

# Texas Business Today

Third Quarter 2012

Tom Pauken  
Commissioner Representing Employers

TEXAS  
WORKFORCE SOLUTIONS  
\* \* \* \* \*

## Tips for properly handling unemployment claims

- Probationary periods for employees • Common employer questions answered •
- Commissioner Pauken: Pro-business initiatives recommended •

# Pauken: Pro-business initiatives recommended for Legislature

Having run a business myself, I can certainly sympathize with employers who are confused with the myriad government regulations that take time and effort away from managing the business. As Commissioner Representing Employers, my staff helps employers understand this maze, and I work to make sure our regulatory and administrative functions at the agency are fair to the job creators in Texas.

In addition to these roles, my office also prepares a legislative agenda in advance of each session. The goal is

## Commissioner's Corner

to free employers to run their businesses and fuel the Texas economy, not spend hours drowning in red tape. My office also

looks for ways to preserve the Unemployment Trust Fund for those who truly need it and save employers money on their unemployment taxes.

Here are some of the key pro-business initiatives that my office commends to the Texas Legislature for further consideration:

- Payroll deductions. As unbelievable as it may sound, it's illegal for an employer to make a deduction from someone's paycheck without their consent to recoup money that an employee stole from an employer.

It's also illegal for employers to deduct money from paychecks to recover loans made to employees without their consent. That makes absolutely no sense. My office suggests amending Texas law to allow employers to make any lawful deduction authorized by the U.S. Department of Labor or a court decision. That would cover the two cases I describe above and many more. I trust that employers will use this authority responsibly, but our existing Texas Payday Law provides penalties for employers who act in bad faith. So there are plenty of protections here for workers.

- Incentives for returning to work. Right now, employees who collect more than three weeks of Unemployment Insurance (UI) do not get their first week's benefit until their fourth week (a part of the law known as "the waiting week"), when they get paid for an extra week. I propose moving that waiting week until the first week when an employee gets a full-time job or when they exhaust state benefits, whichever comes first. This proposal encourages employees to return to work faster, and also gives them needed income while they are waiting for their first paycheck from their new job.



TWC Commissioner Representing Employers Tom Pauken (center) presents a Skills Development Fund grant check to representatives from Collin College and its employer partners. Pictured from left to right are Collin College President Dr. Cary Israel, Natural Polymer International Corp. Human Resources Director Teresa Hart, Collin College Board of Trustees Chair Mac Hendricks, Commissioner Pauken, State Rep. Ken Paxton, Natural Polymer International Corp. Information Technology Director Yow Yi Amstutz, Advantage Machine Owner and CEO Cari Manderscheid, Advantage Machine Representative Haley Shankle and Advantage Machine President Greg Manderscheid. *Photo courtesy of Collin College*

- Compliance with new federal unemployment law. Congress recently mandated that states require that recipients of UI be actively seeking work while claiming benefits. I support amending state law to comply with this common-sense federal requirement. Drug testing. If a UI claimant is in an industry where drug testing is standard or was fired for abuse of illegal drugs, they should have to take a drug test to claim benefits. People who abuse illegal drugs should not get UI benefits.
- Protection from unforeseen events. If a person receives unemployment insurance because of a reason so “urgent, compelling, and necessary so as to make the separation involuntary,” the law should not charge the employer back for that unless the reason for the separation involved wrongful conduct by the employer.
- Benefits for married couples only. Texas law allows workers to collect UI benefits when they move with their spouse. Some fiancés and domestic partners have been collecting benefits under this law. I believe that spouse means lawfully married husband or wife and support declaring that in Texas Unemployment Insurance Law.
- Recovery of overpayments. UI recipients should get the benefits they are entitled to, but when they receive an overpayment by mistake, the state should be able to

recover that overpayment. Current Texas law prevents recovery of overpayments in some circumstances. It isn’t fair to other unemployed workers or the employers of this state for unemployed workers

to collect more than that to which they are lawfully entitled.

When evaluating proposals for changing our employment laws, I asked three questions: Is it good for business? Is it fair to workers unemployed through no fault of their own? And does it make sense?

I hope Texans will agree that these proposals will make our state laws better for employers and employees alike. 🇹🇽

Sincerely,



Tom Pauken  
TWC Commissioner Representing Employers



**Commissioner’s Corner ..... 2**

**Tips for handling unemployment claims..... 4**

**Business briefs..... 6**

**Impact of probationary period on employees..... 8**

**Common employer questions answered ..... 10**

**New rules regulating workers’ compensation ..... 14**

# Tips for employers: Reduce risk through properly handling unemployment claims

In this newsletter, we often give employers tips on what to do prior to an unemployment claim being filed to ensure the best chance of avoiding chargeback liability. But, there are things that you can do after the claim is filed that will also help you minimize charges to your TWC tax account.

## 1. Respond to all documents from TWC by the deadline listed on the document.

If you fail to respond on time you could lose your ability to protest both the payment of benefits and chargebacks to your account. Failure to respond in a timely fashion also can result in you losing all further appeal rights in a case. Therefore, look closely at all TWC documents you receive to determine the response deadline. Remember that, in most cases, you can respond to documents in multiple ways. If you respond by fax, ensure that your fax machine prints a fax confirmation showing a successful transmission. If the transmission was not successful, keep faxing the document and keep copies of the unsuccessful transmission. If you respond by mail, the best alternative is to respond via certified mail or in some other manner that allows you to obtain proof of mailing from the U.S. Postal Service. If for some reason you file a late response or appeal, state why your response is late. There are very few reasons that a late appeal will be deemed timely so make every effort to respond on time. Also, if you have a hearing on the timeliness issue be sure to have the person who filed the response testify at the hearing.

## 2. Update your address with TWC as soon as you move.

If you file a late response or appeal because you failed to update your address with TWC your appeal will be dismissed. You should update your address with TWC as soon as your office (or other designated address) changes. Filing a forwarding order with the U.S. Postal Service is not the same as changing your address with the TWC. To change your address, call TWC Tax Department at 512-463-2700 or contact your assigned tax examiner.

## 3. Have mail monitored while the person who normally handles correspondence is out of the office.

The laws regarding timely appeals are strict. The fact that the person designated to handle correspondence from TWC is out of the office will not

excuse a late appeal regardless of the reason he or she is absent. Therefore, it's very important that you designate a replacement and train this person on how to handle TWC documents.

## 4. Appear at all Appeal Tribunal hearings or Commission-ordered rehearings.

In the same way you can lose a case by failing to respond on time, you also could lose a case by not appearing at a scheduled hearing. This is true whether the hearing is at the Appeal Tribunal level or a rehearing ordered by the Commissioners. If you don't appear for a hearing, the hearing officer's decision will be based solely on the documents already provided and the claimant's testimony if the claimant was the one who filed the appeal and appears at the hearing. If you lose the case after not appearing at a hearing, the first thing you will have to show is good cause for not being present at the previous hearing. Good cause for a nonappearance includes reasons such as not receiving the hearing notice or a sudden medical emergency of the firsthand witness. However, good cause will most likely not be found if you don't appear because no one was checking your mail, you forgot about the hearing, or because you misread the date and time of the hearing on the notice you received. Therefore, the first thing you should do when you receive a hearing notice is take note of the time and date of the hearing. You also should read the hearing instructions carefully, which advise that all parties must call in or log onto the hearing system online (<https://tx.c2tinc.com/register>) at least 30 minutes prior to the scheduled starting time of the hearing. Failure to call in or log on to the hearing system prior to the hearing can result in you being denied the opportunity to participate.

## 5. Have all firsthand witnesses present at hearings.

Firsthand witnesses will always be the best evidence in an unemployment case. These are people who actually saw or heard the incident which resulted in the claimant's separation. Firsthand testimony trumps secondhand testimony as well as notarized, written statements from firsthand witnesses. Therefore, you should always have your firsthand witnesses available to speak to TWC, whether during the initial claims investigation or during a telephone Appeal Tribunal hearing. It is not necessary that the firsthand witnesses be in the same room as the employer's primary representative during the

hearing; they can be conferenced into the phone hearing but you will need to provide the witness's telephone number to the hearing officer. Since firsthand testimony is so important, you should do whatever you can to ensure that the witnesses are available to testify. This would include asking the employees to testify on their days off (with pay, of course), calling them at a job site, or arranging for other employees to cover the witness's job duties so that they can testify. In most cases, even if you have to pay overtime to the witnesses, it will be less expensive than having unemployment benefits charged back to your account if you lose the case due to a lack of firsthand testimony. If your firsthand witnesses are still unavailable to testify due to an unavoidable reason, tell the hearing officer during the hearing and ask that the rehearing be reset to a later date to allow your witnesses to testify. There is no guarantee that your request will be granted, but the request and the reason the firsthand witness is unavailable will be on the record for the Commissioners in the event that you file an appeal to the Commission.

**6. Focus on a final incident.** Sometimes employers respond to an unemployment claim by stating everything that the claimant did incorrectly during the entire time that the claimant was employed. While some of the information may be related to the final incident, you want to focus as much as possible on the final thing that occurred that caused you to fire the claimant or that caused the claimant to quit. Most likely, events that occurred a year ago will not be relevant to your case because you did not choose to fire the claimant when those incidents occurred. However, you do want to mention previous warnings for the same behavior or previous warnings that were required under your progressive disciplinary procedure. Also, remember that most unemployment hearings are subject to a one-hour time limit. You want to take advantage of this time and not distract the hearing officer with extraneous information that is not relevant to the reason the claimant no longer works for you. Therefore, focus on the final incident that caused the separation.

**7. Provide the required evidence.** Remember, if you discharge someone the burden is on you, as the employer, to prove misconduct connected with the work. Therefore, you should provide TWC with all of the information necessary to reach the same conclusion you did regarding the claimant's employment. If the claimant violated a specific policy, provide the policy to the Commission along with proof that the employee was aware of the policy such as a signed handbook acknowledgment form. If you have a progressive disciplinary policy that requires multiple warnings prior to discharge then you

should provide the previous warnings to prove that you followed all of the steps of the progressive policy. Most importantly, provide evidence of the final incident. If the final incident was recorded on a video or voice record, then provide a copy of the recording to TWC. Or if the person was fired due to internet or telephone activity then provide printouts of that activity along with an explanation of how the printed material proves misconduct. Finally, when providing the required evidence make sure that it is discernible and legible. The appearance of many documents changes when they are faxed or copied so be prepared to send separate, clearer copies of the documents by mail later.

**8. Do not make the case personal.** This is easier said than done. Most employers, especially those with only a small workforce, become invested in the lives of their employees. However, treat an unemployment claim the same as any other business transaction. Avoid using inflammatory terms and stick to the facts. Name-calling or straying into unrelated personal matters during the claim investigation or appeal hearing can weaken your case.

**9. Call TWC with concerns.** If there are any documents you receive from TWC that you don't completely understand, be sure to contact TWC immediately to seek assistance. This is especially true if you receive more than one determination regarding a former employee because you may have to appeal two separate issues. Call TWC's Commissioner Representing Employers' office directly at 800-832-9394 and select Option 4 to speak with a staff attorney. Also, if you have questions or concerns regarding the unemployment claim or appeals process, speak with an attorney about these issues as well.

**10. Document all contacts with the TWC.** All TWC staff members are thoroughly trained on unemployment insurance laws and procedures. However, we are all human and therefore, mistakes do occur. There also is a chance that a miscommunication between you and a TWC employee leads you to believe something that is not true, or maybe a conversation you had with an investigator is not noted in the computer system. For all of these reasons, you should document all conversations you have with TWC personnel. Write down the name of the employees to whom you speak, and the date and telephone number you called. This will allow you to refer back to those employees in the event of a misunderstanding. 

*Sonia Luster  
Legal Counsel to Commissioner Tom Pauken*

# Business briefs: what you need to know for your business

## More Activity from the National Labor Relations Board

In *Banner Health System* (28–CA–023438, July 30, 2012), a recent decision involving an Arizona hospital, the National Labor Relations Board (Board) ruled that an employer’s standard practice of asking employees involved in workplace investigations to keep the investigation confidential, i.e., not to discuss the investigation with others, was overly broad and constituted a violation of the National Labor relations Act (NLRA). The Board’s rationale was that it could potentially violate employees’ rights to discuss the terms and conditions of their employment among themselves.

For a very interesting law blog posting about a recent Board case in which the agency ruled that the National Labor Relations Act prohibits an employer from disciplining employees for making “vulgar, offensive, or threatening” comments at work, and even that the NLRA protects an employee’s right to lie about having done so when the employer investigates, see Ohio employment lawyer Jon Hyman’s *The Practical Employer* blog at <http://www.ohioemployerlawblog.com/2012/10/now-nlrb-says-employers-cant-regulate.html#sthash.umh8tRXb.dpbs>.



Commission Rule 815.108 has been amended to remove the notary requirement on written authorizations. This change will help improve the efficiency of processing written authorizations. *iStockphoto/Thinkstock*

## Written Authorizations: Notarization Requirement for Third-Party Representatives Has Been Dropped

Commission Rule 815.108 has been amended to remove the notary requirement on written authorizations. Previously, Commission Rule 815.108 required that a report or form designating a third-party representative to have written authority to sign for an individual or employing unit to be sworn to before a notary public or other officer authorized to administer oaths. The notary requirement imposed an administrative burden on employers and the agency.

In addition, the requirement was not consistent with the processing of other TWC Tax Department documents. As noted in TWC Tax Letter 05-12 (June 21, 2012): “Effective immediately, Written Authorizations (Form C-42) and Revocation of Written Authorizations (Form C-43) do not have to be notarized. All forms available to the public via the TWC website have been updated and conform to the new rule.”

Since January, the Tax Department has processed 11,000 written authorizations. Approximately 80 percent of these were from service agents. This recent rule change will improve the efficiency of processing written authorizations and offer a better opportunity to serve employers in the business community.

Source: TWC Tax Department, September 2012.

## Tier III of Emergency Unemployment Compensation Benefits Is Once Again In Effect

*(Excerpted from a TWC press release)* On October 3, 2012, TWC announced a nine-week extension of Emergency Unemployment Compensation (EUC) Act benefits (Tier III) for unemployed Texans. The extension comes as a result of the state’s average unemployment rate reaching an estimated 7 percent or higher over the previous three months.

Claimants currently receiving unemployment benefits will automatically have the additional benefits added to their benefit period and will receive a letter showing the additional amount of benefits they could potentially receive.

Claimants do not need to contact TWC unless they receive a letter instructing them to do so.

The U.S. Department of Labor authorized TWC to begin processing claims beginning Oct. 7, 2012. This extension is not retroactive, and therefore does not cover weeks of unemployment prior to Oct. 7, 2012. TWC will mail letters to approximately 32,000 Unemployment Insurance (UI) claimants who have exhausted prior benefits and may be eligible for the extension, with instructions on how to apply for the additional weeks of benefits. The letter will direct claimants who are still unemployed to call a special toll-free phone number, available 24 hours a day, to apply for the latest extension.

This extension brings the total number of benefit weeks an individual in Texas may qualify for to a maximum of 63 weeks.

### **New FMLA Guide for Employers**

*(Excerpted from a U.S. Department of Labor press release)* As part of the department's continuing effort to make the Family and Medical Leave Act (FMLA) more accessible, the department has published *Need Time? The Employee's Guide to the Family and Medical Leave Act*. The booklet is designed to answer questions such as who can take qualifying leave and what protections the law provides, and is available at <http://www.dol.gov/whd/fmla/employeeguide.htm>.

### **Plagued by Callers Bothering Your Employees?**

Many businesses have noticed problems caused by outside companies and individuals harassing employees with non-work-related calls. Depending upon who is calling and why, such calls may actually violate certain laws, such as statutes regulating debt collection and solicitation calls. A fast-food restaurant chain is attempting to deal with the problem head-on—see the article at <http://www.mysanantonio.com/business/article/Whataburger-is-attempting-to-hang-up-on-3811027.php>.

Just because someone calls does not mean that the call has to be accepted. If unwelcome callers are a problem for your business, inform all employees that if they get unwelcome calls, they should simply hang up the phone. Of course, make sure they understand that unwelcome calls do not include calls from customers or other people the company needs to talk with, no matter how difficult such a call might be, or calls from supervisors, no matter how much the employee might want to avoid such a call.



Unemployment claimants currently receiving unemployment benefits will receive a letter for TWC showing the amount of benefits they could potentially receive under the extension of Tier III Emergency Unemployment Compensation benefits. *iStockphoto/Thinkstock*

### **Proper Reporting and Taxation of Tips and Service Charges**

Employers with tipped employees can find detailed guidance from the Internal Revenue Service (IRS) on how to handle tips and service charges at [http://www.irs.gov/irb/2012-26\\_IRB/ar07.html](http://www.irs.gov/irb/2012-26_IRB/ar07.html). Every employee should understand that tips and other gratuities need to be properly accounted for, reported, and taxed. The basic IRS resource for reporting tip income is Publication 531 (<http://www.irs.gov/pub/irs-pdf/p531.pdf>).

### **Workplace Bullying**

Anyone with access to *Workforce* magazine online will find the following article, "Talking Power, Safety and Bullying," extremely useful in understanding how important that issue is: <http://www.workforce.com/article/20120822/BLOGS01/120829977/talking-power-safety-and-bullying>.

*Continued on page 13*

# Probationary period for employees— what effect does it really have?

What is so special about a 90-day probationary period for employees? We get questions about this on a regular basis.

Do these sound familiar?

- “I can terminate someone who’s been with me without a written warning and without giving him a reason as long as he’s been with me fewer than 90 days, right?”
- “He was discharged during his first 90 days, so he can’t file for unemployment.”
- “As long as I terminate an employee during his 90-day probationary period, I won’t have to pay for his unemployment.”

There are clearly a lot of misconceptions about an employee’s 90-day probationary or trial period. Let’s see if we can clear some of them up and get a better understanding of what a 90-day introductory period can and cannot do for employers.

***I can terminate someone who’s been with me without a written warning and without giving him a reason as long as he’s been with me fewer than 90 days.***

First of all, there is no state or federal law that requires employers to provide employees with a 30, 60, or 90-day initial trial period of employment. The 90-day probationary period is a period of time that many employers use to distinguish between employees who are eligible to receive certain benefits—such as paid vacation and health

insurance—and those who are not.

As long as there is no employment contract or union agreement that states otherwise, because Texas is an at-will state, employers are free to hire and fire at will at any time and for any reason, as long as it’s not for an illegal reason.

This means that employers are able to fire employees with or without prior written warnings, and without having to give employees a reason for the discharge. This is true no matter how long an employee has worked for the employer, whether three weeks, three months, or three years.

The at-will doctrine allows the employer protection from being sued for wrongful discharge. However, it does not provide employers protection from unemployment insurance (UI) claims, nor does it guarantee that an employer will prevail in a UI claim.

We hear this from employers quite regularly in UI claims after the employer has lost a decision, “But Texas is an at-will state; I had every right to fire that employee.” And that employer is correct—he had every right to fire that employee. However, if the employer wants to prevail in a UI claim, the employer has the burden of proving that the discharge was for misconduct connected with the work. Just because the employer has the right to fire an employee for any reason, it does not always follow that the reason constitutes misconduct.

For more information about misconduct and other qualification issues, see Part IV. Post-Employment Problems: Unemployment Insurance Law – Qualification Issues in *Especially for Texas Employers*.

***OK, so an employer can fire an employee at any time, for any reason, even outside of the 90-day probationary/initial/introductory period. But if an employee is fired during the first 90 days of employment, he can’t file for unemployment, right?***

Wrong. Under most circumstances, the length of time that an employee has been employed with a specific employer prior to the job separation is irrelevant to the issue of whether an employee can file a UI claim.

---

As long as there is no employment contract or union agreement that states otherwise, because Texas is an at-will state, employers are free to hire and fire at will at any time and for any reason, as long as it’s not for an illegal reason. Ultimately, this means employers are able to fire employees with or without prior written warnings and without giving employees a reason for discharge, regardless of how long the employee has worked for the employer. *Photodisc/Thinkstock*



What matters is that a job separation has taken place, which means that the employee is no longer performing personal services for compensation. Of course, there are several other requirements that must be met before a claimant will be able to draw unemployment benefits.

For information on a claimant's eligibility requirements, please see Part IV. Post-Employment Problems: Unemployment Insurance Law – Eligibility Issues in *Especially for Texas Employers*.

But for the most part, if a claimant has been at his last job fewer than 90 days, he will not be barred from filing a valid UI claim and could very well be eligible and qualified to receive benefits.

**Well, OK, a claimant can receive UI benefits even if only employed a short period of time prior to separation, but at least the employer will be protected and won't bear financial responsibility if the employee was discharged within the first 90 days of employment. Is this right?**

Not exactly. Whether an employer will bear potential financial liability for benefits paid to a claimant in an unemployment claim depends on whether the employer reported wages for the claimant during the claimant's base period, not on the number of days that the employee worked.

The base period is a period of four calendar quarters measured from the time the claimant files his initial claim, not from the time of the job separation. The base period is defined as the first four of the last five completed calendar quarters prior to date on which the initial claim was filed.

In order to determine a claimant's base period, first look at the calendar quarter in which the claim was filed. We are looking at simple calendar quarters here, i.e. January, February, and March make up the first quarter; April, May, and June make up the second quarter, etc. Once you know in which quarter the claim was filed, count backwards in time five calendar quarters (see below). The first four quarters of those five you just counted make up the base period for that claim.

For more information about the base period, see Part IV. Post-Employment Problems: Unemployment Insurance Law – Eligibility Issues, Part IV. Post-Employment Problems: Unemployment Insurance Law – Dealing with Claim Notices, and Part IV. Post-Employment Problems: How Do Unemployment Claims Affect An Employer in *Especially for Texas Employers*.

The base period looks like this:

Only those employers who reported earnings for a claimant during the claimant's base period are potentially financially liable for benefits paid to the claimant. That means that if any employer reported wages for a claimant during any of the four base period quarters, then that employer could be found to bear some financial responsibility for benefits paid to the claimant.

If we apply the base period analysis to an employee who was discharged within his 90-day initial or probationary period, what happens? Let's look at one possible scenario.

The claimant was hired on May 15, 2012 and discharged on August 10, 2012. The claimant then files his initial claim for UI benefits the following week. Because the claimant filed his claim during August 2012, he filed his claim during the third calendar quarter of 2012. By looking at the diagram below, you can see that the third quarter of 2012 is the quarter when the claim was filed and does not count toward the base period. The quarter immediately preceding the quarter in progress is the lag quarter, in this case the second quarter of 2012, and would also not be considered part of the base period. The four quarters prior to the lag quarter would comprise the claimant's base period. As you can see, because the employer in our hypothetical example reported earnings for the claimant only during the second and third quarters of 2012, and those two quarters are not included in the base period, the employer would not be subject to liability for benefit payments made to the claimant. So in this example, the employer is protected from financial liability, suggesting that by discharging an employee during the first 90 days of employment, the employer won't have to pay for UI benefits.

However, let's take the same scenario and change only one fact—the claimant waited to file his initial claim until October 2012. What happens now? If we run through the same steps to determine the claimant's base period, this time, the claimant filed his claim during the fourth quarter of 2012, which would be the quarter in progress. The lag quarter would be the third quarter of 2012. That means that the base period would now include the second quarter of 2012, in addition to the three prior calendar quarters.

Now, the employer in our example would be included as an employer in the base period and would be subject to potential liability even though the claimant was employed by this employer for fewer than 90 days.

*Continued on page 14*

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

# Common employer questions answered

## *Employer policies, wage and hour laws, hiring practices and more*

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

### Employer Policies

**Q: Do I have to give a copy of our company's policy handbook to every employee?**

A: No, you are not obligated under federal or Texas law to give a copy of your company's policy handbook to each of your employees. You can certainly do so, but you are not obligated.

**Q: Has sexual orientation become covered under Title VII? Are there classes that employers should be aware of that may become protected in the upcoming years?**

A: Although sexual orientation is not a formally protected class under the federal and Texas employment discrimination laws, the Equal Employment Opportunity Commission (EEOC) and more courts around the country are starting to recognize that discrimination on the basis of sexual orientation and failure to conform to gender-based stereotypes in general can be a violation of Title VII. The EEOC recently ruled that discrimination on the basis of an applicant's transsexuality was a violation of Title VII. Several courts have ruled that same-sex harassment violates Title VII under many circumstances. In each case, the decision is based on an employer taking adverse action because of a person's failure to conform to gender stereotypes. Ultimately, it all goes back to a U.S. Supreme Court decision from 1989, *Price Waterhouse v. Hopkins*, 490 U.S. 228, in the case of a female accountant who sued after the male partners in her firm decided not to promote her because she was seen as not feminine enough. The employer thought she should look and act more like a traditional woman. The Court held that such action constituted gender-based discrimination.

**Q: Can we require that all employees speak English?**

A: Yes, if you are in compliance with the law. The EEOC's position on English-only policies is that such policies have the potential to create a disparate impact on ethnic/national origin minorities (see 29 C.F.R. § 1606.7). Courts will uphold such policies if they are based on business necessity, such as public safety, customer service, or minimizing complaints from other employees. However, the burden is on the employer to show such

necessity [see the following cases as examples in this area of the law: *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Dimarana v. Pomona Valley Hospital*, 775 F. Supp. 338 (C.D. Ca. 1991); *Roman v. Cornell University*, 53 F. Supp. 2d 223 (N.D. NY. 1999); and *EEOC v. Premier Operator Services, Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000)]. Prior to implementing such a policy, an employer should, if possible, have documentation to support whatever business necessity exists, such as reports of safety problems, comments from customers about lack of service, or complaints from coworkers that speakers of a different language appeared to be commenting about them in such a way that they felt excluded or targeted. For more information, please see our "English-Only Policies" article in our online book, *Especially for Texas Employers*: [http://www.twc.state.tx.us/news/efte/english\\_only\\_policies.html](http://www.twc.state.tx.us/news/efte/english_only_policies.html).

### Wage and Hour Law Questions

**Q: How is overtime computed for tipped employees being paid \$2.13 per hour?**

A: Since the U.S. Department of Labor (DOL) regulations provide that the tip credit for overtime hours can be no greater than the tip credit for non-overtime hours, and the tip credit for an employee paid \$2.13 per hour would be \$5.12 per hour, and the overtime rate for a minimum-wage employee is \$10.88 per hour ((\$7.25/hour x 1.5, rounded up to the nearest penny), the overtime pay for each overtime hour for a tipped employee paid the minimum cash wage would be \$5.76 per hour. For more information on tipped employees, please see the "Tip Credits" article in our book, *Especially for Texas Employers*: [http://www.twc.state.tx.us/news/efte/allowable\\_deductions.html#tipcredits](http://www.twc.state.tx.us/news/efte/allowable_deductions.html#tipcredits).

**Q: My employee quit and is refusing to return our company laptop. Can I hold his final paycheck until he brings the laptop back?**

A: No. The employee's duty to return the laptop is separate from your duty to give him the final pay check. If you have a wage deduction authorization agreement, signed by him, allowing you to deduct the replacement cost of the laptop, then you could take that money out of his final paycheck. However, be sure not to let the deduction take the employee's pay below minimum wage (i.e., \$7.25/hour).

*Q: I always pay my employees for time spent at training and/or meetings. I also provide a business vehicle and cover any expenses. My question is, if I am not driving the vehicle to/from the meeting/training/seminar, etc., do I need to pay that employee who is driving the staff?*

A: The employee who is assigned the task of driving other employees to a job-related event would be working while driving, so that employee's driving time would figure into the employee's total hours worked in the workweek in question. As far as whether the time spent traveling to and from the job-related event by the other employees is concerned, whether that time would count as work time would be determined under the rules explained in an article called "Time Spent in Meetings and Training Programs" in our book, *Especially for Texas Employers*: [http://www.twc.state.tx.us/news/eft/g\\_meetings\\_training.html](http://www.twc.state.tx.us/news/eft/g_meetings_training.html).

### Hiring Practices

*Q: Can we ask someone we are interviewing if she or he has tattoos? We hired a woman who had long sleeves on at the interview and when we hired her, she wore short sleeves and she had tattoos all over her arms. The tattoos she had were not good in our professional office atmosphere.*

A: If you are an employer who has 15 employees or more, then the prohibition against religious discrimination under Title VII of the Civil Rights Act of 1964 applies. Therefore, if you ask a potential employee if s/he has a tattoo, and the employee claims to have a religious reason for it, it may look like you are discriminating against them based on their religion (e.g., the person may be practicing a religion that requires them to obtain a particular visible tattoo). The EEOC has established that if an employer does not allow employees to have tattoos, then the burden will be on the employer to prove that such requirement is based on a business necessity such as safety or customer service. For more information, please see the "Dress Code" section on the EEOC website.

*Q: My company is located in Texas, but I have employees working and living in various states. Do we need to do New Hire reporting in each state where they live and work and do we need to report when employees move?*

A: For multi-state employers, the New Hire reporting obligations are summarized in the following topic in the Frequently Asked Questions section of the Texas Attorney General's New Hire reporting website: <https://portal.cs.oag.state.tx.us/wps/portal/NewHiresFAQ#question18>. For an authoritative answer on how to handle the situation of employees moving, call the Texas Attorney General Office's New Hire Office at 1-800-850-6442.

### Independent Contractors & Employees

*Q: We have noticed some of our competitors are using registered nurses as contract labor (i.e., they give them a 1099 form) instead of classifying them as employees (i.e., giving them a W-2 form). Are they classifying the nurses correctly?*

A: It is very rare that a registered nurse is classified as an independent contractor. A recent appeals court decision affirmed TWC's position that such workers are employees [see *Critical Health Connection, Inc. v. Texas Workforce Comm'n*, 338 S.W.3d 758 (Tex.App.-Austin 2011)].

*Q: Can someone at TWC tell me whether I have classified an employee correctly?*

A: While TWC cannot give you what amounts to a formal opinion unless you submit a form (i.e., Form C-12) for that purpose to the Tax Department regarding a current worker, you can obtain an informal opinion regarding the status of a worker by calling 1-800-832-9394. However, the person you speak with will not be able to give you either legal advice or a formal binding opinion. To submit a Form C-12 regarding the status of one or more workers, contact TWC's Tax Department at 512-463-2700, or the account examiner for your tax account if you already happen to have his or her name and contact information.

*Continued on page 12*



Employers concerned about how to treat their employees time spent away from the office in meetings, trainings and seminars can consult the *Especially for Texas Employers* book to determine whether that time would count as work time. View the rules regarding these situations in the Time Spent in Meetings and Training Programs section. *Ciaran Griffin/Stockbyte/Thinkstock*

*Continued from page 11*

**Employer Rights**

*Q: If an employee tells us that she had to go see the doctor, can we ask for proof of a doctor's note?*

A: Yes. Here's a link from our book, *Especially for Texas Employers*, regarding documentation: [http://www.twc.state.tx.us/news/efte/attendance\\_and\\_leave\\_policies.html](http://www.twc.state.tx.us/news/efte/attendance_and_leave_policies.html)

*Q: How do you follow up on an employee who has called in due to a death in his family, but you suspect he is lying?*

A: Employers can ask for proof that he attended such a service. There's no federal or Texas law preventing you from asking such a question.

**Work Separations**

*Q: We fired an employee and discovered that she had deleted all data on a company-issued laptop for purposes of hiding information that could help the employer with a lawsuit against her. What can we do about getting that data back?*

A: If you have an attorney, I would let your attorney know about the situation. There are IT firms with data recovery specialists on staff who can recover almost any data for a price. You also have the right to report the missing information to the police. Unfortunately, you cannot hold their final paycheck. See "Wage and Hour Law" section in this article.

*Q: Can you discharge an employee while they are out sick? He has called in sick for three weeks in a row and he hasn't provided a doctor's note.*

A: Texas is an employment at-will state, and unless the employee is covered by an express employment agreement that ties your company's hands, or is eligible under a special law such as the Family Medical Leave Act (FMLA) [see the requirements at [http://www.twc.state.tx.us/news/efte/family\\_and\\_medical\\_leave\\_act\\_fmla\\_.html](http://www.twc.state.tx.us/news/efte/family_and_medical_leave_act_fmla_.html)] or the Americans with Disabilities Act (see the EEOC guidance on that law at: <http://www.eeoc.gov/laws/types/disability.cfm>), the company does not have to wait to discharge an employee who is absent too much, even if the employee has been given a particular amount of time to address such an issue. However, if the employee has a protected disability and your company has at least 15 employees, you would want to consider whether it is possible to allow the medical leave as a "reasonable accommodation," i.e. as an accommodation that your business can make without experiencing an undue hardship thereby. Even if one of the above laws applies, if the company has a known and consistently enforced policy prohibiting absence without notice, it can enforce such a policy against an employee who violates it. 🇹🇽

*William T. Simmons*

*Senior Legal Counsel to Commissioner Tom Pauken*

*Marissa Marquez*

*Deputy Senior Legal Counsel to Commissioner Tom Pauken*



**Do you have a question regarding employment law?**

*Employers can contact TWC's Commissioner Representing Employers office to speak with our attorneys for information, advocacy and assistance with unemployment compensation cases and other workplace concerns.*

**Contact our Employer Hotline at 800-832-9394 today!**

Employers are allowed to ask employees for documentation, including a doctor's note, when the employee has missed work due to illness. Specific information regarding documentation and what employers can ask for is available in the *Especially for Texas Employers* book. *Jupiterimages/Comstock/Thinkstock*



Through the online Job Accommodation Network (JAN), employers can browse comprehensive information and complete online training modules to better understand workplace accommodations for employees with disabilities. *Digital Vision/Thinkstock*

*Continued from page 7*

### **New JAN Resources**

The Job Accommodation Network (JAN) is an online resource for workplace accommodations for people with disabilities. It is a result of collaboration between private industry, higher education, and the U.S. Department of Labor's Office of Disability Employment Policy. Not only does it offer comprehensive information on practical accommodations for a wide variety of impairments, JAN also offers online training modules, designed for both individual and group training, that make the process of understanding the Americans with Disabilities Act much easier. Here is the link to access the training modules: <http://askjan.org/training/library.htm>.

### **Changing Time Records**

In a recent e-mail inquiry, an employer asked whether it is legal for managers to change timesheets if an employee is in the habit of clocking in early and then preparing breakfast, reading the newspaper, and checking personal

messages on a cell phone. As a general matter, it would not be a good idea for a manager to unilaterally change a time record without the employee's documented agreement for the change. Texas and federal law allow employers and employees to agree to make changes in time records.

Thus, if a supervisor and an employee agree that a time record is wrong in some way, the supervisor can change the time record and have the employee sign some sort of certification authorizing the change. Disparities between automated time records and actual work times should not be a recurring problem. If that is happening, the company needs to investigate and, if necessary, have its equipment repaired to where it once again produces accurate records.

The problem of employees artificially inflating their work times by punching in, then taking an immediate break and engaging in purely personal activities, is not really a time clock issue. That is a management issue. Management needs to decide whether it is a problem that is serious enough to address. If it is a serious problem, then management needs to confront it directly via a clear policy and serious, consistent enforcement.

Since it would not be productive for managers to constantly have to go to employees to correct some time records, it would be best to make it clear that compliance with the work schedule and time recording policies is not an option and should be considered a requirement of every employee's job description.

A sample policy on work schedules and recording of work time is found in the topic of the same name in our book *Especially for Texas Employers* at [http://www.twc.state.tx.us/news/efte/work\\_schedule\\_policy.html](http://www.twc.state.tx.us/news/efte/work_schedule_policy.html).

Employees who ignore initial warnings and become too much of a drain on managers' time in that regard should be clearly advised that they will be replaced if they fail to make compliance with the policy a priority. For an example of what a final written warning might look like, see item 12 in the topic titled "Discipline" in the Outline of Employment Law Issues for part II of the book—here is the link to that topic online: <http://www.twc.state.tx.us/news/efte/discipline.html>. 

*William T. Simmons  
Senior Legal Counsel to Commissioner Tom Pauken*

## New rules regulating workers' comp now apply to self-insured political subdivisions

The Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC), the state agency responsible for regulating workers' compensation, recently adopted rules requiring that self-insured political subdivisions notify the TDI-DWC when they elect to provide medical benefits to employees by directly contracting with health care providers or by contracting with health care providers through a health benefits pool [Texas Labor Code §504.053(b)(2)]. The new rule became effective on August 2, 2012.

Self-insured political subdivisions that provide medical benefits to their employees by directly contracting with health care providers or by contracting through a health benefits pool as of August 2, 2012 must file a DWC Form-020SI, *Self-Insured Governmental Entity Coverage Information*, with the TDI-DWC not later than December 31, 2012 [Texas Labor Code §504.053(b)(2)].

Self-insured political subdivisions that make a decision to start providing medical benefits to their employees through direct contracting with health care providers or by contracting through a health benefits pool after August 2, 2012 must file a DWC Form-020SI with the TDI-DWC no later than 30 days after the date the political subdivision begins providing medical benefits to employees in that manner.

Self-insured political subdivisions must also comply with the proof of coverage reporting requirements outlined

in 28 Texas Administrative Code (TAC) §110.1. Failure to comply with these notification requirements is an administrative violation [Texas Labor Code §406.006].

The DWC Form-020SI is available for download from the TDI website at <http://www.tdi.texas.gov/forms/form20.html>.

Commissioner of Workers' Compensation Rod Bordelon adopted 28 TAC §110.7 on July 13, 2012. The adopted rule may be viewed on the Secretary of State website at <http://www.sos.state.tx.us/texreg/index.shtml>.

Workers' compensation insurance coverage provides covered employees with income and medical benefits if they sustain a work-related injury or illness. Texas private employers can choose whether or not to provide workers' compensation insurance coverage for their employees. Except in cases of an intentional act or omission or gross negligence by an employer involving a fatality, workers' compensation insurance limits an employer's liability if an employee brings suit against the employer for damages.

If you have questions about filing the DWC Form-020SI and employer workers' compensation reporting requirements, contact TDI-DWC's Insurance Coverage section at 800-372-7713. 

*Source: Texas Department of Insurance information release, September 24, 2012*

---

## Probationary period's impact on at-will employment cont.

*Continued from page 9*

As you can see, because the base period depends entirely on when the claimant files his claim, and there is no way to know with certainty when that will be, we cannot definitely say that an employer will not bear the risk of financial liability for UI benefits just because an employee worked fewer than 90 days. A claimant could have been employed by an employer for only 10 days, but if that employer ends up in the base period, that employer bears potential financial liability for benefits paid to that claimant, regardless of only employing the claimant for two weeks.

The good news is that the amount of chargeback liability bears a direct relationship to the amount of wages reported during the base period, so a short period of employment usually means a small amount of wages, which in turn usually means a small amount of chargeback liability.

When dealing with an unemployment claim, the 90-day probationary period does not bar an employee from filing for or receiving unemployment benefits, nor does it guarantee financial liability protection for employers.

Although employers will still continue to use the 90-day probationary period to distinguish between different categories or types of employees, just remember there is nothing special about those first 90 days. To learn more about probationary periods, please see Part II. Pay and Policy Issues - Probationary Periods, in *Especially for Texas Employers*. 

*Elsa G. Ramos  
Legal Counsel to Commissioner Tom Pauken*

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

## Upcoming Texas Business Conferences

Austin

January 18, 2013

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Urban Legends of Texas Employment Law and the Basics of Hiring, Texas and Federal Wage and Hour Laws, Employee Policy Handbooks: Creating Your Human Resources Roadmap, Unemployment Insurance Hearings and Appeals, and Independent Contractors. The registration fee is \$85.00 and is non-refundable. Seating is limited, so please make your reservations early if you plan to attend.

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

please print

Seminar choice: \_\_\_\_\_

First name \_\_\_\_\_

Initial \_\_\_\_\_

Last name \_\_\_\_\_

Name of Company or Firm \_\_\_\_\_

Street Address or P.O. Box \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_

ZIP \_\_\_\_\_

Telephone \_\_\_\_\_

Make checks payable and mail to:

Texas Business Conference • Texas Workforce Commission • 101 E. 15th St., Room 0218 •  
Austin, Texas 78778-0001

# 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 a comprehensive legal analysis 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. If you wish to subscribe to this newsletter or to discontinue your subscription, or if you are receiving more than one copy or wish to receive additional copies, please write to:

Commissioner Representing Employers  
101 East 15th Street, Room 630  
Austin, Texas 78778-0001

or else send an email to [employerinfo@twc.state.tx.us](mailto:employerinfo@twc.state.tx.us).

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 (11/2012) 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    Website: [www.texasworkforce.org](http://www.texasworkforce.org)**  
**Email: [employerinfo@twc.state.tx.us](mailto:employerinfo@twc.state.tx.us)**  
Printed in Texas  on recycled paper

PRSR STD  
US POSTAGE  
PAID  
AUSTIN, TEXAS  
PERMIT NO. 1144

**TEXAS WORKFORCE COMMISSION**  
Tom Pauken  
Commissioner Representing Employers  
101 East 15th St., Room 630  
Austin, Texas 78778-0001

---

OFFICIAL BUSINESS

ADDRESS SERVICE REQUESTED