight a small business that utilized our Skills for Small Business grant to help train and grow its workforce. We also provide helpful articles discussing family medical leave, guns in the workplace, and the most frequently asked questions from employers.

As you continue throughout the year, remember our office is here for you. We know it can be challenging to run a business and we want to be your number one resource for employment law matters. Thank you all for what you do for the great state of Texas! 🇹🇽

Sincerely,

Ruth R. Hughes  
Texas Workforce Commission  
Commissioner Representing Employers

# Making Connections Across the State



1. StandardAero is the aerospace industry's largest independent maintenance provider located at Port San Antonio.
2. We promoted our Texas Internship Challenge alongside Tom Pettitt, Managing Director of Accenture, during a segment on In Focus.
3. The Tyler Economic Development Council Investors & Contributors Appreciation Luncheon focused on the growth and successes of the Tyler Community.
4. The Dallas 100K Opportunities Initiative is the largest-led coalition focused on hiring opportunity youth. JCPenney was one of the many employers that participated.
5. Workforce Solutions Capital Area was presented the We Hire Vets employer recognition, the first Workforce Solutions Office to receive this award.
6. UpSkill Houston promoted the growing petrochemical industry in the Houston area at their Regional Faculty Summit.
7. Governor Greg Abbott joined the Texas Workforce Commission, and the Texas Veterans Commission to present the We Hire Vets employer recognition to Texas Veterans of Foreign Wars.





# 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 matters such as: Hiring Issues, Employment Law Updates, Personnel Policies and Handbooks, Workers' Compensation, Independent Contractors and Unemployment Tax Issues, the Unemployment Claims and Appeals Process, and Texas and Federal Wage and Hour Laws.

The non-refundable registration fee is \$125 (one-day) and \$175 (two-days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. 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.

## 2018 CONFERENCE DATES

- Odessa ..... June 22**
- Arlington ..... July 19-20**
- Abilene ..... July 27**
- Laredo ..... August 10**
- Round Rock ..... August 24**
- Amarillo ..... September 21**
- College Station ..... September 28**



**For a list of our 2018 conference locations, visit**  
**[www.texasworkforce.org/tbc](http://www.texasworkforce.org/tbc)**  
**or for more information, call 512-463-6389.**

<b>Commissioner's Corner.....</b>	<b>2</b>
<b>Making Connections Across the State.....</b>	<b>3</b>
<b>The Family Medical Leave Act for Employers, Part 2 .....</b>	<b>5-6</b>
<b>Guns in the Workplace: An Employer's Choice.....</b>	<b>7-8</b>
<b>A School District's Guide to Substitute Worker Unemployment Claims .....</b>	<b>9-11</b>
<b>Company Trains Employees Through Skills for Small Business Grant.....</b>	<b>12-13</b>
<b>Protection of Military Leave.....</b>	<b>14</b>
<b>Business and Legal Briefs.....</b>	<b>15-16</b>
<b>Frequently Asked Questions From Employers Answered.....</b>	<b>18-19</b>

# The Family Medical Leave Act for Employers, Part 2

Mario R. Hernandez

Legal Counsel to Commissioner Ruth R. Hughes



Photo by iStock/Getty Images

*Failure to tender a proper FMLA designation notice could be viewed as interference with an employee's FMLA rights.*

For Part 1 of this article, please visit our First Quarter 2018 edition of *Texas Business Today*: <http://www.twc.state.tx.us/files/businesses/texas-business-today-1st-quarter-2018-twc.pdf#page=13>.

As you might recall, the Family and Medical Leave Act (FMLA) contains many components that covered employers need to keep in mind. Part 1 of this two-part series focused on the basics of the FMLA, which included concepts such as the kinds of employers covered by the FMLA, and the eligibility requirements for individuals who desire to take FMLA leave. This article will focus on advanced concepts that go beyond the topics discussed in Part 1, and are important to be familiar with when applying FMLA leave.

## Issues With Designations of FMLA Leave

Most employers are aware that once an FMLA leave request has been approved, a designation notice must be sent to the employee notifying him or her of the particular details of the leave. This is important, as failure to do so could violate the employee's FMLA rights.

In all cases, it will be the employer's responsibility to ensure that FMLA leave has been properly designated. Once the employer has enough information to determine that the employee's leave is FMLA-qualifying, it has five (5) business days to notify the employee that his or her leave will be counted as FMLA leave. In addition, Section 825.300(d)(1) of the FMLA regulations states "if the employer requires that paid leave be substituted for unpaid FMLA leave, or that paid

leave taken FMLA leave, or that paid leave taken under an existing plan be counted as FMLA leave, the employer must inform the employee of such at the time of designating the FMLA leave." All designation notices must be in writing. For more information on designating FMLA leave and the designation notice (specifically, §825.300(d) and §825.301), please visit: [https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825\\_1300](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825_1300).

But what happens if an employer fails to timely designate FMLA leave? Is the employer completely out of luck? Not necessarily. An employer may retroactively designate FMLA leave if it meets certain requirements. For instance, in addition to providing the employee with the designation notice, the retroactive designation must not result in harm to the employee who requested the leave. Lastly, per Section 825.301(d) of the FMLA regulations "an employer and an employee can mutually agree that FMLA leave be retroactively designated." For more information on retroactive designation of FMLA leave (specifically, §825.301(d) and §825.301(e)), please visit: [https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825\\_1301](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825_1301).

## Can Other Issues Arise from FMLA?

It is not uncommon for multiple laws and employer policies to be in the background of an FMLA situation. With so many regulations to keep tabs on, it can be challenging to sift through them all. What follows are some highlights of other employment-related provisions to keep in mind when applying FMLA leave.

As alluded to earlier, employers can require that accrued paid leave be substituted for unpaid FMLA leave. This means that the two types of leave will run at the same time. However, accrued leave that has not yet been earned cannot be used as a substitute. Moreover, different issues arise if the employee is receiving other types of paid leave in addition to the accrued leave being substituted for unpaid FMLA leave.

For example, the U.S. Department of Labor's *The Employer's Guide to the Family Medical Leave Act* provides that leave taken under

a disability plan or a workers' compensation claim that also qualifies as FMLA-protected leave may be designated as such and counted towards an employee's FMLA leave entitlement. Because these types of leave are paid, the provision that allows the employer to substitute accrued paid leave for unpaid FMLA leave would not apply. However, employers and employees may agree, where permitted by state law, to have accrued paid leave supplement the other types of paid benefits that the employee may be receiving (*See* 29 C.F.R. § 825.207(d) and (e)). Such may be the case where the disability/workers' comp benefit only provides replacement for some, but not all, of the employee's regular pay. For more information on how the FMLA interacts with other leave policies (for workers' compensation, see §825.207(e)), please visit: [https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825\\_1207](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825_1207).

[se29.3.825\\_1207](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825_1207).

Other types of health discrimination laws can also surface when dealing with the FMLA. The Americans with Disabilities Act (ADA) applies to employers with fifteen (15) or more employees, and requires employers to reasonably accommodate employees who request an accommodation due to a disability. ADA and FMLA leave may run concurrently. However, because the FMLA and the ADA are different laws, each has concepts that need to be analyzed separately (*See* 29 C.F.R. § 825.702(b)). Accordingly, when an employer encounters a situation where two or more laws could be applicable to a given situation, the employer should always go with the choice that provides the employee with the greatest amount of protection. For more information about the FMLA's interaction with federal anti-discrimination and other laws, please visit: [https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825\\_1702](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29#se29.3.825_1702).

## Conclusion

The FMLA provisions are far too numerous to be encapsulated within a couple of articles. However, the information provided here can serve as a gateway for employers to gain more knowledge on the law. For more information on the topics covered by this article, please visit *The Employer's Guide to the Family Medical Leave Act* at <https://www.dol.gov/whd/fmla/employerguide.pdf> or call our Employer Hotline at 1-800-832-9394. 🇹🇽



Photo by iStock/Getty Images

*Substituting accrued paid leave for unpaid FMLA leave means that the accrued paid leave will run concurrently with the unpaid FMLA leave.*

# Guns in the Workplace: An Employer's Choice

Elsa G. Ramos

Legal Counsel to Commissioner Ruth R. Hughs

With guns prominently in the headlines lately, employers may be wondering what rights they have with respect to employees bringing and carrying handguns into the workplace. Regardless of their position on the current firearms debate, the good news for employers is that they have a lot of discretion in choosing if, and how, employees may bring guns to work.

## The Basics

In 2015, the Texas Legislature passed a bill to allow concealed handgun permit holders to carry handguns openly. The bill took effect on January 1, 2016. A License to Carry (LTC) is still required to carry a handgun, either openly or concealed, in public. However, for guns in plain view, the handgun must be carried in a shoulder or belt holster. See statute: Texas Penal Code [Section 46.02](#).

Despite the ability to openly carry handguns in most places, there are still some limitations. [Section 46.03](#) of the Texas Penal Code prohibits weapons under certain conditions, including firearms in places such as schools, racetracks, polling places, government courts and court offices, airports, places that sell alcohol, hospitals, and correctional facilities, among others. Review the full text of the statute for the complete list and specific conditions here: [Section 46.03](#).

## On the Premises

While state law allows licensed handgun owners to carry firearms in public, private employers, with few exceptions (see [Section 46.03](#) above), may choose to allow or forbid guns in the workplace, for both employees

and members of the public.

Regardless of an employer's position on the subject, implementing a gun policy that clearly outlines what is and is not allowed is preferred. If employers choose to prohibit firearms, they are required to provide either oral or written communication to individuals. Of course, providing written notice to employees is best.

An employer's handbook or set of rules should include a guns and weapons policy defining what weapons the employer will not allow in the workplace. As with other disciplinary matters, the consequences of failing to comply with a weapons policy are left up to

each employer.

In addition to including restrictions on firearms in a written policy applicable to employees, if employers wish to restrict the public from entering the property while in possession of firearms, they are required to post signs clearly visible to the public at each entrance to the property. Different statutes address the sign requirements for concealed handguns ([Section 30.06](#) of the Texas Penal Code) and open carry weapons ([Section 30.07](#) of the Texas Penal Code). Texas law regulates not only the wording on the signs, but the size and style of the letters as well. The signs must be in contrasting colors with block letters at least once inch in height. In addition, the signs must be



Photo by iStock/Getty Images

*While state law allows licensed handgun owners to carry firearms in public, private employers, with few exceptions, may choose to allow or forbid guns in the workplace.*

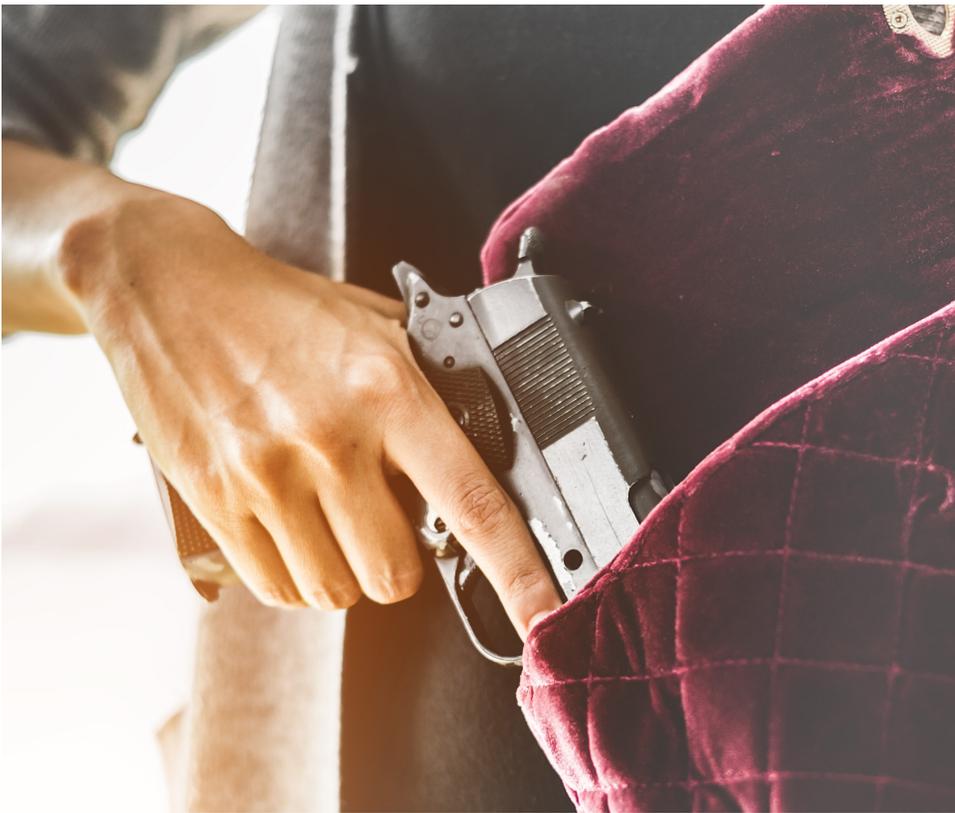


Photo by iStock/Getty Images

*An employer's handbook or set of rules should include a guns and weapons policy defining what weapons the employer will not allow in the workplace.*

both in English and Spanish.

If an employer wishes to ban both types of handguns, both signs must be posted in order to comply with state law.

The sign banning concealed handguns must contain the following language: "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun."

The sign banning open carry handguns must read: "Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly."

### **In Vehicles**

Employers may limit weapons in their company owned vehicles. Of course, such rules should be included in the employers' written policies. However, employers may not prohibit handguns in privately owned vehicles. This is so even if the vehicles are parked on the employers' premises.

[Section 52.061](#) of the Texas Labor Code states that neither a public nor private employer may prohibit an employee who holds a License to Carry from transporting or storing a firearm in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for its employees.

### **Property Owner vs Business Owner**

If the employer owns the property on which the business is located, the guidance above holds true.

Employers are free to choose whether employees can bring firearms to work. However, if the employer does not own the property on which the business is housed, the property owner's rights transcend those of the business owner. This means that the property owner may decide to prohibit weapons, but must meet the statutory requirements and provide written notice.

If the employer does not own the property, and the property owner has communicated no restrictions on firearms, the employer can still make the decision that is best for its business, and may choose to prohibit employees from bringing guns to work. In general, employers are in control of the rules of their workplaces.

### **In Conclusion**

Many behaviors that are perfectly legal outside of the workplace, such as consuming alcohol and using cell phones for example, may be restricted inside the workplace. The same holds true for handguns. With few exceptions, employers may dictate whether or not employees may bring handguns onto the employer's premises, whether to permit them in company vehicles, and under what circumstances, if at all, employees may display them. While much of this is handled by each employer's policies, it is important to be aware of the laws that may restrict or limit an employer's choice. 🇹🇽

# A School District's Guide to Substitute Worker Unemployment Claims

Velissa R. Chapa

Legal Counsel to Commissioner Ruth R. Hughs

Every Heisman trophy winner in history understands the value of preparation and hard work. They recognize that success means learning to play by the rules, studying the opposition, practicing for long hours, and executing various plays. They pour their blood, sweat, and tears into each game without any guarantee of success. However, they also know that the more they prepare, the better their chances are.

Winning an unemployment claim is no different; it requires preparation and focus. Like football, it can be stressful and time-consuming, with no promise of a win. Many employers—particularly school districts—are all too familiar with the pain of losing a claim. This is especially true when responding to claims involving substitute workers. Despite their best efforts, school districts are often billed for benefits because the substitute employee's job separation was treated as a layoff due to lack of work.

To understand why this is so, it is important to know the basic rules of unemployment. A job separation will either be categorized as a discharge or as a quit. If an employee is discharged, the employer will have the burden to prove that the discharge was for misconduct connected with the work. If the employee quits, he or she would have to show good, work-related cause for resigning. That is why employers prefer handling cases where the claimant quit—it lessens the burden on employers and could arguably improve their chances of winning the claim.

However, it is not enough to

simply state that a claimant quit, because the facts of each case will influence how a job separation is viewed and categorized. The struggle for school districts is that job separations involving substitute workers are often treated as discharge cases even though the employer considered them to have quit. The question is: why?

The answer: substitute workers are traditionally labeled as *pro re nata* (PRN) or “as-needed” employees, and the Texas unemployment system considers PRN employees to have been laid off at the end of each assignment. This is because a PRN employee's job is to fill in whenever a regular employee is absent, and once the assignment ends, the PRN employee does not know when the next assignment will begin. The employee is therefore laid off, which is a form of discharge. As layoffs do not occur through any fault of the employee, the employer cannot prove misconduct and will lose the claim.

For this reason, employers often try to explain that substitute workers were not discharged, but instead quit without good cause connected with the work when they stopped accepting assignments. In order to achieve this result, various employers have adopted different policies, procedures, and strategies, with varying degrees of success. While there are no guarantees, some school districts have utilized the following approaches, which employers may want to consider:

## 1. Establish a procedure where the substitute can view and accept open assignments.

The presumption is that the

employer carries the burden of assigning work to substitute employees. In response, various school districts have adopted a procedure to shift the burden to the employee to look up and accept future work. Some have utilized an online system to achieve this, as it is easily accessible and does not require the substitute to report to a physical location.

Placing the burden on employees to look up and accept future assignments creates the foundation to argue that they quit because they failed to accept further work. Employers utilizing an online system should require each substitute worker to log in with a specific username and protected password.

## 2. Have a written policy explaining this procedure to your substitute employees, and have them sign an acknowledgment form.

Having a procedure is a good start, but it is equally important for the employer to prove that the employees knew or should have known of the procedure. A written policy and a signed acknowledgment form resolve that issue.

The policy should be clear and detailed. Avoid vague or ambiguous language and consider the steps an employee would need to take to look up assignments (logging in on the website, following specific instructions, calling a helpline, etc.). Employers may also wish to include language instructing the employee to report any problems with the system to a specific staff member in writing. The policy should not give



Photo by iStock/Getty Images

*Placing the burden on employees to look up and accept future assignments creates the foundation to argue that they quit because they failed to accept available work.*

employees room to argue that they did not understand what they were supposed to do to accept further work.

### **3. Keep excellent records of all documentation connected to the assignments, including vacancies.**

The first two items set the groundwork for prevailing on a claim. However, the employer must also prove that further work was available when the employee quit. This is achieved by preserving and submitting the best evidence of open positions.

There are several ways to do this. Some school districts log into the online system, look up the relevant date, and print out a list of assignments that the substitute worker could have accepted immediately after the last assignment concluded. Any other evidence such as text messages, e-mails, and supervisory notes may also help to establish that work was available. While it is helpful for the employer's representative to verbally confirm that such vacancies existed, providing documentary proof is important to verify those statements.

### **4. Preserve and submit any letters of reasonable assurance.**

Quite understandably, it is not always possible to show that open positions were available. Vacancies may be limited or unavailable during periods such as summer or winter break. Generally speaking, employers who cannot show that open positions were available may lose the claim despite having the policy and procedures described in points 1, 2, and 3. However, one possible solution to this roadblock might be that of reasonable assurance.

If the employer can show that the employee had reasonable assurance to return to work after the break, the employer may be able to successfully argue that a job separation did not occur during the break. The idea is that both parties considered the employment relationship to have continued during the break. This argument does not always work, but it may help depending on the circumstances of the case.

Therefore, employers should preserve and submit as evidence any documentation establishing that the employee had reasonable assurance of further work. For more information on how this may play out on a claim, employers may call our employer hotline at (800) 832-9394.

### **5. Preserve and submit any evidence of the employee's resignation.**

Sometimes employees give advanced notice of their final day of work. This may occur before or during their last day, or while they are on break with reasonable assurance to return.

Whatever evidence the employer has of a resignation should be preserved and produced as evidence on the claim, including when the

employee resigned, in what manner, and for what reason. If the employee submitted a letter, save the letter. If the employee verbally notified the supervisor, the supervisor should ask the employee to put the resignation in writing, and the supervisor should also immediately write a statement of what occurred. That way, if the person with firsthand knowledge of the resignation is unavailable to testify, the employer can submit documentation to prove its point. Submitting the letter may not change the case outcome, but it is worth a try.

### **6. Ensure that the employer's claim representative has knowledge of and access to the above information.**

School districts may be handling a high volume of substitute worker claims at any given time. This can cause the representative to feel overextended and may lead to

prioritizing some claims over others. However, the employer should not have to pick and choose which claims to handle, as there is no rule that requires the same representative to appear for every claim.

Instead, representatives may select and train others to appear on their behalf. The goal is to ensure that the representative handling the claim is familiar with the details of each case and has access to all relevant documentation.

### **7. Provide your people and your paper.**

It is usually preferable to have those with firsthand knowledge of any pertinent facts provide their own statements and testimony. Evidence should pack a punch, and statements or testimony from someone who did not witness something firsthand will not carry as much weight. However, most school district representatives do not have firsthand

knowledge of every relevant fact, and firsthand witnesses are not always available. This is why having a prepared representative who provides excellent documentation is important. Paper records bolster the statements of your witnesses.

### **Conclusion**

The above information reveals that unemployment cases are won before the employment relationship ends. Employers who do the work up front and keep great records tend to have the most success. With these basic approaches in mind, school districts can begin crafting a playbook to help improve their chances of prevailing on a substitute worker claim. 🇹🇽



Photo by iStock/Getty Images

*If the employer can show that the employee had reasonable assurance to return to work after the break, the employer may be able to successfully argue that a job separation did not occur during the break.*

# Local Austin Company Trains Employees Through Skills for Small Business Grant

**Bonnie Fletcher**

*Communications Director to Commissioner Ruth R. Hughs*



*Commissioner Hughs visits with CEO Mathias Ihlenfeld of woom Bikes USA at the North American headquarters located in Austin, TX.*

Woom Bikes USA was born in 2014 with the desire to bring high-quality and lightweight bicycles to families in North America. The bikes are designed to make bike riding safe and fun. They are available in six different sizes for ages 18 months to 14 years.

A woom Bike is 40% lighter than a conventional children's bike.

The company designs 85% of all components in Vienna and Austria. Its North American headquarters is located in Austin, Texas.

As a direct-to-consumer brand, customers can order bikes on [us.woombikes.com](http://us.woombikes.com). Woom Bikes USA will deliver the easy-to-assemble

bikes from their Austin warehouse directly to the customer's home.

## Using Skills For Small Business Grant

Woom Bikes USA has been growing at 300% per year and just moved to a new 10,000 square foot facility in Austin.

To keep up with the tremendous growth, they have been aggressively hiring new team members.

That's why owner Mathias Ihlenfeld approached the Texas Workforce Commission (TWC) for assistance with their workforce. Ihlenfeld applied for a grant from the Skills for Small Business (SSB)

program. The application was easy and they received the grant quickly. Ihlenfeld then partnered with Austin Community College and matched his employees' training needs with their workforce development program. Team members enrolled in Leadership & Management, Marketing, Customer Service, Technical Communications, and Logistics and Supply Chain classes. Their goal is to continuously improve the skills and knowledge and create a smarter workforce. Training, coaching, and improving the skills of a fast-growing workforce is important to their company.



*A new woom Bike employee works on assembling a bike at the North American headquarters in Austin, TX.*

### **SSB Background**

Through the SSB program, up to \$2 million from the Skills Development Fund is dedicated to the backbone of Texas' business community—our small employers. This exceptional opportunity supports businesses with fewer than

100 employees, and emphasizes training for new workers, though it may also help upgrade the skills of incumbent workers.

The program pays up to \$1,800 for each new employee being trained and \$900 for existing employees per 12-month period. Small businesses

can apply to TWC for training offered by their local community or technical college, or the Texas Engineering Extension Service (TEEX).

TWC processes the applications and works with the college to fund the specific courses selected by businesses for their employees.

If you are a small business looking to grow your workforce and train your current employees, please check out the Skills for Small Business grant.

TWC has a team dedicated to helping you fill out the application and keep you updated along the way.

For more information on this grant, please visit: <http://www.twc.state.tx.us/businesses/skills-small-business-employers>. 



*The SSB program pays up to \$1,800 for each new employee being trained and \$900 for existing employees per 12-month period.*

# Protection of Military Leave

By William T. (Tommy) Simmons

Legal Counsel to Commissioner Ruth R. Hughs

The recently-announced deployment of National Guard troops to the Texas border ([see https://gov.texas.gov/news/post/governor-abbott-visits-national-guard-troops-deployed-to-border](https://gov.texas.gov/news/post/governor-abbott-visits-national-guard-troops-deployed-to-border)) is an important reminder of the laws protecting the employment rights of military service members and veterans. The main law governing the employment rights of employees on military duty is the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), found in Title 38 of the United States Code starting at Section 4301. The law does several things:

1. Employers must hold open the jobs of employees on military duty and may not otherwise discriminate against them because of their military service. Generally, a job must be held open for up to five years, but during times of a declared national emergency, the time for holding the job open must be extended until the emergency declaration is revoked. This is relevant because the national emergency declared on September 14, 2001 is still in effect.

2. The law gives that protection to every type and variety of employee.

3. Upon return from military duty, a veteran or employee who is still in the military is entitled to whatever position he or she would have attained with reasonable certainty if the military service had not occurred. In narrowly-defined situations, a veteran may be given a comparable position as long as the seniority, pay, and status remain the same.

4. If a replacement employee is laid off due to the rehiring of a

veteran and files an unemployment claim, Texas law allows the employer to obtain protection from chargeback of such unemployment benefits.

5. A veteran may not be discharged or subjected to adverse employment action for one year after the date of reinstatement, except for cause; the same rule applies to service in the reserves or National Guard.

6. Employers must provide up to 24 months of health plan coverage to employees when they are absent on military leave. When the veteran returns, the employer must immediately cover the veteran under the employer's health plan, assuming the veteran was covered prior to the leave.

7. Seniority under an employer's pension plan must continue to accrue while the employee is on military duty. To the extent that the employer funds the plan, the employer must continue to fund the employee's participation in the plan.

8. In general, if a benefit having to do with length of service would have accrued with reasonable certainty, had the veteran been continuously employed by the employer, the employer must award the benefit as if the veteran had been continuously employed.

"Employer Support of the Guard and Reserve (ESGR) understands the unique talents and skill set Guard and Reserve Service members can bring to the civilian workforce," said Raette Hearne, ESGR Texas Employer Outreach Director. "To make this arrangement work, both parties must be aware of their rights and responsibilities under USERRA."

One can see that the overall

thrust of the law is to guarantee the veteran's job during the military duty and to make military-related absences irrelevant for most intents and purposes. In general, the employee who returns from military duty must be in the position that he or she would have been in, had there been no military service.

The U.S. Department of Labor has a very detailed fact sheet on employers' responsibilities under USERRA on its website at [http://www.dol.gov/vets/programs/userra/userra\\_fs.htm](http://www.dol.gov/vets/programs/userra/userra_fs.htm). Employers may also call the Veterans' Employment and Training Service for Texas at 512-463-2814 for assistance with USERRA issues. Another very useful resource for employers is the website of the ESGR – that website is at <https://esgr.mil/>. This article is excerpted from the article "Legal Issues for Military Leave" in the book *Especially for Texas Employers* – for the full article, see [http://www.twc.state.tx.us/news/efte/legal\\_issues\\_for\\_military\\_leave.html](http://www.twc.state.tx.us/news/efte/legal_issues_for_military_leave.html) online. 



# Business and Legal Briefs

By William T. (Tommy) Simmons

Legal Counsel to Commissioner Ruth R. Hughs

## Pregnancy Discrimination Can Apply To Breastfeeding

In the case of *Hicks v. City of Tuscaloosa*, 870 F.3d 1253; 2017 U.S. App. LEXIS 17290; 2017 WL 3910426 (11th Cir. 2017), the city was found liable for pregnancy discrimination and for violating the FMLA after it failed to reasonably accommodate a police officer who had recently given birth and was nursing her baby. The police department had transferred her from narcotics work to a patrol job, which necessitated the wearing of a bulletproof vest that was too big to adequately cover the officer's body. The employer's case was badly damaged by evidence that the officer had overheard her supervisor telling higher management that she wanted to "get her out of here" and

using gender-related slurs to describe the officer. Significantly, the court ruled that "... a plain reading of the [Pregnancy Discrimination Act] covers discrimination against breastfeeding mothers . . . ."

## Employer Liability for Wrongful Acts of Employees

The Texas Supreme Court issued an important ruling in the case of *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499 (Tex. 2017) relating to the duty of an employer to prevent employees from doing harm to others. The court held that when "the foreseeability of injury is small, and the likelihood of injury is remote," and there is nothing to suggest that a serious injury would occur, "[a]ny duty an employer has to control its employees should not

make it an absolute insurer of their safety and the safety of patrons." The court further noted that when the likelihood of injury is as small as it was in this case, "the employer [cannot be] liable for the most extreme consequences of simple employee friction."

## GPS Tracking in the Workplace

Although Texas law does not currently regulate employers' use of GPS tracking technology in the employment context, the indiscriminate use of a GPS tracking system could potentially risk violating employees' common-law privacy rights if they reveal certain types of information without a legitimate business-related reason. The key to minimizing liability for invasion of privacy with a GPS



Photo by iStock/Getty Images

*In one case, the city was found liable for pregnancy discrimination and for violating the FMLA after it failed to reasonably accommodate a police officer who had recently given birth and was nursing her baby.*

system is to tie its use to legitimate business needs, such as the need to know when employees are using company equipment, where the company equipment is being used, and how the equipment is being used. Naturally, there is a limit to how closely an employer should use the GPS system, and that limit is generally where it becomes obvious that an employee is doing something private that should not be monitored further. Examples of limitations would be things like the following:

1. Acceptable: Requiring employees to use a GPS system in company vehicles at all times.
2. Acceptable: Requiring employees to use a GPS system in personal vehicles while using their vehicles for job-related purposes.
3. Acceptable: Using audio-monitoring features of GPS systems to monitor conversations in company vehicles at any time.
4. Acceptable: Using audio-

monitoring features of GPS systems to monitor conversations in personal vehicles while the vehicles are used for company business. However, the system should allow employees to switch off the audio monitoring features during non-duty times. Employees may be subject to corrective action if they fail to use the systems correctly.

5. Unacceptable: Requiring employees to never turn off their GPS systems that are in their personal vehicles, even during non-duty times.

6. Unacceptable: Using audio-monitoring features of GPS systems to monitor conversations in personal vehicles during non-duty times.

### Quick Items

- Electronic filing of Texas Payday Law wage claims is now possible under Sec. 61.051(d)(4) of the Texas Labor Code. The online portal is at <https://apps.twc.state.tx.us/WAGECLAIM/logon?language=en;>

a Spanish-language portal is at <https://apps.twc.state.tx.us/WAGECLAIM/logon?language=es>.

- The U.S. Department of Labor has some excellent wage and hour law training videos that are perfect for employers in learning the most important facts about minimum wage, overtime pay, recordkeeping, and exemptions. The DOL video website is at <https://www.dol.gov/whd/flsa/videos.htm>.
- Automobile service advisors are exempt from overtime pay under FLSA Section 213(b)(10) (A), according to a very recent U.S. Supreme Court decision – see *Encino Motorcars, L.L.C. v. Navarro*, No. 16-1362, 2018 U.S. LEXIS 2065 (S.Ct, April 2, 2018).
- An employee’s salary history cannot justify a violation of the Equal Pay Act, under the ruling issued by the 9th Circuit Court of Appeals in the case of *Aileen Rizo v. Jim Yovino*, 16-15372, 2018 U.S. App. LEXIS 8882 (9th Cir., April 9, 2018).

• The most recent amendment to the Fair Labor Standards Act clarifies the law with respect to tipped employees. The major points of the new statute provide that tip pools between “front of the house” and “back of the house” employees can be legal if the employee is paid at least the full minimum wage without a tip credit, and that employers (owners and managers) may not take a share of an employee’s tips under any circumstances. Details are found in DOL’s Field Assistance Bulletin at [https://www.dol.gov/whd/FieldBulletins/fab2018\\_3.htm](https://www.dol.gov/whd/FieldBulletins/fab2018_3.htm). 



Photo by iStock/Getty Images

*Naturally, there is a limit to how closely an employer should use the GPS system, and that limit is generally where it becomes obvious that an employee is doing something private that should not be monitored further.*



# WAGE AND HOUR DIVISION U.S. DEPARTMENT OF LABOR



The Wage and Hour Division's (WHD) new nationwide pilot program, the Payroll Audit Independent Determination (PAID) program, facilitates resolution of potential overtime and minimum wage violations under the Fair Labor Standards Act (FLSA). The program's primary objectives are to resolve such claims expeditiously and without litigation, to improve employers' compliance with

overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster.

Under the PAID program, employers are encouraged to conduct audits and, if they discover overtime or minimum wage violations, to self-report those violations. Employers may then work in good faith with WHD to correct their mistakes and to quickly provide 100% of the back wages due to their affected employees.

Employees will receive 100% of the back wages paid without having to pay any litigation expenses, attorneys' fees, or other costs.

WHD will implement this self-audit pilot program nationwide for approximately six months. At the

end of the pilot period, WHD will evaluate the effectiveness of the pilot program, potential modifications to the program, and whether to make the program permanent.

Please visit the PAID webpage at [www.dol.gov/whd/paid/](http://www.dol.gov/whd/paid/) for more information. The FAQ page is online at <https://www.dol.gov/whd/paid/paid-faq.htm>. 



FOR MORE  
INFORMATION

**ARE YOU AN EMPLOYER?  
IS YOUR WORKFORCE  
COMPOSED OF  
10% MILITARY VETERANS?  
WE WANT TO RECOGNIZE  
YOU FOR OUR  
"WE HIRE VETS" PROGRAM**

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



# Frequently Asked Questions

By William T. (Tommy) Simmons

Legal Counsel to Commissioner Ruth R. Hughs

The following questions were compiled from past Texas Business Conferences around the state and questions from Texas employers on our employer hotline (1-800-832-9394) and via e-mail at [employerinfo@twc.state.tx.us](mailto:employerinfo@twc.state.tx.us).

**Q:** *If a salaried employee arrives to work at 9:20 a.m. on a Wednesday, types up a resignation letter, and hands it to the boss at 10:30 a.m. before walking out, what type of pay would the employee be entitled to receive? Can we pay the employee for two hours that day (a little extra on time)?*

**A:** If the employee is a salaried exempt employee, the employer could pay him or her a pro rata amount for the time worked on the final day. That is because the DOL regulation defining what a true salary is for a salaried exempt employee (29 C.F.R. § 541.602 – see [http://www.twc.state.tx.us/news/efte/salary\\_definition.html](http://www.twc.state.tx.us/news/efte/salary_definition.html)) provides the following in subsection (b)(6): “An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee’s full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee’s full salary for the time actually worked will meet the requirement.”

**Q:** *What about if the employee is a salaried non-exempt employee?*

**A:** The company would not have the benefit of the specific exception above to the general rule that the employer must pay the full salary, exactly as it is promised. To pay the salaried non-exempt employee on a partial-day basis for the final day of work, and on a partial-week basis for the final week, the company would need to have the employee’s written authorization to make a corresponding deduction from the final week’s salary. There is an example of how to obtain

such authorization in item 12 of the sample wage deduction authorization agreement in our book *Especially for Texas Employers* at [http://www.twc.state.tx.us/news/efte/wage\\_deduction\\_authorization\\_agreement.html](http://www.twc.state.tx.us/news/efte/wage_deduction_authorization_agreement.html).

**Q:** *What are the overtime rules for insurance agency employees, including salaried staff and salary/commission agents?*

**A:** Executive, administrative, professional, outside sales representative, and computer professional staff might be exempt if the employee meets the duties test and, if applicable, the salary test for a particular type of white-collar exemption.

a. **Executive:** The top executives of the company, i.e., the ones with hiring and firing authority and who supervise two or more full-time employees, can be executive-exempt if they are paid a salary of at least \$455/week. The salary test does not apply to an owner of the company who has management responsibilities and owns at least a 20% share of the company.

b. **Administrative:** The top administrators of the company, i.e., the senior managers who do not have hiring and firing authority, but who are responsible for managing a major aspect of the company’s operations, who have discretion and independent judgment with respect to matters of significance, and whose decisions have a substantial impact on the company as a whole, can be administrative-exempt if they are paid a salary of at least \$455/week.

c. **Professional:** Licensed professionals who have at least a four-

year college degree in the field in which they work can be professional-exempt if they are paid a salary of at least \$455/week.

d. **Outside Sales**

**Representatives:** Outside salespeople may be paid on any basis, with no concerns for minimum wage, overtime, or a minimum salary, as long as their sales work requires them to work outside of the company’s principal place of business for most of each workweek.

e. **Computer Professionals:**

The top experts in the company regarding IT operations, i.e., the computer programmers, network designers, and webmasters, can be exempt from overtime pay if they are paid a salary of at least \$455/week, or a straight-time hourly rate of at least \$27.63/hour.

**Q:** *Are there any guidelines regarding hour requirements for part-time employees? We have an employee who is a college student and has been working Saturdays and Sundays, averaging 16 hours per weekend. We would like to reduce the schedule to 4-6 hours per weekend because there is less work to do. Would we be violating any rules, or inviting an unemployment claim, by cutting the employee’s hours?*

**A:** There is no Texas or federal law that would prohibit a reduction in hours such as the one described in your inquiry. Work schedules are up to an employer’s discretion – see the following topic in our book *Especially for Texas Employers* for details on the legal issues: [http://www.twc.state.tx.us/news/efte/work\\_schedules.html](http://www.twc.state.tx.us/news/efte/work_schedules.html).

It would be at least theoretically possible for an employee whose

hours have been reduced to file an unemployment claim based on the reduction. TWC's guidelines for evaluating unemployment claims from employees whose hours have been cut are explained in the book at <http://www.twc.state.tx.us/news/efte/ui-law-the-claim-and-appeal-process.html#ui-20percentrule>.

**Q:** *I currently own my business and have been a single person sole proprietorship. Thankfully, my business is growing and I have determined I can no longer do everything by myself and will be hiring part-time staff. I know there are requirements of a business owner in regard to employees, but I have absolutely no idea what I need to do or where to begin. I will be hiring a couple of workers to help me cover my busiest hours a couple days per week, but I'm not sure how to implement the payroll.*

**A:** A good place to start would be to look in our free book for employers titled *Especially for Texas Employers*, which is online. First, check out the table of contents at <http://www.twc.state.tx.us/news/efte/tocmain2.html>. The book is organized into five main

sections, the first four of which are focused on the four main phases of every employment relationship, and the fifth of which contains sample employment forms and policies that might be handy for any business to have.

There are two main ways to find topics in the book: 1) Use the table of contents to drill down the information you need; or 2) use the index (see <http://www.twc.state.tx.us/news/efte/indexmain.html>), which is extremely detailed and offers direct links to outline topics or to specific issues contained in longer articles. It is based on keywords – each topic or article has several keywords that can help locate it.

The entire book is based on the most common questions that employers ask at our conferences (<http://www.twc.state.tx.us/events#texasBusinessConferences>), via our e-mail help address ([employerinfo@twc.state.tx.us](mailto:employerinfo@twc.state.tx.us)), and when calling us on the toll-free hotline for employers (1-800-832-9394).

Specifically for your inquiry, new employers should start out with the top ten tips for employers at <http://www.twc.state.tx.us/news/efte/top-ten-tips.html> to get an overview of

the most essential principles for every employer to follow, then get directly into the outline of employment law issues for the section on Hiring Issues (see [http://www.twc.state.tx.us/news/efte/i\\_hiring\\_basic\\_legal\\_issues.html](http://www.twc.state.tx.us/news/efte/i_hiring_basic_legal_issues.html)).

Regarding the payroll question, you may review the main procedures to follow, including payroll, in the “New Hire Paperwork” topics at [http://www.twc.state.tx.us/news/efte/new\\_hire\\_paperwork.html](http://www.twc.state.tx.us/news/efte/new_hire_paperwork.html). The main payroll-related procedures would be the following: 1) Have each worker sign a written wage agreement (see [http://www.twc.state.tx.us/news/efte/pay\\_agreements.html](http://www.twc.state.tx.us/news/efte/pay_agreements.html)); 2) Have each worker complete a W-4 form before doing any work (see <https://www.irs.gov/pub/irs-pdf/fw4.pdf>); and 3) Register with TWC for a state unemployment tax account within ten days after becoming a liable employer, which happens as soon as your company has paid at least \$1500 in wages to one or more employees during a calendar quarter. The online account registration form is at <http://www.twc.state.tx.us/businesses/unemployment-tax-registration>. 🇹🇽



Photo by iStock/Getty Images

*If the employee is a salaried exempt employee, the employer could pay him or her a pro rata amount for the time worked on the final day.*

# Texas Business Today

*Texas Business Today* is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be comprehensive legal analyses of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

*Texas Business Today* is provided to employers free of charge.

Subscribers may go to [www.texasworkforce.org/TexasBusinessToday](http://www.texasworkforce.org/TexasBusinessToday) and enter their email to receive *Texas Business Today*.

For tax and benefits inquiries, email [tax@twc.state.tx.us](mailto:tax@twc.state.tx.us).

Material in *Texas Business Today* is not copyrighted and may be reproduced with appropriate attribution.

Equal Opportunity Employer/Program Auxiliary aids and services are available upon request to individuals with disabilities.

Relay Texas: 800-735-2989 (TTY) and 711 (Voice)

Copies of this publication (6/18/18) have been distributed in compliance with the State Depository Law, and are available for public use through the Texas State Publication Depository Program at the Texas State Library and other state depository libraries.

**Telephone: 800-832-9394 • 512-463-2826**

**Fax: 512-463-3196 Email: [employerinfo@twc.state.tx.us](mailto:employerinfo@twc.state.tx.us)**

**[www.texasworkforce.org](http://www.texasworkforce.org)**



Printed in Texas on recycled paper



A proud partner of the [americanjobcenter](http://americanjobcenter.net) network