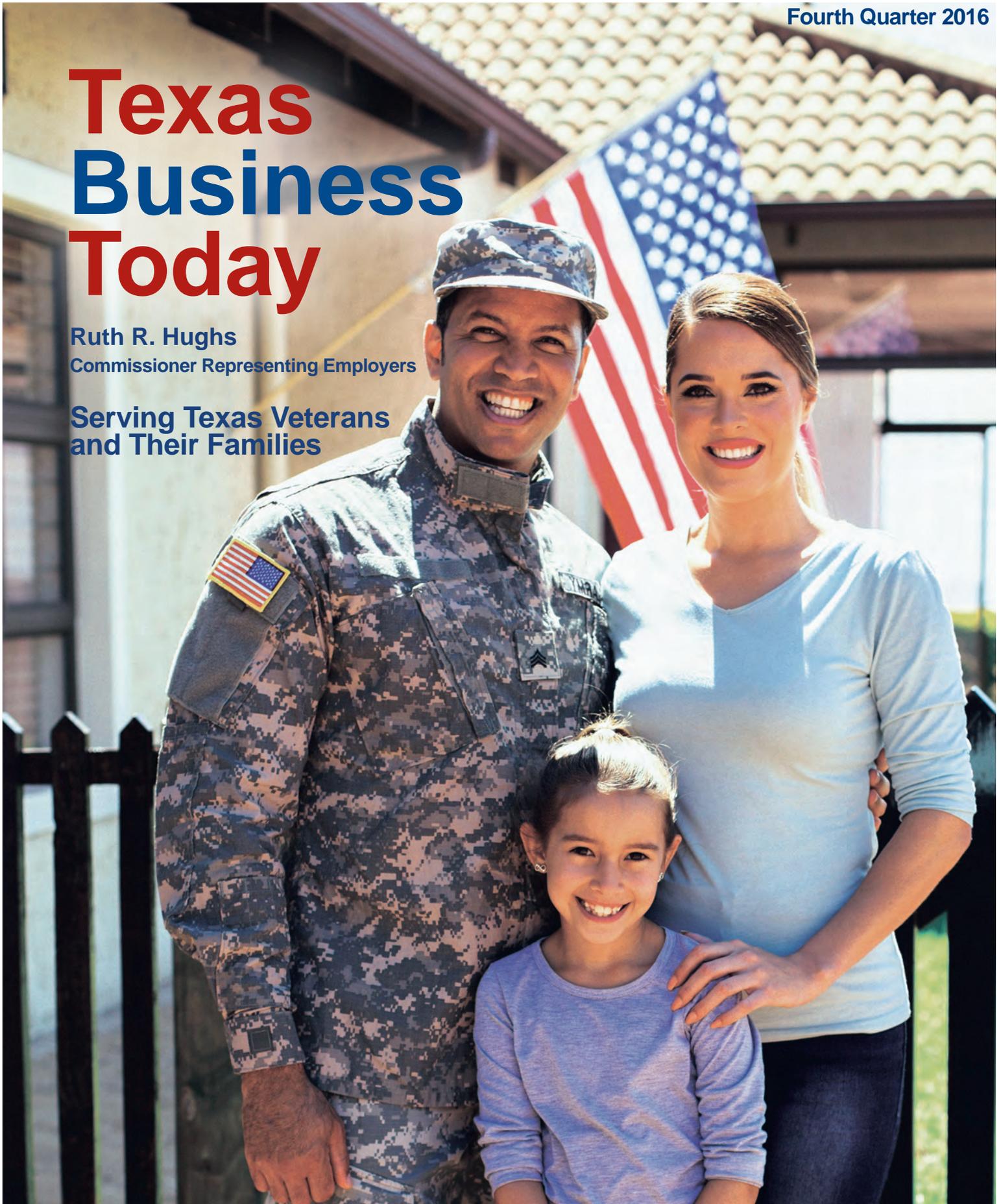


Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

Serving Texas Veterans
and Their Families



Veteran Initiatives for Employers ■ End of Year Gifts & Bonuses ■ Employer Essentials

Expanding the Talent Pipeline in Texas

Commissioner's Corner

Dear Texas Employer,

Thank you for taking the time to read our 4th quarter issue of *Texas Business Today*! We are pleased to recognize another busy and successful quarter, including the recent Texas Education & Workforce Summit and the Inaugural Governor's Business Forum for Women. On September 1st, we also officially welcomed the Texas Department of Assistive and Rehabilitative Services to the Texas Workforce Commission (TWC) team.

On Veterans Day, and every day, we honor our veterans for their courage. Texas serves as home to 1.7 million veterans, and continues to have one of the nation's largest veteran populations. We encourage you to participate in TWC's 5th Annual Hiring Red, White & You! Statewide Fair (HRWY). This project is a joint initiative supported by the Office of the Governor and the Texas Veterans Commission to connect veterans and their spouses in Texas with employers who are seeking veterans' exceptional skills. TWC, in partnership with 28 local workforce development boards, the Texas Veterans Commission, and the Texas Medical Center, is hosting these fairs on Thursday, November 10th, at 30 locations throughout the state. Please contact your local Workforce Solutions office to get involved!

On September 19-20, I participated in the Texas Education & Workforce Summit, where along with my fellow commissioners from the Texas Education Agency, Texas Higher Education Coordinating Board, and the Texas Workforce

Commission, we presented recommendations in response to Governor Greg Abbott's Tri-Agency charge issued in March. We held meetings across the state to focus on our transitioning service members and the importance of ensuring our men and women are prepared for the high-wage, high-demand job opportunities that are available throughout the state. From all of the successful discussions, we created the *Operation Welcome Home* program to better meet the needs of transitioning service members at military installations in Texas.

This program includes the *Texas Transition Alliance* that will enhance the partnerships between Military Transition Centers, Office of the Governor, Texas Veterans Commission, Texas Department of Licensing and Regulation, and the Texas Workforce Commission's local workforce development boards.

We also created a Skills for Transition training program that will work with service members who are within 180 days of separation from service, and who plan to remain in Texas. Finally, on September 28th, we partnered with the Office of the Governor, the Governor's Commission for Women, and the Alamo Area Council of Governments to host the Inaugural Governor's Business Forum for Women in San Antonio in support of Governor Greg Abbott's goal to make Texas #1 for women-owned businesses. The sold-out event provided women-owned businesses



September 19, 2016 – Statewide leaders joined Governor Greg Abbott's Tri-Agency Education & Workforce Summit.

and entrepreneurs with informative sessions on finance, branding and communication, procurement, and business development.

In this issue of *Texas Business Today*, you will find two guest articles from the Texas Veterans Commission and our Texas Veterans Leadership Program, as well as helpful articles on employment law issues and the latest updates on U.S. Department of Labor rules.

Once again, I want to express our deepest gratitude for the dedication of our brave men and women in our Armed Forces. We can never repay the debt we owe them and their families for sacrifices they have made, but we can honor them for their service. 🇺🇸

Sincerely,

Ruth R. Hughes
Texas Workforce Commission
Commissioner Representing Employers

Hiring Red, White & You!™ Statewide Hiring Fair

Save the Date NOV 10 2016



Join the Texas Workforce Commission, 28 local workforce development boards, and the Texas Veterans Commission in partnership with the Texas Medical Center for the **5th Annual Hiring Red, White & You! Statewide Hiring Fair** to connect veterans, service members, and their spouses with Texas employers.

For your local hiring fair location visit: Texasworkforce.org/hrwy.

No cost to veterans, participants, or employers.

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Making Connections Across the State



1. Moderating the *Operation Welcome Home* panel at the Tri-Agency Education & Workforce Summit.
2. Commissioner Hughs meets Colonel Gadson at the 2016 National Association of State Workforce Agencies.
3. Pictured from left are two conference attendees, Commissioner Hughs, and Keynote Speaker Geneva Grainger at the Inaugural Governor's Business Forum for Women.
4. Visiting with Workforce Solutions North Texas.
5. Touring the San Antonio Lighthouse for the Blind with CEO Mike Gilliam.
6. Touring SpaceX with Government and Business Affairs Representative Alma Walzer and Keith Graf from the Office of the Governor.
7. Meeting with local employers in Midland.



Job Separations with PRN and “As Needed” Employees

As many employers are well aware, there are various types of employment relationships that a company can have with its workers. Some of these arrangements include hiring employees to be full or part-time, seasonal, temporary and so on. In essence, employers in Texas possess great flexibility in hiring workers to suit the scheduling and business needs of their companies.

The PRN or On-Call/As Needed designation (hereafter referred to as PRN) is another type of employment relationship that is seen in multiple industries in Texas. While employers have great interest in onboarding employees with a scheduling arrangement that suits their needs, they are equally as interested in preventing unemployment liability if the employment relationship ends. The PRN designation has its advantages, but it also has some unique characteristics that employers need to be aware of if a job separation occurs.

What does the PRN designation mean?

PRN stands for “pro re nata.” This is latin for “as the circumstances arise.” While the PRN designation often finds its home in medical and home health care settings, the term can be applied to any worker who is employed on an “as needed” basis. Some employers find this type of employment relationship beneficial to the extent that if there is ever spillover or additional work that has popped up at a moment’s notice, the employer can easily summon the PRN employee to fill the needs of that particular assignment.

How do PRN Job Separations Affect Unemployment Claims?

Because a PRN employee’s work schedule depends on the availability of job assignments from the employer, PRN employees share a lot of similarities with temporary workers. Like a temporary worker, if a PRN employee’s assignment concludes and he or she is not apprised or given notice of when the next assignment will be, then a job separation will have occurred. A job separation will have occurred because the PRN employee’s work will have ended through no fault of his or her own. This essentially equates to an employer-initiated job separation due to a lack of work. If a claimant files an unemployment claim under these circumstances, there is a high probability that he or she will prevail on the claim. Chargeback liability can also arise if the employer has reported base period wages for the claimant. For more information on the base period, please visit:

www.twc.state.tx.us/news/eft/how_ui_claims_affect_employers.html#dateofinitialclaim.

So, is the PRN designation an automatic invitation to hike the employer’s unemployment tax rate? Not necessarily. While the necessity of PRN arrangements



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may be the reality for many employers, there are measures that employers can deploy to get themselves in a better position to defend against unemployment claims from PRN employees.

When a PRN employee’s job assignment has come to an end:

1) Make sure another assignment is available for the PRN employee and notify the employee of such assignment immediately following the conclusion of his or her previous assignment.

2) When the employer offers the new assignment to the PRN employee, make sure that the employee is alerted of what the wage will be for the assignment, any change in distance from the previous assignment to the new assignment, any change in job duties (if applicable), how many hours per week the assignment will be, and the start date for the new assignment. The start date should be the next day following the conclusion of the previous assignment.

3) Document everything mentioned in point #2. If the PRN employee refuses a new assignment that is comparable to his or her previous assignment, the details of the offer will be critical evidence in showing whether the new assignment was, in fact, comparable.

Noticeable in the guidance above is the word “comparable.” This

means that in addition to doing the things in the above list, the new assignment being offered should also be comparable.

Basically, when offering a new assignment to a PRN employee, the employer should not make the new assignment so different or adverse that a reasonable person would not accept it. The more that the new assignment deviates from the previous assignment in terms of travel distance, pay rate, hours, and job duties, the more likely it is that the PRN employee will have good cause for rejecting the new assignment and potentially file for unemployment benefits.

In Conclusion

The PRN designation does not turn job separations into automatic unemployment claim wins for the employer. Indeed,

PRN work separations could lead to chargebacks for the employer if the employer reported wages for the PRN employee during the base period and there was no further work available for the PRN employee the day after his or her previous assignment ended. Accordingly, employers who document and offer comparable work to their PRN employees immediately after their assignments end will be in a better position to defend against an unemployment claim if a separation occurs. 🇹🇽

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

OSHA’s New Rules on Post-Accident Drug Testing

If your company conducts post-accident drug testing, new regulations may require significant revisions to your policy to be in compliance.

In May 2016, the Occupational Safety and Health Administration (OSHA) announced its new Electronic Recordkeeping Rule, which focuses on improving accurate recordkeeping of work-related injuries. The rules require employers to implement reasonable procedures for reporting workplace injuries and will require certain employers to report this information electronically beginning January 2017: www.osha.gov/recordkeeping/finalrule/finalrule_faq.html.

The purpose of these changes, according to OSHA, is to ensure that employees maintain “their right to report work-related injuries and illnesses free from retaliation.” In order to achieve this, OSHA explains that employers must maintain accurate recordkeeping of accidents and cannot have any company policies that would discourage an employee from reporting an accident. While not mentioned in the new rules themselves, OSHA commentary suggests that post-accident drug testing policies would violate these new regulations if they discourage employees from reporting accidents.

As a result, OSHA’s new rules, which will go into effect December

1, 2016, tighten the requirements for post-accident drug testing. In essence, the policy cannot deter the reporting of workplace injuries and cannot be retaliatory. Therefore, an employer’s post-accident drug test must now meet two new requirements.

The first requirement addresses when employers may conduct a post-accident drug test. **Employers may only test if it appears that drug use likely caused or contributed to the accident.** Employers do not have to suspect drug use specifically, but at the very least, there must be a “reasonable possibility” that impairment caused the incident. For example, if the

employee suffered a bee sting or an injury caused by a repeated machine malfunction, a post-accident drug test would not be appropriate because the injury does not appear to have been caused by employee impairment. This is where blanket post-accident drug testing policies can land the employer in hot water; such a test would appear to be retaliatory because it would not help determine the cause of the accident. In that case, the test would allow employees to be punished for something that had nothing to do with the incident.

There is an exception to this rule. If the post-accident drug testing policy exists to comply with workers' compensation carrier guidelines, or federal or state law—the employer will not be in violation.

The second requirement deals with the kind of test that would be acceptable to administer. **The test must detect very recent impairment to prove that the employee was impaired at the time of the incident.** A test that can only establish that the employee used drugs at some point in the past is too broad because it will not show if impairment contributed to the accident.

Hair follicle and shaved-nail testing are likely unacceptable, and breathalyzers are problematic because they only detect alcohol. Oral fluid tests appear to be the best option, and urine tests may not be appropriate for substances that remain in the system for weeks or months at a time.

Therefore, if post-accident drug testing is in company policy, it is imperative that the employer take action immediately. The following options should prove helpful:

1) Remove the post-accident drug-testing portion of your policy.

This is the quickest and easiest

option that employers may prefer as a temporary solution in the event that the new policy is not ready by December 1, 2016. Employers may still test employees for cause, but may also wish to increase random testing in response to this rule.

2) Revise your drug testing policy.

Employers should review the language and intent of the policy. Blanket post-accident policies that are not in place to comply with workers' compensation policies or federal or state laws should be removed and the policy should be tightened to only test in scenarios where there is a reasonable possibility that impairment caused the accident. Have your policy in writing and acquire written permission from the employee to test. Enforce the policy fairly. Test employees as soon as possible, and make sure that the test itself is limited to testing for impairment at the time of the incident.

If the employee is tested, investigate fully and document the results. Take written statements from firsthand witnesses and from the employee who is tested, and advise witnesses to keep all information confidential. Employees should receive training on the policies and consequences of violation, and supervisors should receive specific training on how to determine if



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there is a reasonable possibility of impairment and the testing protocol to follow. For example, if the supervisor sees possible impairment, he or she should find another supervisor or employee with authority in the company to witness the conduct before confronting the employee. Multiple firsthand witnesses could be crucial in the event the employee denies impairment.

Finally, employers may wish to seek an employment law attorney of their choice to help revise the post-accident portion of their drug testing policy. For further information, employers are encouraged to call our employer hotline at **800-832-9394**.

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



Texas Veterans Commission Initiatives for Employers

As Veterans Day approaches, we are reminded of the quote by President Theodore Roosevelt who said on July 4, 1903 that, “A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards.”

At the Texas Veterans Commission we’re honored to partner with the Texas Workforce Commission to fulfill the commitment to those who volunteered to defend our nation by providing employment services to veterans and spouses – along with our other programs that connect veterans to the benefits and services that they have earned.

From one-on-one job coaching for veterans with significant barriers to employment by our Veteran Career Advisors, to working with military spouses and caretakers of severely wounded service members, we work with veterans and their families to connect them to long-term, meaningful employment.

Additionally, the Texas Veterans Commission Veteran Employer Liaisons work closely with employers to match the organization’s employment needs with qualified veterans.

Across the state of Texas many employers embrace recruiting and hiring veterans and their spouses, recognizing that they possess talents that make them a valuable addition to the workplace. They realize veterans leaving the service bring critical thinking skills, teamwork, accountability, multicultural awareness, adaptability, and the ability to work under pressure.

Our Veterans Employer Liaisons work closely with employer organizations throughout the community and facilitate hiring events at the local American Job Centers (AJC) across the state to connect these employers to veterans seeking jobs.

And the efforts of these employers do not go unnoticed, as each year the Texas Veterans Commission hosts an awards ceremony to recognize the top employers from across the state that have gone above and beyond in their commitment to hiring and retaining veterans.

On November 10, 2016, we’re once again proud to be partnering with the Texas Workforce Commission for



Photo by U.S. Department of Defense Media

the fifth annual Hiring Red, White and You! (HRWY) statewide job fair. In cooperation with 28 Workforce Solutions board partners, HRWY connects Texas veterans and their spouses with employers who value the experience, discipline, and other exceptional qualities inherent with a military background.

Prior to the HRWY events, the Texas Veterans Commission conducts numerous veteran employment workshops across the state aimed at preparing veterans for the hiring events. These sessions provide information on how to research potential employers, resume preparation, and tips on conducting a successful job interview.

Those who stood up and answered our nation’s call to serve did not do so to seek fame or fortune – the country called and they responded. As they return home, it is now our duty—our calling—to stand up, and secure for them the “square deal” promised by President Roosevelt more than 100 years ago. 🇺🇸

Bryce Dubee
Public Affairs Officer
Texas Veterans Commission

End-of-Year Gifts and Bonuses

The end of the year is a time for many companies to reflect on their business performance through the year and to reward employees for their hard work, dedication, and loyalty by the use of bonuses or awards. It's also the holiday season and many employers enjoy giving gifts to their employees in the spirit of the season. Because these end-of-year offerings are special and infrequent, many employers erroneously believe that the usual tax and legal consequences associated with regular wages and compensation do not apply.

Tax Treatment of Gifts and Bonuses

The general rule is that gifts and bonuses, whether cash or not, are considered additional W-2 wages and subject to payroll and income taxes: www.law.cornell.edu/uscode/text/26/102. Cash, regardless of the amount, is always considered wages subject to payroll taxes. The same is true for gift certificates and gift cards with a cash equivalent.

Some non-cash gifts and awards can be tax free if they are considered a “de minimus” fringe benefit: www.irs.gov/government-entities/federal-state-local-governments/de-minimis-fringe-benefits. These types of benefits are deemed to have little value. Although the law provides no specific guidance on a threshold dollar amount considered to be too large to qualify as de minimus, it does provide some examples of items that meet the de minimus requirement. These include group meals for employees, coffee, donuts, soft drinks, and flowers for special occasions, as well as

traditional holiday gifts with low market value.

If gift cards or gift certificates are not interchangeable for cash, and are redeemable for specific tangible items, such as a movie pass, they may qualify for tax-free status as de minimus fringe benefits. However, large ticket items valued at large dollar amounts will not be considered de minimus.

Legal Ramifications of Bonuses on Overtime Pay

When calculating the overtime rate for employees entitled to overtime pay, employers must determine the “regular rate” of pay. This regular rate may differ from the employee’s usual hourly rate if the employee receives a bonus meant to cover a period of time during which the employee worked overtime hours. If this is the case, employers must calculate the correct regular rate of pay to properly pay the overtime: www.twc.state.tx.us/news/efte/wh_part778.html#778_110.

Not all bonuses need to be included in the calculation of the regular rate of pay. Discretionary bonuses can be excluded from employees’ regular rate of pay. These are bonuses which are not required under a wage agreement, contract, or policy. For a bonus to be discretionary, the employer must retain the authority to decide the amount of the bonus and whether or not the bonus is paid at all: www.twc.state.tx.us/news/efte/k_bonuses_exclusions.html.

Non-discretionary bonuses include those based on employee production,



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quotas, sales, attendance, or those that depend on the quality or quantity of work. These must be included in an employee’s regular rate of pay for overtime purposes: www.twc.state.tx.us/news/efte/otpay_conclusions.html.

It is important to note that the new overtime rules, which go into effect on December 1, 2016, allow 10% of an exempt employee’s salary to come from non-discretionary bonuses, which are paid, at a minimum, on a quarterly basis: www.dol.gov/whd/overtime/final2016/faq.htm#S1.

Conclusion

The end of the year can be a great time for reflection, planning, and generosity for many businesses. However, employers will face the new year with fewer tax troubles and wage claim worries if they recognize that end-of-year gifts and bonuses may be subject to the same rules and regulations of wages and compensation paid out during the rest of the year. 🇺🇸

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

Especially for Texas Employers

The most widely-used employment law resource in Texas

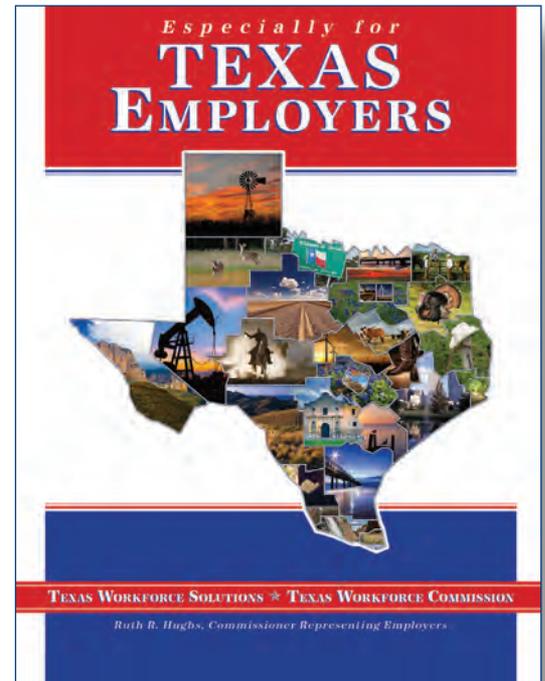
Designed for Texas employers, this resource from the office of Texas Workforce Commission Employer Commissioner Ruth R. Hughs includes a wealth of both basic and advanced information about the most important Texas and federal employment laws that every employer must know.

The book's organization is simple and follows the four main phases of work relationships:

- **Hiring**
- **Pay and policies**
- **Work separations**
- **Post-employment claims and lawsuits**

The book also includes:

- **Sample forms and policies**
- **Training materials on employment law**



Especially for Texas Employers is available at no cost to employers in a variety of formats, as noted below:

- **PRINT:** Order a bound copy by mail (“Tax Department, Texas Workforce Commission, 101 E. 15th Street, Room 504, Austin, TX 78778”), fax (512-463-3196), or click the link “To get a print version ...” on the web page at www.twc.state.tx.us/news/efte/tocmain2.html.
- **PDF:** Click “Get a PDF version ...” at www.twc.state.tx.us/news/efte/tocmain2.html to download the PDF file. The PDF is fully text-searchable and has a clickable table of contents.
- **E-BOOK:** The PDF works well as an e-book on any mobile device with PDF reader software.
- **ONLINE:** The full book, complete with a detailed index and separate pages for each topic, is available online at www.twc.state.tx.us/news/efte/tocmain2.html. The topics all have links to allow for quick

and easy browsing. All of the text may be copied and pasted into any word processing application for further use. The online version also features several software utilities (powered by JavaScript) that will help an employer calculate overtime pay, estimate unemployment benefits for an employee, and estimate chargebacks and tax rates.

- **WEB APP:** The Texas Business Conference Companion web app at texasworkforce.org/tbcapp has a direct link to the book *Especially for Texas Employers*, includes all of the employment law utilities found in the online book and more, and allows employers to call the employer hotline at 800-832-9394 or e-mail Commissioner Hughs’ office at employerinfo@twc.state.tx.us with just the touch of a button. The web app works on any mobile device using any mobile operating system.

Business and Legal Briefs

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

New OFCCP Federal Contract Guidelines

On June 14, 2016, the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs released its final rule setting forth the requirements that federal contractors must meet under Executive Order 11246 as amended. The new rule updates the 1970s-era requirements with updated guidelines reflecting various barriers to equal employment and fair pay, including pay discrimination, sexual harassment, hostile work environments, failing to properly accommodate pregnant workers, and discrimination on the basis of gender identity and family caregiving duties. Details are available online at www.dol.gov/ofccp/sexdiscrimination.html.

EEOC Releases New Wellness Plan Rules

The Equal Employment Opportunity Commission (EEOC) has issued new rules for wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Non-disclosure Act (GINA). The main points to keep in mind are the following: If the wellness plan involves health-related inquiries or examinations, it must be voluntary, meaning there is no requirement to participate, no adverse consequence for non-participation, no denial or limitation of coverage under any group health plan for non-participation, and the plan complies

with certain notice, confidentiality, and incentive requirements. The wellness plan may not discriminate on the basis of genetic information. Information about spouses may be obtained with incentives and penalties in connection with otherwise compliant programs, but incentives and penalties may not be used to obtain information about employees' children. In most cases, the maximum incentive amount is 30% of the cost of coverage for a single employee. The official EEOC guidance is available online at www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm.

Pay Data Reporting by Larger Employers

According to a recent announcement on the EEOC website, starting in March 2018, the EEOC will begin requiring employers that have to submit the EEO-1 report (employers with 100 or more employees) to also report summary pay data. The first EEO-1 report with such a requirement will be the one for 2017, which will be due on March 31, 2018. The stated goal is to improve awareness of pay scales that affect members of different groups, particularly by gender, race, and ethnicity. The new report form will not require pay data by name or by other personally-identifiable information, but rather only requires summary data for various groups within the company. The press release is on the EEOC website at www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm, and detailed

information is at www.eeoc.gov/employers/eeo1survey/2017survey-fact-sheet.cfm.

New Required Posters from DOL

DOL has issued new required posters for the Fair Labor Standards Act (FLSA) and the Employee Polygraph Protection Act (EPPA). The new posters became effective August 1, 2016, and must replace the older posters. The FLSA poster may be downloaded in English at www.dol.gov/whd/regs/compliance/posters/flsa.htm and in Spanish at www.dol.gov/whd/regs/compliance/posters/minwagesp.pdf. The EPPA poster is in English at www.dol.gov/whd/regs/compliance/posters/eppac.pdf and in Spanish at www.dol.gov/whd/regs/compliance/posters/eppaspan.htm. Remember, these are free posters from the agency that issues and requires them. They can always be downloaded at no cost from the agencies that require them. Links to all of the required poster agency websites can be found on the TWC website at www.texasworkforce.org/businesses/posters-workplace.

Help with I-9 Requirements

The Immigration and Customs Enforcement (ICE) bureau of the U.S. Department of Homeland Security has announced a new resource to help employers understand and comply with the requirements for I-9 forms. It is

called “IMAGE” and provides a kind of self-audit of I-9s in which the agency helps employers correct any deficiencies with the forms without risking the fines associated with a regular I-9 compliance audit. Employers interested in finding out more can use the following contact information: Worksite Enforcement Group, phone number 210-967-7274, email david.o.tamez@ice.dhs.gov, or at www.ice.gov/image.

Age Discrimination Through Inaction

In a recent case from the 5th Circuit Court of Appeals in New Orleans, *Nicholson v. Securitas Security Services USA, Inc.*, 2016 U.S. App. LEXIS 13127 (5th Cir. 2016), the appeals court ruled that a staffing firm that had referred an 83-year-old individual for a temporary receptionist position with a client company, only to have the client reject the employee, violated the Age Discrimination in Employment Act (ADEA) by not inquiring into why the client rejected the individual. This case highlights that both the staffing firm and the client can share liability for employment law violations that arise in temporary or contingency staffing situations.

ADA Discrimination Verdict

A federal court jury recently awarded almost \$300,000 in total damages to a former cashier at a discount merchandise store after the employee was fired for allegedly violating the store’s anti- “grazing” policy. She drank orange juice prior to paying for it, but did so in order to avoid a diabetes-related episode

of hypoglycemia from occurring. The evidence showed that the store had denied her request to keep fruit juice near her register. Granting the request would have been a reasonable accommodation under the ADA. More information about the case can be found at www.eeoc.gov/eeoc/newsroom/release/9-19-16a.cfm.

Strike-Related Misconduct Can Justify Termination

In the case of *Consolidated Communications, Inc. v. NLRB*, No. 14-1135, 2016 WL 4750914, 2016 U.S. App. LEXIS 16702 (D.C. Cir. Sept. 13, 2016), the D.C. Circuit Court of Appeals held that the National Labor Relations Board (NLRB) applied the wrong standard for determining misconduct in connection with a strike and that the agency should have found that a striker’s reckless driving toward a manager and a replacement worker on a public highway justified the striker’s termination for misconduct. The court’s full decision can be found online at [www.cadc.uscourts.gov/internet/opinions.nsf/D5F4F5FE88FFE9098525802D004D14AC/\\$file/14-1135-1635356.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/D5F4F5FE88FFE9098525802D004D14AC/$file/14-1135-1635356.pdf). The concurring opinion, starting on page 34 of the decision, is an interesting response toward recent controversial decisions from the NLRB that seem to protect misconduct that in any other context would risk severe liability for an employer that failed to effectively respond to such acts (for example, acts of racial and other discrimination).

New Online Resource Center for Small Businesses

A new online resource center for small businesses provides “user-friendly information on federal anti-

discrimination laws, tips for small businesses and videos on frequently asked compliance questions.” Using the links at the Small Business Resource Center (www.eeoc.gov/employers/smallbusiness/), an employer can quickly access a treasure trove of good information about the most important federal employment laws applying to most businesses. This site provides quick access and ease of use.

“Ban the Box” in Austin

Austin’s version of “ban the box” ordinances is called the “Fair Chance Hiring Ordinance.” It covers private-sector employers with at least 15 employees working in Austin, public employers, including Independent School Districts, and private membership clubs exempt under Section 501(c) of the Internal Revenue Code are exempt. Under the ordinance, an employer may not ask about an applicant’s criminal history until it makes a conditional offer of employment to that person, and also may not indicate in the job posting that criminal history will disqualify a person from employment. Further, a conditional job offer may not be withdrawn based on criminal history unless the employer has done an individualized assessment of the job-relatedness of the criminal history to the job in question. In many ways, the ordinance follows the guidance of the EEOC regarding the use of criminal history information in the hiring process. For detailed information see <http://austintexas.gov/fairchancehiring>. 

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

Texas Veterans Leadership Program Addresses Needs of Returning Veterans

The Texas Veterans Leadership Program (TVLP), administered by the Texas Workforce Commission (TWC), is a comprehensive program that assists returning veterans from Iraq and Afghanistan as they resume civilian life in Texas. It is veterans helping veterans. The TVLP covers the entire state of Texas, with 21 Veterans Resource and Referral Specialists (VRRS) assigned to all of the 28 Workforce Boards. Since its creation, the program has contacted and served over 77,000 veterans. Molly Schlumpberger is part of this great team that serves our returning veterans.

Molly entered the United States Navy in October of 1998. Upon graduation from Basic Training, Molly completed her technical training as an Air Traffic Controller in Pensacola, Florida. Molly's first assignment was in Norfolk, Virginia, and this is where she laid her foundation for a successful career. In 2008, Molly was hand-selected to augment the United States Marine Corps as an Air Traffic Controller in Iraq. Molly was one of nine Navy personnel assigned and one of four females in the entire unit. Throughout the final years of her career, Molly performed duties such as Personnel Clerk, Legalman, and Career Counselor, to name a few. During a realignment of the legal offices for the west coast, Molly was selected to lead the Administrative Department of Defense Service Office West, the largest Navy Legal Office in the world. She was also selected as Sailor of the Year 2013, as well as Navy Woman of the Year 2013. Molly was medically

retired in August of 2014 with numerous medals, awards, and achievements. She is married with two children and resides in Corpus Christi, TX.

Molly now works for the TVLP, as a VRRS. She specializes in outreaching to Operation Iraqi Freedom and Operation Enduring Freedom veterans by assisting in their transition to civilian life.

Molly will play a part in the two new Texas Veterans Leadership Programs. *Operation Welcome Home*, will create a partnership with 11 workforce development boards across Texas that have military bases. *Operation Welcome Home* will actively engage transitional service members up to 180 days prior and after discharge to actively work with a VRRS to prepare them for the workforce as they transition into civilian life.

Additionally, Molly and other VRRS across the state will participate in a new program, *Military Family Support*. TWC has developed a program that provides employment assistance to military spouses who are experiencing challenges in obtaining employment, appropriate licensures or certifications, or new skills to compete in the job market. Texas has 9 active duty military installations with multiple National Guard, and U.S. Armed Forces Reserve armories. There are over 170,000 Active Duty, National Guard and Reserve service members with over 200,000 military dependents. Military spouses are vital members



of their communities. The financial well-being of military families has a direct impact on service members and their ability to focus on the mission at hand.

Employment, education, and training opportunities for military spouses are limited due to the constant relocation of military families. These two programs will help provide additional resources for veterans and their families.

If you have any questions about these new programs please visit us at: www.twc.state.tx.us/jobseekers/texas-veterans-leadership-program. 🇺🇸

Gabriel Lopez
Assistant Director
Texas Veterans Leadership Program

'Twas the Eve of the Party



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If you have stepped into any store lately, you know that the holidays are upon us. That means that many companies and workers will start to plan their holiday parties. These could range from a staff get-together to watch a football game, to organizing a full-fledged Thanksgiving dinner with all the trimmings, or the traditional office/work Christmas party that many films and TV shows have immortalized. These parties are an opportunity for co-workers to relax and get to know each other in a less formal setting. However, staff parties can also be fraught with danger for both employees and employers. Often, when inhibitions are reduced, employees may display poor judgment, may engage in ill-advised behavior which crosses the line into sexual harassment, may even end up in jail, or worse. Here is a cautionary tale to remind everyone that celebrating the holidays with co-workers, while a nice change from the ordinary, should be approached prudently and with one's faculties intact.

'Twas the eve of the party,
And all through the land,
All employees were stirring
The drinks in their hands.

The bosses declared this
A booze-free event,
In hopes of avoiding
Last year's incidents.

But few had paid heed
To instructions this year.
There were bottles,
And mixers, and cases of beer.

Did someone say Joe
Was removing his jeans?
He was seen on his way
To the copy machines.

The last thing that anyone
Here wants to see,
Are digital scans
Of his anatomy.

Oh no! There goes Bob
With a mistletoe sprig.
Someone stop him before
He ends up in the brig.

The women don't think
That his antics are cute,
A repeat of last year
Will result in a lawsuit.

Now Susan is stumbling.
Someone please get her keys!
She's really impaired.
Should we call the police?

An arrest in her state,
That would be bad enough,
But losing her job, too,
Now that would be tough.

She could easily lose
The control of her car,
For driving as drunk
As if leaving a bar.

And what if she crashes?
That would be such a shame.
If someone gets hurt,
Is the company to blame?

While Susan, as driver,
Would, of course, be responsible,
The business, as party host,
May also be liable.

But we know there's a way
Out of all this – a fix.
Alcohol and holiday
Parties don't mix. 🇺🇸

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

Your Business Case: Four Reasons to Use An Employee Traffic Safety Program

Surprisingly, not all business owners recognize that the deadliest issue for their employees is also one of the priciest--costing employers \$60 billion and 3 million lost workdays a year. As a business owner, you know how important it is to understand what impacts your bottom line and find cost effective solutions to remain competitive.

The Our Driving Concern (ODC) program is a completely free traffic safety program designed for employers by the National Safety Council, funded through the Texas Department of Transportation. Here are four good reasons to take advantage of it.

Reason #1: Don't accept accidents as the "cost of doing business"

The most dangerous part of the day for any employee is the time they spend in their vehicle. While Texans look at the increasing strain of traffic congestion, many don't realize that about 90 percent of crashes are still the result of human error and, therefore, can be prevented.

Think about it, how many of you have been cut off by someone jabbering away on their cellphone, or remember a time you nearly fell asleep behind the wheel? The ODC program addresses the most common types of unsafe driver behaviors but allows businesses to customize resources and interactive materials to create a comprehensive driver safety program for their unique workplace setting.

Reason #2: "Everybody else is doing it!" Some positive peer pressure...

The ODC program has worked with employers of all types, from trucking companies to small nonprofits, municipalities to large corporations. The City of Irving, Fort Worth, and Sugar Land, among others, have applied tools and practices to the diverse departments they oversee, including waste management, police, and fire. Large, corporate offices like Saulsbury Industries have made use of resources in the monthly Safety Coach, while more rural, trucking fleets like Hughes Transportation use the Tailgate Talks to bring the message into the field.

Reason #3: You can't afford not to

Consider the associated costs for employers from motor vehicle crashes, including: medical care, legal expenses, property damage, and lost productivity. They also drive up the cost of benefits such as workers' compensation, social security, and private health and disability insurance. Additionally, they increase the company overhead involved in administering these programs. The real tragedy is that these crashes are largely preventable.

Sure you can save money and lives, but also achieve a number of indirect benefits, like building employee morale, productivity,



txdrivingconcern.org

brand reputation, and community relations.

Reason #4: You can't beat free, customized solutions

Host a free training at your location or find the right resources to address your employees' specific concerns. We work with your company's risk managers, HR professionals, and safety leaders to build a comprehensive traffic safety program that speaks to office workers or professional drivers.

Some of the Texas ODC program offerings include:

- Interactive, on-site training
- Webinars
- Employer-focused newsletters
- Posters and visuals
- Safety Coach & Tailgate Talks
- Videos
- Resources for company health fairs
- Texas Employer Traffic Safety Awards

Resources can be found at www.txdrivingconcern.org. If you have any questions or need more information, please contact Lisa Robinson, CFLE, Program Manager at Lisa.Robinson@nsc.org, 512-466-7383. 🇺🇸

Employer Essentials

Always do these:

- Get a signed written acknowledgement from each new hire as to their work availability and any limitations, their schedule, their job description, and their pay and benefits. Doing that will not by itself constitute a contract of employment or limit your rights under the employment at will rule, but it will help you document that the new hire was hired with full knowledge of the terms and conditions of employment.
- Get a signed W-4 form from each new hire before letting them do any work. If an employee quits suddenly or has to be fired on the spot for some reason, you do not want to be wondering how to fill out the final paycheck; get it to the former employee, and report the wages. Wage reports and W-2s require a social security number in addition to the employee's correct name. A properly-completed W-4 will give you that information.
- Get the I-9 form completed within the first three business days of hire. The monetary penalties for non-compliance with I-9 requirements are serious. If someone quits suddenly, you do not want to be left without a completed I-9.
- Have new hires sign all of the other new hire paperwork that is important for your company, such as employee handbooks, consent forms for drug testing, searches, and/or video surveillance, relevant benefit forms, and the like.

Never do these:

- Allow a worker who does the work for your company, under your direct supervision, to opt out of being an employee of your company. Employment status is not a matter of choice – it is not up to an employee to decide to be “contract labor” or a “1099” worker, and it is not up to your company, either. It is a matter of Texas and federal law. The legal presumption is that anyone who performs personal services for pay is an employee of the entity for which the services are performed. Ways exist to rebut that presumption, but it is not a good idea to simply assume that someone working for you is anything other than an employee. Get good, sound legal advice from a knowledgeable attorney, or consult with an HR professional, or obtain information from a TWC or IRS representative before going too far down the “contract labor” road.
- Allow an employee who you know or should know is non-exempt to work off the clock. Employers have no choice—they must accurately and fully record all time actually worked by non-exempt employees. Basically, everyone in the average company except for the very top executives and managers will be non-exempt. You will know whether you have doubts about an employee's status. If you have doubts, call someone knowledgeable and get an informed opinion.
- Loan money or advance wages to an employee without first obtaining their signature on a clear, written



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agreement documenting the loan or wage advance, agreeing that the money represents an advance of future wages payable, agreeing that the employer may deduct the repayments in certain specified amounts from the employee's pay in order to repay the loan or advance, and further agreeing that if the employee leaves employment with a balance remaining, the employer may deduct the unpaid balance from the employee's final pay in a lump sum.

- Pay wages in cash without taking out proper payroll deductions and without getting a signed written receipt from the employee. Doing otherwise is only a severely disappointing wage claim or tax audit waiting to happen.
- Act upon an employee's oral request to change something about their job. Always insist that any requests for changes in pay, benefits, hours, schedules, job titles, or duties be submitted in writing. Then, grant or deny the request in writing. That way, your company will have the best evidence of what really happened. 🇹🇽

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

Frequently-Asked Questions From Employers Answered

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

Q: *I heard from another business that the upcoming increase in the salary requirement for exempt salaried employees is on hold because of a lawsuit that has been filed. However, an employment lawyer I called says that the rule will still go into effect. Which is it?*

A: This has to do with the planned increase, effective on December 1, 2016, in the minimum salary for an exempt salaried employee. The minimum salary is set to go from the current level of \$455/week to \$913/week, as explained in the third quarter issue of *Texas Business Today*. In the new regulation, for the first time ever, up to 10% of the minimum salary can be met with non-discretionary bonuses or commissions, as long as they are paid at least quarterly (see www.dol.gov/whd/overtime/final2016/faq.htm#S1). Texas and 20 other states filed suit against the U.S. Department of Labor enforcing its new rule. That lawsuit has been joined by another suit filed by business groups. Both lawsuits were filed in the same federal district court in Sherman, Texas. The lawsuit by Texas and 20 other states is available as a PDF file at www.wagehourinsights.com/wp-content/uploads/sites/697/2016/09/DOL-OT-Rule-Complaint-Filed.pdf.

pdf. The lawsuit filed by the Texas Association of Business and over 50 other business groups is archived online at <http://hr.cch.com/ELD/USChambervDOL-09212016.pdf>.

pdf. There are numerous articles from law firms and HR groups summarizing the issues in both suits. It is important to note that no court has yet issued an injunction that would delay the increase on December 1, 2016, so the best advice is to plan on the new requirement becoming effective on that date, just to be on the safe side.

Q: *My company just received the decision from an Appeal Tribunal hearing on an unemployment claim, and unfortunately, we lost. We had sent in a lot of documentation about the claimant's attendance problems and policy violations. I want to file an appeal to the Commission, because I do not think my previous evidence was looked at, but I do not have anything new to offer. If I'm just asking the Commission to review the decision, do I have any obligation to submit anything? All the evidence should be on the record.*

A: A party appealing to the Commission does not have to submit or forward any previously submitted evidence along with the appeal. Everything that was in the record



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at the time of the Appeal Tribunal (AT) hearing will be in the appeal file for the Commissioners to review. Of course, if a party has come up with additional evidence after the AT hearing was held, it would be important to forward that new evidence to the Commission for consideration, along with an explanation of its significance.

Q: *If my company issues cell phones to all employees, will we have to worry about keeping track of the time they spend taking and answering company calls and messages?*

A: Yes. Non-exempt employees who have to deal with work-related texts, e-mails, and phone calls after hours must be paid for the time spent responding to and dealing with such contacts. The company must

keep exact track of all such time, and the time so spent would count toward possible overtime for the work week.

Q: *If one of my employees is assigned to work on a paid holiday, do I have to pay her for both the work and the holiday?*

A: Whether an employer gives an employee who works on a paid holiday both the pay for the work and the pay for the holiday is up to the employer to specify in its company policy. Most companies design their paid holiday policies so that an employee who does not work gets paid for the holiday and an employee who works gets paid for the work, but not paid for the holiday. The ones who work on holidays, even though they do not get both paid for the work and paid for the holiday, will be allowed to take a paid day off at some other point in the year to make up for the “lost” holiday.

Q: *Can my company refuse to hire any smokers?*

A: While Texas has no “smokers’ rights” laws, some might believe that smokers are protected by disability rights laws if they claim an addiction to nicotine. You can avoid the issue of whether someone is a smoker by enforcing an appropriate policy in the workplace prohibiting smoking and smoking breaks during the day. Breaks are optional, including smoking breaks, so employees do not have to be given time off to smoke during their shifts. Also, employers have the right to require employees to not smell like cigarette smoke when they are at work or on company business. In our book *Especially for Texas Employers*, the section with sample forms and policies includes two sample smoking policies. One is fairly flexible but firm, while



Photo by iStock/Thinkstock

the other adopts a much more stringent set of requirements. Take a look at those two sample policies. Here is the link to the topic in question: www.twc.state.tx.us/news/efte/smoking_policy.html.

Q: *Can an employer automatically deduct one hour for lunch? It states in our handbook lunch is one hour for office employees. Some of our employees take a lunch, but won't clock out.*

A: An employer must keep exact track of all time worked by non-exempt employees. That includes any portion of a lunch hour that an employee does not take. Failing to clock out for a lunch break would be a policy violation. Failing to take a lunch break might also be a policy violation. In both cases, the legal response would be to administer appropriate corrective action for the policy violation. It would not be legal to fail to pay the employees for the time actually worked. It

would be important to send a very clear message, both in the policy and through warnings, that employees must take their lunch breaks as scheduled and that they do not have permission to work through lunch unless they have advance permission from a designated supervisor. Also, make it clear that failing to properly record all work time and to clock out for lunch breaks will result in appropriate disciplinary action, up to and possibly including termination of employment. Before firing someone for persistent violations, it would be best to give them a clear, formal, final written warning – see item 12 in the topic “Discipline” in our book *Especially for Texas Employers* at www.twc.state.tx.us/news/efte/discipline.html. 🇹🇽

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



TEXAS BUSINESS CONFERENCES EMPLOYMENT LAW UPDATE

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

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

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

The non-refundable registration fee is \$125 (one-day) and \$199 (two-days). Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resources professionals attending this 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 is available for CPAs. General Professional Credit is also available.

To register, visit www.texasworkforce.org/tbc

2017 CONFERENCE DATES

Houston.....Jan. 20

GrapevineApril 27-28

Bastrop-Lost PinesJune 2

San Antonio.....Sept. 14-15

Stay tuned for additional locations!



TO LEARN MORE:
TxHireAbility.texasworkforce.org

Employing individuals with disabilities is cost-effective.

33%	of hiring managers and executives reported that employees with disabilities stay in their jobs longer.
Employees with disabilities are rated by supervisors as being equally or more productive than coworkers and as achieving equal or better overall job performance.	
Businesses that hire employees with disabilities may be eligible for tax benefits.	



Texas Business Today

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

Fax: 512-463-3196 Email: employerinfo@twc.state.tx.us

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