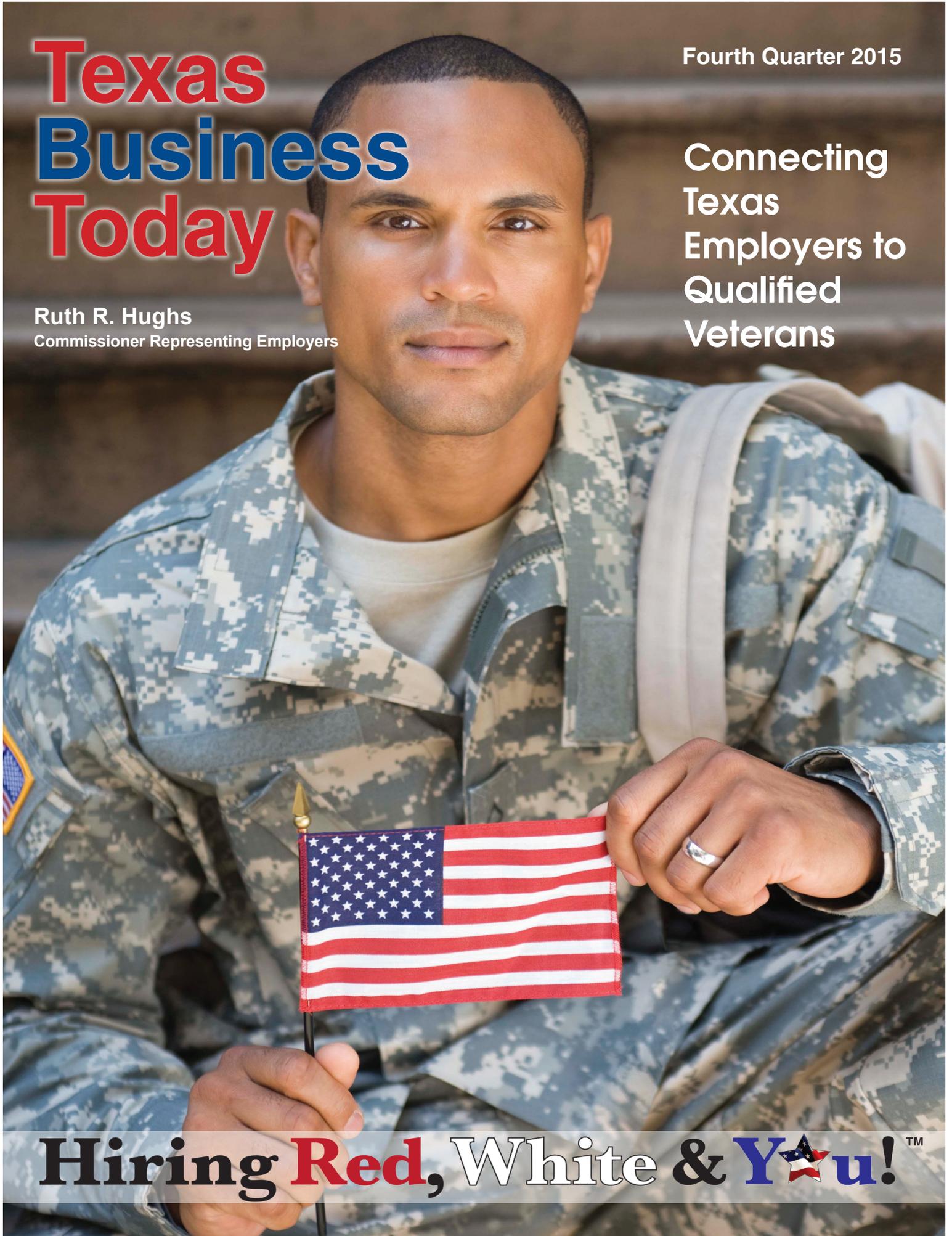


Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

Fourth Quarter 2015

Connecting
Texas
Employers to
Qualified
Veterans



Hiring **Red**, White & **Y^u**!™



Commissioner's Corner

Dear Texas Employer,

As we prepare to honor our military service men and women who served our great nation, Texas employers have the opportunity to employ these veterans that bring valuable experience into our workforce.

Veterans are talented and dedicated workers, and businesses that employ them will benefit from their many contributions. They bring experience, skills, and leadership abilities that strengthen the Texas workforce and help employers succeed.

Over the year, 64,783 veterans were hired by Texas employers after receiving services from the Texas Workforce Commission (TWC). Employers in this state are known for creating opportunities for jobs, success, and prosperity. We are looking forward to sending even more veterans your way than ever before so that you can keep growing in Texas!

Veterans Raise Quality of Workforce

Under HB 3547, passed last session, a private employer may adopt a policy under which the employer gives a preference in employment decisions regarding hiring, promotion, or retention, to a veteran over another qualified applicant or employee. It requires, however, that a policy adopted under this provision be in writing.

If you are an employer interested in hiring veterans, then you have an opportunity to adopt employment policies that favor veterans during the hiring and promotion process. The preference does not guarantee veterans a job, but it helps them jump to the front of the line if they have the appropriate qualifications for the position.

An employer may require appropriate documentation from a veteran for the veteran to be eligible for the preference under a policy adopted under this chapter. The law also states that granting a veteran's preference does not violate employment discrimination statutes.

We also encourage you to participate in TWC's fourth annual Hiring Red, White & You! Statewide Hiring Fair. This project is a joint initiative supported by the Office of the Governor, the Texas Medical Center, 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 and the Texas Veterans Commission, is hosting statewide veterans hiring fairs on Thursday, Nov. 12 at 27 locations throughout the state. Please contact your local Workforce Solutions office to get involved!

Also, the work opportunity tax credit (WOTC) can provide employers with incentives to hire certain unemployed veterans. The tax credit is available to businesses that hire eligible unemployed veterans and part of the credit is available to tax-exempt organizations. Businesses claim the credit as part of the general business credit, and tax-exempt organizations claim it against their payroll tax liability. Contact the TWC WOTC information line at **800-695-6879** or visit www.twc.state.tx.us/businesses/work-opportunity-tax-credit for more information.

I have no doubt that with the help of our veterans we can meet demands for job-ready, skilled workers. Let us continue our commitment to them for their service. If you need guidance writing a Veterans Employment Preference policy, then my office stands ready to help! Please don't hesitate to give us a call at **800-832-9394**.

Sincerely,

A handwritten signature in black ink, appearing to read "Ruth R. Hughs".

Ruth R. Hughs

*Texas Workforce Commission
Commissioner Representing Employers*



Job seekers attend 2014 Statewide Hiring Red, White and You! job fair.



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Business and Legal Briefs

Red, White & You! Veterans Hiring Fairs

The Texas Workforce Commission (TWC) is once again sponsoring Hiring Red, White & You! veterans hiring fairs around the state, and the events will take place on November 12, 2015. These hiring fairs began in 2012 with the goal of connecting Texas veterans and their spouses with Texas employers who value the experience, discipline and other exceptional employable skills inherent with a military background. Since the launch of Hiring Red, White, & You!, the popular fairs have connected more than 31,000 veterans with more than 4,700 employers. Information on how employers and job seekers can participate in Hiring Red, White & You! may be found on the TWC website at <http://www.texasworkforce.org/hiring-red-white-you>.

Enforcement Begins for New DOL Overtime Rules for Caregivers

After the home care industry lost an appeals court decision on the validity of the U.S. Department of Labor's (DOL's) new overtime rules for caregivers and live-in domestic employees <http://www.dol.gov/whd/regs/compliance/whdfs79a.htm> and <http://www.dol.gov/whd/regs/compliance/whdfs79b.htm>, DOL has begun preparing for full enforcement of the rules. According to the latest information on the U.S. Department of Labor website <http://www.dol.gov/whd/homecare/litigation.htm>, the rules go into effect on October 13, 2015, but the DOL

will not begin enforcing them until November 12, 2015. From November 12, 2015 through December 31, 2015, DOL will exercise "prosecutorial discretion" in deciding whether to bring an enforcement action against an employer, based on "the extent to which States and other entities have made good faith efforts to bring their home care programs into compliance with the Fair Labor Standards Act (FLSA) since the promulgation of the Final Rule." Full enforcement will begin on January 1, 2016.



New Court Decision on Meal Breaks

On September 15, 2015, the Fifth Circuit U.S. Court of Appeals issued an important decision on what constitutes a non-compensable meal break in *Naylor v. Securiguard, Inc., No. 14-60637, 2015 WL 5438195*, the court ruled that under its "predominant benefit test", a lunch break practice that involved employees traveling eleven or twelve minutes just to get to an approved break area and have a lunch break lasting less than

twenty minutes violated the Fair Labor Standards Act (FLSA) by not treating the time as compensable time worked. The court observed that the predominant benefit test considers "whether the employees are subject to real limitations on their personal freedom which inure to the benefit of the employer; whether restrictions are placed on the employee's activities during those times...; whether the employee remains responsible for substantial work-related duties; and how frequently the time is actually

interrupted by work-related duties." Since the guards were required to stay in uniform, travel in company vehicles, and not eat, drink, smoke, or talk on their cell phones while en route, the time so spent could not be considered part of a meal break, and the remaining time, less than twenty minutes, was insufficient to constitute a true meal break. Employers may find the decision online at <http://www.ca5.uscourts.gov/opinions/pub/14/14-60637-CV0.pdf>.

Employers should review their own meal break policies and practices in light of this ruling.

Oil and Gas Industry Gate Guards

It is rare when a government agency lands in legal hot water for its handling of a case, but it happened in a recent case from the U.S. Court of Appeals for the Fifth Circuit. In *Gate Guard Services, L.P., et al v. U.S. Department of Labor (DOL)*, the

court noted that due to questionable conduct during the investigation and during the court proceedings, the agency had demonstrated bad faith and merited the sanction of having to pay the employer's legal fees. Among other problems noted by the appeals court, the investigator bragged in an e-mail sent before the actual investigation that he was letting the employer "dig their own grave", he admitted burning his notes against DOL policy (thus, he was unable to turn them over to the employer for its defense), he was not sufficiently trained or experienced in investigating worker classification cases, and he failed to follow several standard guidelines for investigators while conducting his audit. Once the lawsuit was underway, the legal team for the agency made motions and took other actions that the appeals court characterized as "spurious", "specious", "frivolous", "disruptive", "belligerent", "harassing", and "misleading". The attorney fee issue was settled on September 17, 2015 for \$1.5 million. Despite the agency's conduct taking center stage, the case itself involved the employment status of gate guards staffing entrances to oil and gas field areas, and the courts agreed with the employer that the gate guards were independent contractors. The decision is online at <http://www.ca5.uscourts.gov/opinions/pub/14/14-40585-CV0.pdf>.

DOL Publishes Federal Contractor Minimum Wage Rate for 2016

The U.S. Department of Labor (DOL) announced on September 16, 2015 that effective January 1, 2016, the minimum hourly wage for federal contract employees (including employees of subcontractors) will go

up to \$10.15/hour from its previous level of \$10.10/hour. For tipped employees, the minimum hourly cash wage will go to \$5.85/hour, a 95 cent/hour increase from its former level. The DOL order is online at <http://www.gpo.gov/fdsys/pkg/FR-2015-09-16/pdf/2015-23235.pdf>.

New Overtime Exemption Rules

This has appeared here before, but it is so important, it bears repeating. On July 6, 2015, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking (NPRM) outlining the changes it expects to make in the overtime exemption regulations for employees paid on a salary basis.

The white-collar overtime exemption regulations found in Part 541 (Title 29 of the Code of Federal Regulations) of the wage and hour regulations were last updated in 2004. The main change then was to increase the minimum salary amount to \$455/week. Prior to that, Part 541 was last updated in 1975, primarily to provide a minimum salary of \$155/week. Based on the NPRM, the most probable effective date for any revisions will be January 1, 2016.

Part 541 is based on Fair Labor Standards Act (FLSA) Section 213(a)(1), which provides that executive, administrative, professional, and outside sales representatives may be exempt from overtime pay, and Section 213(a)(17), providing that top-level computer workers may be exempt as well.

The main changes to Part 541 envisioned in the DOL NPRM are as follows:

- ▶ An increase in the minimum salary level to \$970/week, which represents approximately the 40th percentile of average salaries paid to full-time salaried employees across all industries in the country;
- ▶ Indexing of future salary level increases to inflation, either by a fixed percentile or by indexing to the current consumer price index;
- ▶ Inclusion of bonuses in the salary amount, as long as the bonuses are paid at least monthly or more frequently;
- ▶ Revision of the duties test to clarify just how much time an employee may spend on non-exempt duties and still qualify as an exempt-level employee.

The new overtime exemption regulations will substantially affect a large number of Texas employers that employ white-collar workers. The change will be particularly felt in lower-wage industries, such as service industries. The greatest impact will be on the restaurant, small retail, and hospitality industries, whose lower-level supervisors and assistant managers tend to be paid on the lower end of the wage scale. Such employees will likely need to be paid overtime in the future, unless the employer handles the issue by hiring additional employees and spreads the excess hours out among more employees, thus avoiding the need to pay overtime. 

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

Handcuff Hijinks: Employee Arrests and Employer Concerns

When an employee is arrested, all sorts of questions may come to the employer's mind. When will the employee return to work? Can I discharge this employee without any negative consequences? Will I lose the unemployment claim? These are the types of questions frequently posed by employers when they contact our employer hotline **800-832-9394**. Because this situation can be quite stressful, it helps to understand what your rights are as a Texas employer. From there, you can fashion certain policies to help maintain order in the workplace when a situation like this occurs.

The first point an employer should remember is that Texas is an at-will state. Absent an agreement stating otherwise, either party can sever the employment relationship at any time, for any reason (absent an illegal reason), with no advance notice required. Illegal reasons for discharge include race, color, religion, age, national origin, U.S. citizenship, gender, disability, and genetic information. Therefore, because there is no law that requires an employer to keep an employee who has been arrested, the employer can discharge the employee if so desired.

However, the analysis is not that simple for the purposes of unemployment claims, where the employer has to prove misconduct as the reason for discharge. The following questions and answers shed light on certain scenarios in an unemployment claim under Texas Workforce Commission (TWC) rules:

My employee was arrested. I'm afraid she may not be able to come back to work. If I fire her, can she collect unemployment?

Possibly. Employers may feel compelled to discharge an employee as soon as they hear of the arrest out of fear that the employee is no longer dependable. The worry is that the employee may not be able to bond out of jail or will need to miss work to attend future court hearings. Unfortunately, this could cause the employer to lose an unemployment claim. If the employer discharges the employee in anticipation of future issues, the employer is likely jumping the gun because the "misconduct" has not occurred yet.

Can't I prove misconduct just by showing that my employee was arrested? Isn't that misconduct by itself?

No. Being arrested does not necessarily equal misconduct. It is possible that the employee was wrongfully arrested; therefore, it may be improper to assume the employee is guilty of any wrongdoing. This is why the employer would lose an unemployment claim if the criminal charges are pending at the time the claim is investigated. Without a conviction, it is hard to prove employees guilty of the act that resulted in arrest.

I discharged my employee when he was arrested — he filed for unemployment.

The claim is pending and we have now learned that he was convicted. Is that misconduct?

It can be. If the employee is convicted and that information comes to light during the unemployment claim process, this may establish misconduct. The idea is that the employee failed to manage his or her personal affairs in a way that would not affect the job. However, it is unwise for the employer to rely on a future conviction, as that is never guaranteed.

What if the employee's arrest or felony indictment makes the news and my company's reputation suffers? Can that be misconduct?

Yes. Sometimes, an employee arrest or indictment may come out in the news. In some cases, the news ties the employee to the employer's business, causing potential damage to the employer's reputation. Depending on the circumstances surrounding the arrest or indictment (severity of the offense, amount of news coverage, impact on the employer's interests, etc.), the employer may choose to discharge the employee to preserve its public image. In these cases, an employer may be able to establish misconduct.

What if I terminate employment after the employee is arrested and convicted while working for me?



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Depending on the circumstances surrounding the arrest or indictment, the employer may discharge the employee to preserve its public image.

This can also be misconduct. In these cases, the employer should have a policy that explains what types of convictions would result in discharge. For example, an employer with a zero-tolerance policy for drug convictions might establish misconduct because the employee willingly violated a known employer rule and should not receive unemployment benefits as a result.

What if I find out that an employee omitted conviction information from a job application?

Employees should to fill out employment applications truthfully. Therefore, if an employee intentionally omitted this information from the application and the employer later discovers it, the employee’s subsequent discharge may be misconduct. The employer should have a policy stating that such an omission will result in discharge.

My employee wants me to pay to bond him out of jail. Am I required to do this?

No. There is no law that requires

employers to fund an employee’s release from jail. If an employee requests such assistance, an employer may elect to provide the employee a wage advance in order to gain release. If this occurs, a wage deduction authorization agreement that specifically explains how and when the employer will deduct from future pay should be signed by the parties. A sample agreement can be found here: http://texasworkforce.org/news/efte/wage_deduction_authorization_agreement.html.

What if my employee is absent for several days due to being in jail?

This may be misconduct if your employee violated your policies because of his or her absence. Your company policies are important here. If the employee is not following your reasonable absenteeism notice policy, follow the disciplinary action outlined in the policy. The same is true if your employee violates your no-call/no-show policy. In these cases, the discharge is not for the arrest itself, but for failure to abide by a specific

company policy. If your policies are silent on these matters, be aware that TWC operates under the rule that three consecutive days of no-call/no-show constitutes a job separation. Of course, your own no-call/no-show policy may be stricter (for example, one day of no-call/no-show can result in discharge).

Conclusion

Remember, details matter. Each case is different and will be reviewed on a case-by-case basis. Therefore, keep in mind that documentation is your best friend. Keep thorough notes on how circumstances unfold. In addition, policies and procedures may prove beneficial for maintaining order in situations such as this. For further information on unemployment claims, policies, and procedures, please take advantage of our employer handbook, *Especially for Texas Employers*, which is available at the following link:

<http://texasworkforce.org/news/efte/indexmain.html>. 🇹🇽

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

Temporary Help: What is it and How Does it Work?

As we approach the holiday season, there are many employers across the state that will experience an increase in business activity due to the growing demands of seasonal consumers.

During these perennial periods, it is not uncommon for businesses to face personnel shortages and encounter work spillover. As a result, employers seek the assistance of temporary help to manage the excess workload.

Ultimately, however, the seasonal demand subsides and, often, the temporary help is released from employment. While many employers are familiar with this process, it is

still important to be aware of the effects of hiring temporary help. For instance, an employer should know what temporary help is, how temporary help job separations can affect the employer's unemployment tax account, and what potential alternatives exist to hiring temporary help directly.

What is Temporary Help?

Temporary help is essentially any worker that is brought on by the employer for only a specified period of time. Usually, temporary help is recruited by the employer to satisfy

the increased demands of seasonal consumers (as mentioned above), a special project, or a labor-intensive contract. Temporary help can be secured in two different ways: hiring the temporary employees directly, or obtaining them from a temporary help firm. Regardless of the method of hire, there are some common misconceptions linked with temporary employees.

Setting the Record Straight on Temporary Help

One frequent misunderstanding that surrounds temporary help is the



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It's important to note that just because a worker is a temporary employee, it does not mean that he or she is automatically disqualified from unemployment benefits.

idea that temporary employees are not allowed to receive unemployment benefits. Temporary employees that are hired directly by the company are the company's employees for all intents and purposes and can file unemployment claims when the job runs out. Understandably, this prompts the question as to how these claims affect the employer's unemployment tax rate.

In short, employers that are in the base period when an unemployment claim is filed (by a temporary employee or any other former employee) will be subject to have their unemployment tax account charged back and affected by the benefits paid to the claimant. This results in an increase to the employer's unemployment tax rate. For more information about the base period, please visit http://www.texasworkforce.org/news/efte/ui_law_claim_notices.html#baseperiod.

The most important concept to note is that just because a worker is a temporary employee, it does not mean that they are automatically disqualified from unemployment benefits. Consequently, employers who find themselves in the base period when a temporary employee files an unemployment claim can expect to have their tax accounts affected if the separation was due to no other reason than the job assignment ending. The good news, however, is that temporary assignments tend to be short in duration and many times employers are not in the base period when the temporary employee files his or her claim for benefits. In these situations, the employer's tax account is unaffected.

The second misconception about temporary help is that they can all be categorized as "contract" or "1099" labor. This may appear to be an attractive way of handling work spillovers because the employer

can avoid significant labor costs by labeling all their temporary workers as independent contractors. The problem with this method is that the vast majority of temporary workers do not qualify as independent contractors. In other words, by simply "contracting out" or "1099ing" temporary workers, an employer runs the very real risk of misclassifying its workers and incurring penalties, payment of back wages, back taxes, and fines. For a better understanding of independent contractors, please visit: http://www.twc.state.tx.us/news/efte/ics_contract_labor.html.

The third myth that is frequently associated with temporary help is that they must be given the same benefits as the rest of the employer's non-temporary employees. Employers are afforded great latitude in establishing their own preferences and methods for benefits such as vacation time, holiday pay, accrual of paid time off, and so forth. This means that employers can provide for differences in their policies and procedures for their temporary and non-temporary employees. Employers should also note, however, that some laws will still apply regardless of the temporary status of the employee. For instance, the Employee Retirement Income and Security Act of 1974 (ERISA) states that if an employee works at least 1,000 hours in a 12-month period and the company has some sort of retirement plan, the company must give that employee a chance to participate in that plan.

An Alternative to Directly Hiring Temporary Help

It is worth noting that true contract labor comes in the form of an employer seeking the assistance of a temporary help firm to fill the positions of its temporary assignments. This method of

addressing temporary help needs may result in higher labor costs (the costs associated with temporary help firms), but the unemployment liability will shift to the temporary help firm.

Similarly, professional employment organizations (PEOs) act in a manner not unlike temporary help firms and are responsible for the unemployment liability associated with the temporary employees it places with employers. While there are some statutory differences between temporary help firms and PEOs, they both serve as viable solutions for employers seeking alternatives to directly hiring temporary help.

Conclusion

There are a few takeaway points that can be useful for employers dealing with temporary help situations. First, temporary employees can still file unemployment claims and the base period will determine whether the employer will be liable for charge backs. Second, employers should pay careful attention any time they use "contract labor" to fill temporary help needs and make sure that the worker is truly an independent contractor or was retained by a temporary help service. Lastly, employers may elect to differentiate temporary employees and non-temporary employees in their policies and procedures.

The fluid nature of our state's economy ensures that there will always be sudden periods of high demand for various services and goods. Accordingly, the need for temporary help will continue to be an issue worth exploring for many employers. 

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

Interesting Questions from Employers, Asked and Answered

Q: *If an employee requests copies of each of his check stubs for a past number of years, is the employer obligated to do so? I understand that an employer is required to keep those forms of records for at least 3 years. If the employer has more than 3 years of records would the employer be required to give copies of them as well if the employee request them? Along with check stubs, time sheets, etc.?*

A: An employer is not obligated to give copies of payroll documentation to employees after the initial documents are given, and a company may charge employees a reasonable per-copy fee in case the company decides to make copies available. Most companies that give copies like that to employees charge a standard fee of 10 cents per copy, which is certainly not unreasonable. The same goes for timesheets. Payroll and time records need to be kept for certain lengths of time in the event that a government agency performs an audit for some reason, or in order to deal with discovery requests in connection with lawsuits, but the copies do not need to be given to employees outside of the context of an employment claim or lawsuit.



Q: *We have a home health care service. If an employee is on a pay rate of “paid per visit” and receives more than 40 hours per week; will that employee be eligible for overtime (in accordance to the Texas Overtime Law (time and one-half), even if the employer has a policy about overtime pay on the “paid per visit” employees (i.e., one-half of the blended rate)?*

A: Non-exempt employees must be paid overtime pay for hours worked in excess of 40 in a seven-day workweek, regardless of the method used to determine their regular pay. For employees paid on a per-visit basis, the overtime pay would be one-half of the regular rate of pay for each overtime hour worked, assuming that the regular rate of pay equals at least minimum wage. The regular rate of pay would be determined by dividing the total straight-time pay for the week (number of visits times the per-visit rate) by the total number of hours worked that week. Each overtime hour, or part thereof, would be compensated at one-half of that regular rate of pay. Mileage payments would not count toward overtime pay, and would not be considered “wages”, as long as they do not exceed the IRS mileage rate for the time period in which the mileage payment is made.

Q: *I’m considering changing the time schedule of one employee. Our normal business hours are 8am-5pm, with a one-hour lunch. If I authorize 7am-3pm, does the law mandate a 30-minute or one-hour mandatory lunch break?*

A: Since no federal or Texas law requires lunch breaks for employees, your company would be free to set whatever time it wants to for that employee's lunch break. The employee could take lunch from 11 a.m. to noon, or 11:30 a.m. – 12:30 p.m., or whatever makes sense under the circumstances.

Q: *I have a situation where I have authorized a 3.25% cost of living adjustment (COLA) increase to all staff members. I only have a staff of eight, so I individually prepared a letter for each staff member so that they could review and sign acknowledgement. However, one staff member indicates “thank you, but I respectfully decline my 3.25% COLA increase.” One of my senior staff members indicated he did the same last year, but the COLA was issued across the board. I plan to speak to the employee today, but is there any problem we would be looking at if we were to concur with his decline?*

A: Here are some things to consider about those issues:

1. It is legal to give him the pay increase anyway and tell him that his pay will go up no matter what. He could, of course, choose to quit, to accept the raise anyway, or to do something else like donate the unwanted increase to charity. Those would be the main possibilities.



2. If your organization decides to let him turn the pay increase down, I would suggest getting him to confirm in writing that he a) does not want the 3% pay increase, and b) would like to continue receiving his current pay rate of \$_____ per [pay period – specify what that is in the form you give him to sign].

Q: *Our company contracts with the city to run a public transport shuttle service for disabled individuals in the community. One of our drivers recently had an incident wherein he returned to his driver seat after helping someone off the bus and sat back down, noticing only then that one of the other disabled passengers had urinated on his seat. Unfortunately, the pool of liquid was quite substantial and quickly soaked his pants and underwear, leaving him uncomfortable, upset, and concerned about the risk to his health from coming into close contact with that fluid. He did the right thing and finished dropping off his remaining passengers, but upon returning to the transit hub, he notified his supervisor that he had to go home, clean off, and get some fresh clothes before he would finish the rest of his shift. The supervisor allowed him the time to do that, but now the driver is telling us that we are required to pay him for the time he spent dealing with the soiled clothes from the incident. We are hearing different things from different people - some are saying it was his own personal issue and he should not be paid for taking time to deal with it, others are saying we should let him apply available PTO to the time in question, and a couple of sources we've consulted tell us we should consider it work time. What would be the best thing to do in a case like this?*



A: You're certainly right about it being an unfortunate situation. The key here is understanding what makes an activity work-related and compensable. Basically, time spent in a work-related activity is compensable if it is a necessary part of the job and related to job requirements. The following things are important to remember: the incident occurred in the course and scope of the driver's work; helping passengers and sitting back down to drive further were both part of his regular duties; dealing with the unexpected is part of any job, but especially when one is dealing with the public; your city has a duty to maintain a safe, sanitary, and healthy work environment for its employees; and finally, the driver did not intentionally or negligently cause himself to become soiled to the point where he needed to clean himself off. Taking all of those factors into consideration, it is highly likely that the U.S. Department of Labor, the Texas Workforce Commission, or a court would consider the time in question to be compensable time worked. Thus, it would be advisable to make appropriate notes in the time records to ensure that the employee gets credit for the time he spent dealing with the problem. Of course, there are reasonable limits - if he wanted to be paid for an hour he spent on the Internet at home looking up ways that he could bring legal action for emotional distress or something like that, your company could legitimately contest that. Just meet with him and get him to agree on the time he spent directly dealing with

the clean-up operation and include that time in his time worked for the day. If you handle it that way, you should be fine.

Q: *I have ten employees who work out of our company's office in Fort Worth. We have a yard area about 100 by 100 feet where we keep tools, equipment, and supplies that has been broken into four times in the past year and a half. We have made police reports after every break-in. The Fort Worth Police Department is now requesting the ten employees' social security numbers (SSNs). They have told us that pawn shops gather SSNs from any individual who pawns merchandise and would like to check my employees' SSNs against anyone who has pawned merchandise. My employees are the only ones that have keys to the yard shop and the only ones who really know what we have in there. Is it ok to give the police the SSNs for them to conduct their investigation?*

A: It is permissible for your company, in cooperation with an investigation by law enforcement authorities, to give otherwise confidential information, such as employees' SSNs, to the police. The police are under a legal duty to keep such information confidential, and if anyone out in the public, such as a representative of news media, requests such information, there is a specific exemption in the Public Information Act that allows public agencies to withhold SSNs from information that is released.



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Too many things can go wrong when employers lend money to employees.

Q: *Please see the attached loan agreement, which provides for repayment of money we loaned to an employee at 18% interest. We have terminated an employee, and his final pay check is less than what he owes on the loan. Can we keep his final paycheck as agreed to on his loan agreement? Is there any statute on your website that we can cite?*

A: Thank you for your inquiry regarding a loan repayment deduction from an employee's final paycheck. Based upon the wording of the final sentence ("If I terminate employment before my loan is paid in full, I agree that [name of company] can deduct the unpaid balance from my last paycheck."), and assuming that the company has a complete, filled-out copy of the agreement that is signed by the employee, your company would be able to deduct the unpaid balance of the loan from the employee's final paycheck. That is so even if the amount left to the employee after deduction of the required payroll taxes and the loan repayment is

zero. That is because under U.S. Department of Labor (DOL) guidelines found in DOL's Field Operations Handbook, loan repayments are one of the things that may take an employee's pay below minimum wage (because with a loan or wage advance, the employee effectively gets his or her pay in advance - see http://www.texasworkforce.org/news/eft/allowable_deductions.html#loansadvances in our book *Especially for Texas Employers* for details). However, in keeping with the disclaimer in the book, it is important to note that my opinion is not binding on the Texas Workforce Commission (TWC) and is not a guarantee that in the event of a wage claim that the former employee might file, your company would have nothing to worry about. If a wage claim is filed and TWC makes a decision that your company does not agree with, file a timely appeal and point out how the authorization and DOL guidelines expressly permit the kind of deduction that the company made. *Important caution before you do anything:*

since the DOL guidelines allowing deductions for loan repayments to take an employee's pay below minimum wage do not also allow the employer to make a profit (i.e., charge interest) on a transaction like that, any pay documentation that is associated with the deduction for the unpaid balance of the loan must be free of any sign that an interest charge has been included. That would violate the Fair Labor Standards Act because interest on a loan is not one of the few allowable deductions below minimum wage. One final note: every competent labor and employment law attorney in Texas would advise against trying to act like a bank, unless you're a bank. There are so many ways that lending out money at interest can go wrong for an employer that most employment law textbooks and employment law seminars do not even bother to mention them, and I do not have time to list them all here, but honestly, give up that kind of practice. Basically, it is my advice to never lend money to an employee. Too many things can go wrong. If they need financial assistance, they can go to places designed to give financial assistance. Otherwise, if your company really wants to loan or advance money to employees, go ahead and do it with valid wage deduction authorization agreements, but do not attempt to charge interest. 🇹🇽

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

Employer as Big Brother: GPS in the Workplace

One of the benefits of this high-tech world in which we live are the many technological advancements which employers can use to further their goals of a more efficient and financially rewarding business. Among the tools at an employer's disposal is the use of GPS (global positioning satellite) technology.

Most people with smart phones are aware that they are able to utilize the GPS tracking systems in their phones to optimize helpful navigation features, to find restaurants, gas stations, or other conveniences when traveling, or to help find a lost mobile device. In addition to these individual uses, employers are now able to use the same technology to keep track of their personal property as well as their employees. However, before implementing such a business practice, employers should be aware of some of the legal issues and concerns which may arise.

Can employers track employees using GPS technology embedded in company equipment?

Employers have every right to place or enable GPS devices on company owned equipment, such as motor vehicles, phones, tablets, and laptops. In fact, it's a commonly used practice among many employers whose workers perform the majority of their work off-site, such as construction workers, oil and gas hands, and technicians who perform work in client homes. It's simply not feasible for an employer to supervise this type of mobile worker by having a manager present

at all times when the work is performed.

There are legitimate work related reasons for employers to track their employees' movements when they are away from the company's home office. One of these is ensuring productivity. Employers need to know who is, and who is not, performing work as assigned when away from the home office. This information is crucial to determine whether an employee should be reprimanded or rewarded for his or her performance.

Tracking employee movements also provides employers with information about their allocation of resources. For example, if a certain technician has finished a job with time to spare before going to the next job, then the employer can reassign that technician to another job if necessary.

Can employers track employees using GPS technology in the employees' devices or equipment?

Most employees nowadays own their own cell phones, many of which are smart phones enabled with GPS features. Employees can agree to give employers access to the GPS information generated by their phones.

This situation usually arises in cases where the employer uses certain timekeeping phone applications to keep track of and record employee work hours. These "apps" replace the traditional time clock or punch clock of years past. Both employers and



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employees would agree that keeping track of hours worked is crucial to paying employees in compliance with applicable laws. For this reason, many employees have no objection to using such apps on their phones and giving employers access to that information.

Employers, however, are not allowed to place or access GPS devices on employees' personal property, such as phones, computers, and motor vehicles, without their knowledge and consent. Texas law (Texas Penal Code Section 16.06) specifically prohibits the placing of a GPS tracking device on another person's vehicle without the explicit consent of the owner. A violation of this statute is a Class A misdemeanor, punishable by up to one year in jail and a \$4000 fine. Full text of the statute can be found here: <http://codes.lp.findlaw.com/txstatutes/PE/4/16/16.06>.

Can employers track employees during off-duty hours?

Currently, there is no law that prohibits employers from tracking employees during non-working hours. However, since there is no legitimate job-related reason for an employer to do so, it is not recommended.

It comes as little surprise that tracking employees during their off-duty hours could result in accusations of violations of privacy. A pending lawsuit in California, filed in May 2015, addresses this issue. In that case, the employee alleged that her employer tracked her movements, using an app on the employee's phone, regardless of whether she was on or off duty. The employee objected to being tracked during her off hours, and removed the app from her phone. She was discharged a few weeks later. Her claims include invasion of privacy and wrongful termination, among others. More information about this case can be found here: <http://www.courthousenews.com/2015/05/08/timecard-app-tracks-workers-woman-says.htm>.

However, there are other causes of action that could result from this practice once employers learn information about their employees that they didn't have before. For example, if a GPS report documented that an employee was at a certain address each Sunday morning, corresponding to a specific place of worship, the employer would now possess information about this employee's religious beliefs. This knowledge could place the employer at risk for a claim of religious discrimination if the employer took adverse action against this employee subsequent to acquiring this information. Similarly, if the employee visited a certain medical treatment facility after work hours, the employer could learn of some possible illness or medical issue. This raises the risk of a claim under the Americans with Disabilities Act.

When dealing with information which could reveal some characteristic that places an employee in a protected

class for purposes of the anti-discrimination statutes, it's best for employers not to know. If the employer was not aware of the characteristic, the employer could not have relied upon it to fire, suspend, demote, reprimand, or otherwise harass the employee

Are employers required to notify employees of their use of GPS tracking?

Employers who are using GPS devices on company owned equipment are not required to provide employees with notice or to obtain consent. Although employers can track employee movements in secret, it is not recommended as a best practice.

Employees usually find out as soon as the employer uses the information it received for some work-related purpose. Once that happens, employees may interpret the employers' actions as deception and react in a negative way. Employees may feel that the employer did not trust them, thereby resulting in a lack of trust for the employer in return. This subterfuge may also give rise to disgruntled employees and a decrease in morale, both issues that employers can do without.

Recommendations for use of GPS tracking of employees:

1) Notify employees that the employer will be utilizing GPS to monitor job performance, employee whereabouts, etc. during employee work hours. In addition, obtain employee consent. While not required, engaging in this practice with employee knowledge and consent reduces distrust, low morale, and employee disgruntlement.

2) Implement a privacy policy informing employees that they do not have an expectation of privacy while

working. A sample policy addressing some of these issues can be found here: http://www.texasworkforce.org/news/efte/search_policy.html.

3) Inform and reassure employees that the employer will not be tracking off-duty conduct which is not related to the work. Make sure that employer managers or supervisors with access to the tracking information do not track off-duty conduct.

4) If termination, or some other adverse employment action, is a possible outcome from review of the GPS tracking data, explain under what circumstances such an action could occur.

Conclusion

There is no doubt there are legitimate business reasons for employers to take advantage of the GPS technology available to them. It can be a valuable tool in assisting employers to manage their employees and comply with certain legal requirements – both pursuits which are in an employer's best interest. However, it's important for employers to prudently limit use of this feature. Tracking should only be used when employees are engaged in work for the employer and not at any other times. Following this simple recommendation will help employers reap the benefits, yet avoid the possible pitfalls, of this employment practice. 

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