

# Texas BusinessToday

Chair Ruth R. Hughs  
Commissioner Representing Employers  
First & Second Quarter 2019

All in the Family: Working with  
Relatives

Delivering Wages to Hard-to-Reach  
Employees

When Tempers Flare: Employee  
Violence in the Workplace

## 86th Texas Legislature: Bills That Impact Employers





*For the seventh year in a row, Texas has claimed Site Selection Magazine's Governor's Cup for business and job creation. The Cup goes to the state with the most major corporate location and expansion projects each year.*

## Commissioner's Corner: Texas Wins Governor's Cup, 7th Year in a Row

### Dear Texas Employer,

Welcome to our 2019 1st & 2nd quarter issue of *Texas Business Today*! Texas continues to be the place for job growth and economic development as Texas employers create job opportunities for our world-class, highly-skilled workforce. In 2018, the Texas economy added 391,800 jobs and Texas' seasonally adjusted unemployment rate remained at a historically low rate of 3.7 percent.

In addition, for the seventh year in a row, Texas claimed Site Selection Magazine's Governor's Cup for business and job creation. Texas had 608 new projects in 2018, up from 594 in 2017. Texas is a state that always welcomes new employers and also supports our homegrown businesses, offering them the tools to succeed and build on our continued success as a global economic leader.

One tool that employers continue to use is our premiere job training grant, the Skills Development Fund. This grant ensures Texas employers meet the challenges of today's competitive marketplace. Last year, TWC awarded 50 grants with an average of \$475,000. These grants assisted 90 businesses with their training needs and supported the creation of over 4,600 new jobs and the retraining of over 11,400 current employees. We want to encourage Texas employers to take advantage of these opportunities. We have a number of grants that can assist any business, no matter the size. For more information, please visit: <https://twc.texas.gov/businesses/train-your-workforce>.

To close out the year, TWC hosted the 22nd Annual Texas Workforce Conference in Houston. During this conference, we announced the winners of the 2018 Texas Workforce Solutions Employers of the Year. Eaton's B-Line, a power management company located in Sherman, TX, was named Large Employer of the Year. The Small Employer of the Year Award was presented to PRESCO Polymers, a manufacturing company also located in Sherman, TX. The other top finalists were Samsung, Lowe's, Kat Excavation & Construction, and

La Vox 93.3 FM of Abilene. Congratulations to all the award recipients and finalists!

To help employers stay current with employment law updates, we announced our 2019 Texas Business Conferences (TBC) schedule. We started the year strong with three sold-out conferences in Houston, Brownsville, and Dallas, and have 11 more scheduled throughout the year. When you attend one of our TBCs, you will hear directly from our employment law attorneys who will guide you through a number of topics, including hiring issues, policy handbooks, and unemployment claims. For the full list of TBCs, please visit: [www.texasworkforce.org/tbc](http://www.texasworkforce.org/tbc).

In January, TWC sadly lost its Executive Director, Larry Temple. Mr. Temple was a vital part of our agency and he will be truly missed. His work was recognized nationally and he contributed to Texas being a model workforce for the nation. A tribute to his life and work can be found on pg. 5.

In closing, the 2019 general session of the Texas Legislature has begun and will extend through the end of May, 2019. My office will be following all bills related to employment law and we will provide updates throughout the session. You can find a list of the current employment law bills beginning on page 17.

As you continue through the year, remember our office is here for you. We are committed to helping you navigate the unique challenges of running a business. Please do not hesitate to contact my office if you need any assistance.

*Sincerely,*

*Chair Ruth R. Hughs  
Texas Workforce Commission  
Commissioner Representing Employers*

# Making Connections Across the State



- 1.** Skills Development Fund Grant presentation to Lone Star College in partnership with Daikin Industries, which will support the manufacturing industry in the Gulf Coast area.
- 2.** We Hire Vets ceremony recognizing Trailboss Enterprises for their efforts in hiring our nation's heroes.
- 3.** Exploring breakfast hosted at Austin Community College to recognize our public safety entities and their local efforts in mentoring students in their future careers.
- 4.** Texas Lyceum 2019 Public Conference, which focused on the workforce of 2036.
- 5.** Texas Capitol Schoolhouse event hosted by Senator Larry Taylor, which showcased 10 ISDs and gave them the opportunity to demonstrate the advanced technology being used in their schools.
- 6.** Tour of Dynamic Systems, Inc., which is a company that has been vital to our growing Texas infrastructure and economy.
- 7.** Workforce Solutions Gulf Coast set-up at the Women In Industry Conference that focused on female students learning about careers in the industry trades.



# TEXAS BUSINESS CONFERENCES EMPLOYMENT LAW UPDATE

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

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



## 2019 Conference Locations

- Corpus Christi.....April 25-26**
- Eagle Pass.....May 9**
- San Antonio..... June 7**
- Texarkana .....June 21**
- Horseshoe Bay ..... July 11-12**
- Fort Davis.....July 25**
- Lubbock ..... August 22-23**
- Midlothian.....August 30**
- Witchita Falls.....September 13**
- Longview .....September 20**

For more information and registration, visit:  
[www.texasworkforce.org/tbc](http://www.texasworkforce.org/tbc)

**Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include matters such as:**

- Hiring Issues • Employment Law Updates • Personnel Policies and Handbooks • Workers' Compensation • Independent Contractors and Unemployment Tax Issues • The Unemployment Claims and Appeals Process • Texas and Federal Wage and Hour Laws

The non-refundable registration fee is \$125 (one day) and \$175 (two days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Business Conference, please visit the Texas SHRM website. Also, attorneys may receive up to 5.5 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference, or 11 hours for the two-day conference (one hour of ethics available). Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

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# In Memoriam:

## A Tribute to TWC Executive Director Larry Temple

On January 5th, 2019, the Texas Workforce Commission (TWC) Executive Director Larry Temple passed away at the age of 66. Mr. Temple faithfully served the State of Texas for over two decades, from 1997 until 2019.

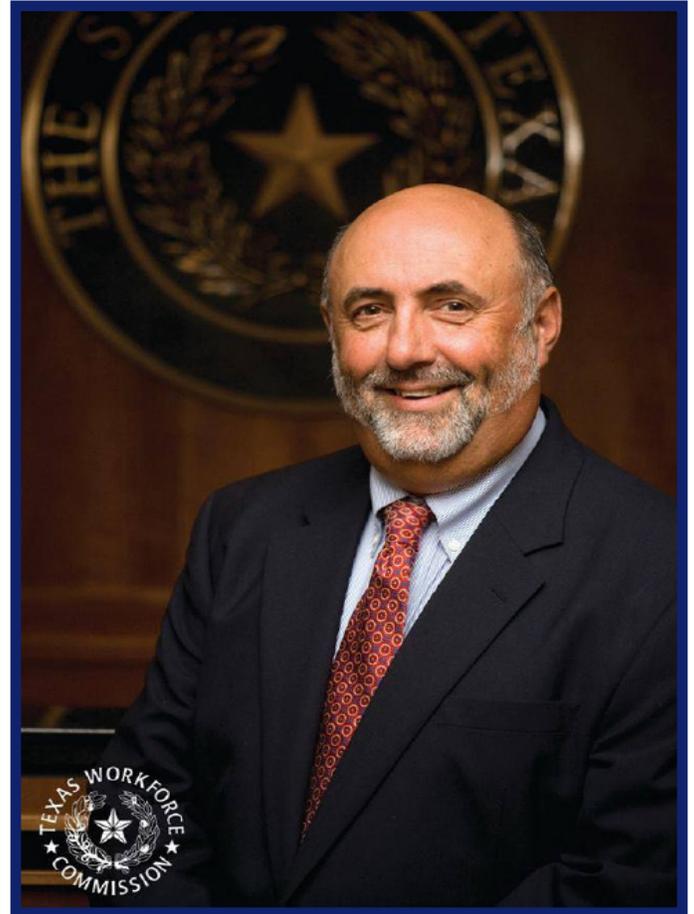
No words can adequately express our sadness at Mr. Temple's death or our gratitude for the opportunity to work with him. He was an unstoppable force. His commitment to helping the Texas workforce system changed thousands of individual lives.

Mr. Larry Temple came to the TWC agency in 1997, serving first as Director of Welfare Reform for six years before becoming Executive Director in 2004. Over the course of Mr. Temple's state service, individuals inside and outside of Texas saw firsthand his integrity, humility, and compassion always on display. TWC strengthened under his leadership, becoming one of the most comprehensive and integrated workforce development systems in the country.

Mr. Temple never deterred from his most important mission and purpose. He understood deeply the importance of providing exemplary service to his family, community, state, and nation. He befriended everyone he met locally and nationally—he loved life, and he loved his work. His strong leadership and problem-solving skills helped bring dignity and pride to working Texans. He understood that putting Texans back to work is the most honorable of jobs, and keeping Texas working is the greatest hope for our future. He continuously stated that the “best part of my job is knowing that I had a part in helping someone else get a job.”

Meanwhile, he was an extremely hard worker and had a natural authenticity that came with great wisdom and experience. He was deeply compassionate to others in need, and shared with everyone he met his well-refined sense of humor and charismatic self.

Mr. Temple vigorously championed major transformative workforce goals. Over the past 20 years, he frequently testified before Congress and advised many states, sharing best practices on reemployment and other leading policy and program ideas. Under his leadership, TWC also actively helped other state workforce agencies in times of crisis. For example, in the aftermath of Hurricane



*Mr. Temple faithfully served the State of Texas for over two decades, from 1997 until 2019.*

Katrina, the TWC Unemployment Insurance Division handled thousands of claims for the Louisiana Workforce Commission, at a time when Texas was dealing with its own catastrophic damage.

Prior to serving at TWC, Mr. Temple served as Deputy Executive Director of the Mississippi Department of Human Services for five years. In Mississippi, he oversaw statewide administration of the state's human services programs and led one of the early statewide welfare reform initiatives.

Mr. Temple was actively involved with the National Association of State Workforce Agencies (NASWA), the national organization representing all 50 state workforce agencies, serving at various times as both president and board member.

His work was recognized nationally and contributed to Texas being a model workforce for the nation. In December, he was honored with the Lifetime Achievement Hand Up Award by the American Institute for Full Employment (AIFE). We are forever in his debt. 🇹🇽

# All in the Family: Working with Relatives

Velissa R. Chapa / Legal Counsel to Chair Ruth R. Hughs

**C**hances are that everyone knows someone who has worked in a family business. As someone who grew up working for her parents, I understand firsthand the unique issues that such companies can face. There is an extra level of comfort in hiring family, but there is also an added layer of complexity to the relationship that can lead to unanticipated problems. Many of these issues have been communicated to the Texas Workforce Commission (TWC) via our employer hotline (800-832-9394).

Working with family can be one of the biggest joys in life, but even joyful situations can create issues. Over the years, I have found that the best way to operate is to understand how the law works, anticipate problems, have a plan, and follow through. The following information is intended to help readers do just that.

## Personal and Business Risks

Family issues in the workplace put employers in a tough personal position, regardless of the choices they make, and employers should be prepared for that. Working with family increases the possibility that family issues will make their way into the office. Sometimes family members can even be your worst employees, but disciplining or terminating them can easily lead to bad blood or make for an awkward time at Thanksgiving dinner.

Sweeping things under the rug only means that there will be a bigger mess to clean up later. Excusing bad conduct can lead to disgruntled workers and intolerable working conditions, which can harm company morale and business flow. Failing to address these problems will only encourage continuing bad behavior and may expose the employer to a discrimination lawsuit or lead to other violations of law (see #s 3, 4, and 5 in this article for more information).

## Legal Risks

Let us begin with the simple answer to a common question: Is it against the law to hire family members? Nepotism is not illegal. However, there are several legal issues that employers should be aware of when family members are involved:

## 1. Wage and Hour Issues

There is a common misconception that hiring family means that federal laws pertaining to minimum wage and overtime do not apply. Generally speaking, this is a falsehood. Many employees have filed wage claims against their own family members for money owed to them for work they performed. It is no defense that the parties are related.

## 2. Child Labor

Putting your children to work is often seen as a win-win scenario; employers can keep tabs while their children help the business and learn valuable skills. However, employers should be aware of federal child labor laws, which exist to ensure that a minor's working environment is safe and does not interfere with a child's education. For one, children are not allowed to perform hazardous duties. Examples of what hazardous duties are in different industries can be found here: <https://www.dol.gov/whd/childlabor.htm>.

Also of note is that different rules apply depending on the child's age. For a basic overview of these laws, please see the following link: [https://twc.texas.gov/news/eftc/child\\_labor.html](https://twc.texas.gov/news/eftc/child_labor.html). The penalties for violating child labor laws include significant civil penalties, criminal penalties, and even a temporary prohibition on the sale or transfer of any goods produced by the employer.

## 3. Unemployment Claims

Family members who are discharged or who quit may qualify for unemployment benefits. It does not matter that they were related to the employer by blood or marriage; such cases undergo the same analysis as any other case. As an example, when couples who co-own a business decide to separate, it is likely that one party will either leave the business or get pushed out. Those who quit a job for personal reasons are usually disqualified from unemployment; however, if the other spouse makes the working conditions intolerable, the person who quit may qualify for unemployment. In cases where a spouse is "pushed out" and discharged, the unemployed spouse may qualify for benefits because marital discord does not constitute work-

connected misconduct. For more information on the basic unemployment claim rules, please see the following link: [https://twc.texas.gov/news/eft/ui\\_law\\_qualification\\_issues.html](https://twc.texas.gov/news/eft/ui_law_qualification_issues.html).

#### 4. Discrimination Lawsuits

There is no doubt about it: company policies are difficult to enforce when family members are involved. Nobody wants to warn their son, daughter, or spouse for rule violations.

Although it is not against the law to treat family members more favorably, treating employees differently could expose the employer to a discrimination lawsuit. Perception is everything and it can often override reality. Although family members get a free pass because they are family, this will not stop employees from arguing that they were treated unfairly for an unlawful reason, such as race, color, national origin, U.S. citizenship, religion, age, gender, disability, or genetic information (see <https://www.eeoc.gov/laws/practices/index.cfm> for more information on prohibited practices). Being treated less favorably can be all an employee needs to allege a discrimination claim. Therefore, it is a best practice to treat all employees the same, regardless of any familial relationship.

#### 5. National Labor Relations Act

Employees who are upset about their working conditions tend to talk about these issues with one another. Employers who want to stop these discussions should resist that urge, because such conversations are protected under the National Labor Relations Act (NLRA). The NLRA affords employees the right to discuss the terms and conditions of their employment. Any attempt by an employer to curb these discussions could result in a violation of the NLRA. For more information on employee rights under the NLRA, see the following link: <https://www.nlr.gov/rights-we-protect/rights/employee-rights>.

#### Conclusion

For many employers, working with family is not only a preference, but a necessity, and it can be tempting to ignore certain rules or laws to preserve the family unit. Just remember, as the saying goes: everything is fine until it's not. Keeping the above information in mind will help to guide and protect employers moving forward. 🇹🇽



*Although it is not against the law to treat family members more favorably, treating employees differently could expose the employer to a discrimination lawsuit.*

# Delivering Wages to Hard-to-Reach Employees

Mario R. Hernandez / Legal Counsel to Chair Ruth R. Hughs

**H**ave you ever experienced a situation where an employee vanishes into thin air and you have no idea how to deliver the final paycheck? Maybe you have experienced a scenario where an employee has been incarcerated, but still needs to be paid in accordance with the payday laws. What if an employee has passed away? These are all things that have happened to employers, and this article discusses some rules and methods for delivering wages to hard-to-reach employees.

## The Basics

We start with basic rules that are in play when talking about the delivery of wages. The main law that employers should be aware of is the Texas Payday Law. This law requires that employees receive their pay in full and on time on regularly scheduled paydays. Wages can be delivered to an employee in person, through registered mail (to be received by the employee not later than payday), to a third party that the employee has authorized in writing to receive the employee's paycheck, via direct deposit, or in any other reasonable way that the employee has agreed to in writing (See [Texas Labor Code §61.017](#)).

In addition, after a job separation, there are different deadlines for payment of an employee's final paycheck, depending on whether the job separation was involuntary or voluntary. If the job separation was involuntary, (i.e. the employee was discharged), then the employer has 6 calendar days from the effective date of separation to deliver the final pay. On the other hand, if the job separation was voluntary, (i.e. the employee quit), the employer has until the next regularly scheduled payday to deliver the final pay. (See [Texas Labor Code §61.014](#)).

## Hard-to-Reach Employee Scenarios:

### The Incarcerated Employee

Sometimes an employer has an employee who is unable to attend work due to being in jail. A key thing to remember is that just because an employee is in jail, it does not mean that the employer is relieved from its obligation to deliver payment according to payday law. So, what is an employer to do? First,



remember that one of the delivery methods that is permitted under the Texas Payday Law is to deliver the wages to a third party that the employee has authorized in writing to receive the paycheck. As such, if a family member, or other person who is in contact with the incarcerated employee, gets the employee's permission in writing to receive the paycheck, the employer could release the paycheck to the person so authorized.

Alternatively, the employer could contact the facility that is housing the incarcerated employee and ask about the procedures to mail the check to the employee. Remember, wages delivered through the mail must be sent by registered mail, unless the employee agrees to a different, reasonable method in writing.

### The Deceased Employee

When an employee passes away, employers sometimes ask what the proper method is to deliver the deceased employee's final paycheck. The concept that employers want to remember here is that the final paycheck belongs to the estate of the deceased employee. This means that not just anyone can receive the final paycheck. The final pay would go to the legal representative of the deceased employee's estate. If the employee was married at the time of death, a special affidavit can be signed to release the final paycheck to the surviving spouse if no executor or administrator was appointed to the deceased employee's estate (See Special Wage Delivery Problems – Deceased Employee and Unclaimed Wages at: [https://twc.texas.gov/news/efte/delivery\\_of\\_wages.html](https://twc.texas.gov/news/efte/delivery_of_wages.html)).



*The employer should hold an unclaimed paycheck for one year and then contact the Unclaimed Property Division of the Texas State Comptroller's Office for further instruction on what to do with the unclaimed check.*

## **The Disappearing Employee**

Our employer hotline has received calls from employers who state that an employee has worked for them for a few days and then never returned to work, without notice or warning to anyone. In these situations, the employer should review its personnel file to see if it can verify an address for the employee. If so, the employer can mail the check via registered mail to the address that the employee provided. If the employee arranged to have pay deposited electronically via direct deposit, the employer could deliver wages in that manner. But what if the employer mails the final paycheck and the paycheck comes back as undeliverable? In this scenario, the employer may be faced with a situation involving unclaimed wages. Unclaimed or abandoned property reverts to the state after a certain period of time. The employer should hold an unclaimed paycheck for one year and then contact the Unclaimed Property Division of the Texas State Comptroller's Office for further instruction on what to do with the unclaimed paycheck (See Unclaimed Wages at: [https://twc.texas.gov/news/eftc/delivery\\_of\\_wages.html](https://twc.texas.gov/news/eftc/delivery_of_wages.html)).

## **Consequences for Failure to Pay?**

The consequences for failing to pay an employee properly can be serious for an employer. An employer could face criminal penalties for intentionally avoiding payment of wages owed to an employee (See [Texas Labor Code §61.019](#)). In addition, an employee who has not been paid accordingly could file a claim for unpaid wages with either the Texas Workforce Commission or the U.S. Department of Labor's Wage and Hour Division.

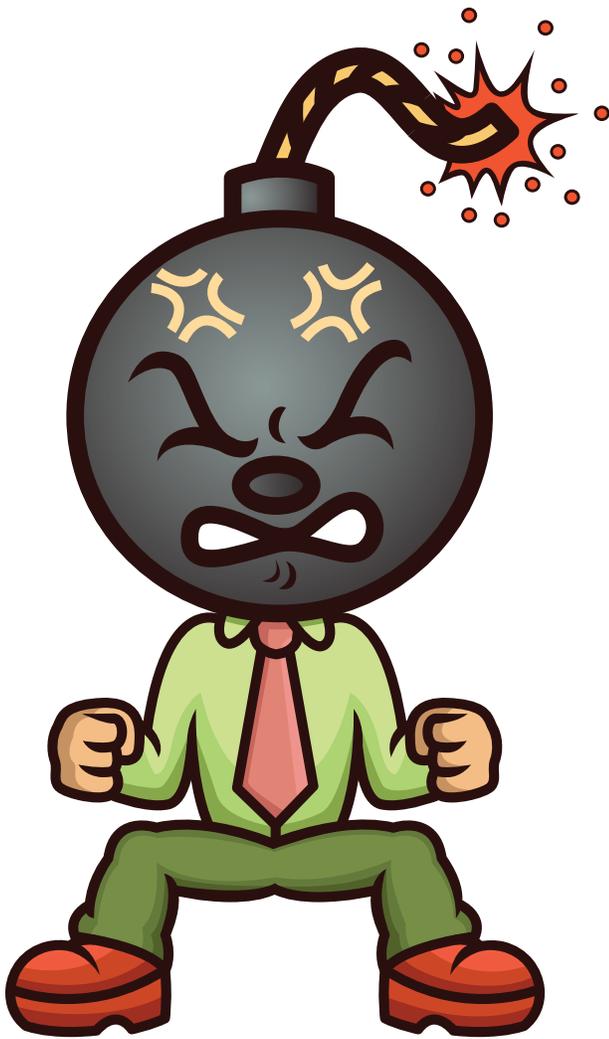
While this is not an exhaustive list of consequences, it offers a glimpse into what could happen if employees are not paid properly.

## **conclusion**

Delivering wages to hard-to-reach employees can be challenging, but it is not impossible. It is ultimately the employer's responsibility to ensure that wages are delivered in full and on time, despite any unusual circumstances that might arise. As such, employers should be familiar with the proper pay methods and deadlines associated with employee paychecks. If you encounter a scenario not covered in this article or have any other questions, please feel free to call our employer hotline at 1-800-832-9394. 🇹🇽

# When Tempers Flare: Employee Violence in the Workplace

Elsa G. Ramos/ Legal Counsel to Chair Ruth R. Hughs



**M**ost employers do not expect their employees to engage in violence in the workplace. However, since stress is a large contributor to altercations between employees, and most would agree that at one time or another they experienced stress while at work, it should come as no surprise when disagreements or differences of opinion erupt into episodes where voices are raised, profanity flows freely, threats of physical harm are exchanged, and fists begin to fly. When this happens, many employers may find themselves wondering what to do. Were they supposed to have

a policy prohibiting violence? Should they fire the employees involved? What about contacting the police? Are they legally required to take any action at all?

## Workplace Violence Policy

Employers have an obligation to provide their employees with a safe working environment. Section 5(a)(1) of the Occupations Safety and Health Act requires employers to provide a workplace free from hazards, including workplace violence, that could result in death or serious physical harm (<https://www.osha.gov/laws-regs/oshact/section5-duties>). To this end, while not legally required, having a workplace violence policy is highly recommended. The Occupational Health and Safety Administration, most commonly known as OSHA, recommends that employers adopt a zero-tolerance policy toward workplace violence. Once a policy is implemented, it is important to train and familiarize employees on the policy. While neither OSHA nor Texas provide a workplace violence policy that companies are required to use, the sample provided at the conclusion of this article may act as a starting point for employers without a policy addressing this issue.

## Discipline for Employees Involved

Employee discipline is a matter of employer discretion in Texas. This means that employers are free to choose the appropriate employee discipline for violations of employer policy. The same is true for incidents of workplace violence. Companies may choose to discipline employees differently depending on the nature of the offending behavior.

For example, is this statement from a frustrated employee, “If I don’t get that invoice by the end of the day, I’m liable to slap someone!” the same as, “If that manager doesn’t get off my back... I swear! He’s a dead man!” And what about statements that just indirectly reference violence, such as the familiar, “Maybe we should just take this outside?” Or, if one employee is verbally harassing and provoking a co-worker, without any physical contact, to the point that the co-worker resorts to physical aggression in return, are both employees equally culpable? What if two or more employees are engaged in a physical brawl, yet

claim they were acting in self-defense? Should all employees be treated the same as the aggressor? While these questions may not have simple answers, organizations should consider different scenarios and be prepared with a plan for enforcing the policy.

Employers have multiple disciplinary tools at their disposal, such as verbal or written reprimands, suspension, probation, demotion, pay cuts, or termination. Whatever the organization's choice of discipline, employers should strive for consistency and fairness in their treatment of employees and compliance with the employer's duty to provide a safe working environment.

### Contacting Local Law Enforcement

Title 5 of the Texas Penal Code includes various chapters that address offenses against the person—from simple assault to criminal homicide—including specific threats of violence (see: <https://law.justia.com/codes/texas/2015/penal-code/title-5/>). Depending on the severity of one employee's conduct toward another, or on the conduct of a non-employee—such as a customer—toward an employee, employers should exercise their best judgment. Any decision to involve the authorities should consider the safety

of all involved and the employer's duty to maintain a safe workplace. Of course, simply because an employer chooses to not contact law enforcement does not preclude any of the individuals involved from reporting the incident to the police.

### Conclusion

Hoping for the best while preparing for the worst is how most employers deal with violence in the workplace. To that end, having a policy in place that addresses this issue, and making sure that all employees are aware of the policy, is just the beginning of an organization's action plan in ensuring a safe working environment for all employees.

### Learn More, Do More

For more information on workplace violence strategies and prevention, visit: <https://www.osha.gov/SLTC/workplaceviolence/> and <https://www.tdi.texas.gov/pubs/videoresource/stpwpvio.pdf>.

\*See page 12 for sample workplace violence policy 🇹🇽



*Any decision to involve the authorities should consider the safety of all involved and the employer's duty to maintain a safe workplace.*

# Sample Workplace Violence Policy

XYZ Corporation (XYZ) has a zero-tolerance policy for violence in the workplace. “Workplace violence” is defined to include:

1. Physically aggressive, violent or threatening behavior, such as attempts to instill fear in others or intimidation;
2. Verbal or physical threats of any sort;
3. Any other conduct that suggests a tendency toward violent behavior. Such behavior includes, but is not limited to, excessive arguing, profanity, threats of sabotage of XYZ property, belligerent speech or a demonstrated pattern of insubordination and refusal to follow XYZ policies and procedures;
4. Causing physical damage to XYZ’s facilities or defacing company property; or
5. With the exception of XYZ security personnel, carrying firearms or weapons of any type or kind onto XYZ premises, or while conducting XYZ business.

If any XYZ employee becomes aware of or observes any of the above-referenced behavior or actions by a co-worker, consultant, customer, third party vendor, visitor, or any other party, he or she should notify his/her supervisor, any member of management, and/or the human resources department immediately. Employees should notify the human resources department if they are aware of any restraining orders that are in effect, or of the existence of any other non-work-related situation with the potential to erupt into workplace violence.

All reports of violence in the XYZ workplace will be taken seriously and will be investigated thoroughly and promptly. To the extent possible, XYZ will keep the identity of the reporting employee confidential. However, under certain circumstances, XYZ may need to disclose the reporting employee’s identity (for example, to protect that individual’s safety). XYZ will not tolerate retaliation in any form against an employee who makes a report of workplace violence.

If, after a thorough investigation, XYZ determines that workplace violence has occurred, appropriate corrective action will be taken, and discipline will be imposed on the offending employee(s). The level of appropriate discipline will depend on the facts in each case, and may include oral or written warnings, reassignment of responsibilities, probation, suspension, or termination. If a non-employee is responsible for the violent activities, XYZ will take corrective action to ensure that such behavior is not repeated.

--Author: the late Renee Miller, Legal Counsel at the Office of the Commissioner Representing Employers, January 1989 – November 2011.

# Frequently Asked Questions from Employers

By William T. (Tommy) Simmons | Legal Counsel to Chair Ruth R. Hughs

**Q** ● I heard that there is a new salary requirement, but I thought there was already a new requirement in 2016.

**A** ● The U.S. Department of Labor (DOL) proposed in late 2016 to increase the minimum salary requirement for a salaried exempt employee to \$913 per week, but that regulation was invalidated by a court decision in 2016. DOL spent 2017 and 2018 revising the salary proposal, and on March 7, 2019, that agency announced a new rule proposing a more modest increase, from \$455/week to \$679/week. More information about the proposed rule is available at [www.dol.gov/whd/overtime2019](http://www.dol.gov/whd/overtime2019). The DOL has invited comments, which can be submitted electronically at [www.regulations.gov](http://www.regulations.gov) in the rulemaking docket RIN 1235-AA20. Comments may be submitted until early May, 2019 - check the DOL website at [www.dol.gov/whd](http://www.dol.gov/whd) for the latest on how the comment period and the rule are progressing.

**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/eft/discipline.html](http://www.twc.state.tx.us/news/eft/discipline.html).

**Q: I have an employee requesting a foot stool for her back and a neck rest for her phone. Is an employer required to provide this equipment?**

**A:** Assuming that your company is large enough (15 or more employees) to be covered by the Americans with Disabilities Act (ADA) and that the employee who is requesting a foot stool and a neck rest for her phone has a protected disability, furnishing those items as a way of helping her minimize the effects of her disability could easily be considered a reasonable accommodation under the ADA. No particular equipment is required at any particular work station. When dealing with accommodations for disabilities, each situation will be different, and it is common to work out a customized solution for each employee who needs an accommodation. In terms of legal obligation to furnish an accommodation, the ADA would require the employer to furnish an accommodation if it makes sense for the job and can be done without undue hardship to the company. In the situation described in your inquiry, it sounds like the footstool and the neck rest for the phone would be very inexpensive and simple accommodations to make. A good resource for researching potential workplace accommodations for various kinds of disabilities is the Job Accommodations Network, which is a joint project of the U.S. Department of Labor, the U.S. Chamber of Commerce and other business sponsors, and a university partner. Learn more at [www.askjan.org](http://www.askjan.org).

**Q: Are there any Texas laws that require employers to tell their employees they have to deal with professional work e-mail on their personal phones?**

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

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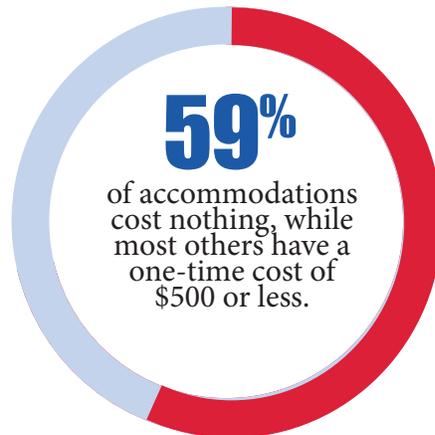


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# Business and Legal Briefs

By William T. (Tommy) Simmons / Legal Counsel to Chair Ruth R. Hughs

## Reporting and Taxation of Employees' Tips

A frequent question is how to deal with tipped employees who do not seem to be fully and accurately reporting their tips. Some people mistakenly believe that tips are somehow exempt from reporting and taxation. That is not true. Under the law, tips are considered part of an employee's personal income that must be reported to the IRS and income tax paid thereon. The IRS has prepared some helpful materials for tipped employees and their employers to use to track, log, account for, report, and pay tax on tips from customers. Those materials regarding tipped employees are on the IRS Forms and Publications pages listed and linked at <https://www.irs.gov/forms-pubs-search?search=tipped+employee>. Reading those materials and using the included forms can greatly simplify the task of complying with the tax laws.

## Don't Let Discrimination and Harassment Go Unpunished

As the 11th Circuit Court of Appeals ruled in *Smelter v. Southern Home Care Services*, 904 F.3d 1276 (11th Cir. 2018), a discrimination charge based on a hostile work environment cannot simply be dismissed if the facts show that the employer failed to properly handle racial slurs and degrading stereotypes that were directed by an employee's coworker toward the employee. Once discrimination or harassment has come to an employer's attention, the only prudent course of action is to immediately investigate and take prompt remedial action to stop further problems and deal appropriately with the offender.

## Vocational Education Students Not Employees Under FLSA

The 10th Circuit Court of Appeals has ruled that vocational education students at for-profit massage therapy schools are not employees under the FLSA with regard to the massages they do as part of their training, and that they are not entitled to minimum wage and/or overtime pay for the work done for their training (*Nesbitt v. FCNH, Inc.*, 908 F.3d 643 (10th Cir. November 9, 2018)). As the court held, "The district court determined that the six factors announced in *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993), when considered in their totality, resulted in a finding that the students were not employees of Steiner (*Nesbitt*, 217 F. Supp. 3d at 1294). The district court came to that conclusion because (1)

the students received vocational training from Steiner, (2) the training primarily benefited the students because they were required to complete hours of clinical time for their licenses, (3) the students did not displace regular employees and worked under supervision of Steiner instructors, (4) there was no genuine issue of material fact regarding the profit Steiner made from operating its schools, (5) the students were not entitled to employment upon completion of their training, and (6) the students and Steiner both understood that the students were not entitled to wages during their time spent training." The appeals court agreed with the district court's analysis on each point and affirmed the lower court's ruling.

## Age Discrimination Law Applies to All Units of State and Local Government

The U.S. Supreme Court's ruling in *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (November 6, 2018) makes it clear that the ADEA's prohibitions against age-related discrimination apply to all units of state and local government, even if such employers have fewer than 20 employees. The Court focused on the definition of "employer" in the ADEA (29 U.S.C. § 630(b)): "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . ." As a reminder, the ADEA and the corresponding provision in the Texas Labor Code prohibit age discrimination against employees who are 40 years of age or older.

## E-Verify Affected by Government Shutdown

During the recent government shutdown in very early 2019, employers found that they were unable to use the E-Verify system for employment authorization checks. Many employment law attorneys told their clients that the best way to deal with such problems is to document the unsuccessful attempts to access the system, including proof of the date and time of the attempts, and obtain printouts of error messages that come up during periods of inaccessibility. Such documentation will help an employer show that it tried everything it could to avoid problems and perform the checks required under the law. 🇺🇸

# 86th Texas Legislature: Employment-Related Bills

By **William T. (Tommy) Simmons** / *Legal Counsel to Chair Ruth R. Hughs*

The 2019 general session of the Texas Legislature will extend from January through the end of May, 2019. It will be very important for Texas employers to follow the events of this legislative session due to the significant number of employment-related bills that have been and will be filed this year. Although not all bills make it into the law, all of the bills are important because they tend to reflect what is on the minds of the members of the Legislature and of the voters who elect them. Moreover, some bills that do not pass in one session may pass in a future session, so they serve as predictors of legal trends in the state. With that in mind, here is a survey of the most significant employment-related legislation that has been filed up through mid-January, 2019. The list is organized into subject areas and shows the bill number and the bill caption indicating the subject matter of the bill.

## Civil Rights - Discrimination

HB 188	Relating to the prohibition of housing discrimination on the basis of sexual orientation or gender identity or expression and to the enforcement of that prohibition.
HB 244	Relating to the prohibition of certain discrimination based on sexual orientation or gender identity or expression.
HB 254	Relating to the prohibition of certain discrimination based on sexual orientation or gender identity or expression.
HB 287	Relating to unlawful employment practices regarding discrimination in payment of compensation.
HB 393	Relating to certain unlawful employment practices regarding compensation. (prohibits salary history inquiries)
HB 619	Relating to damages in certain claims involving sexual assault or sexual harassment.
HB 850	Relating to the prohibition of employment discrimination based on sexual orientation or gender identity or expression.
SB 46	Relating to the prohibition against sexual harassment in the workplace.
SB 56	Relating to employment discrimination training for members of the legislature and state or legislative employees and interns.
SB 112	Relating to unlawful employment practices regarding discrimination in payment of compensation.
SB 151	Relating to the prohibition of certain discrimination based on sexual orientation or gender identity or expression. (condition of contracting with the state)
SB 160	Relating to a prohibition on sex discrimination in compensation.
SB 212	Relating to reporting requirement for certain incidents of sexual harassment, sexual assault, dating violence, or stalking at certain public and private institutions of higher education.

## Human Resources – General

HB 144	Relating to the consideration by employers of the consumer credit reports of employees and applicants for employment.
HB 495	Relating to the consideration of criminal history record information regarding applicants for employment. (“ban the box”)
HB 504	Relating to employment protections for a person serving as a grand juror.
HB 574	Relating to the consequences of successfully completing a period of deferred adjudication community supervision.
HB 618	Relating to the prohibition of certain required nondisclosure and arbitration agreements.
HB 621	Relating to prohibited adverse employment action against an employee who in good faith reports child abuse or neglect.
HB 682	Relating to the establishment of a pilot program for the issuance of digital identification.
SB 91	Relating to certain unlawful employment practices relating to the reporting of criminal offenses.
SB 120	Relating to criminal history record information obtained or disseminated by certain private entities.
SB 159	Relating to the prohibition of certain required nondisclosure and arbitration agreements.

## Immigration / E-Verify

SB 197	Relating to requiring state contractors to participate in the federal electronic verification of employment authorization program, or E-verify.
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## Pay / Benefits / Wage and Hour

HB 48	Relating to a database of employers penalized for failure to pay wages or convicted of certain offenses involving wage theft.
HB 83	Relating to administrative penalties assessed by the Texas Workforce Commission against certain employers for failure to pay wages.
HB 106	Relating to employer retaliation against employees who seek recovery of unpaid wages and procedures in wage claim hearings conducted by the Texas Workforce Commission.
HB 133	Relating to the payment of gratuities to certain employees. (Employers must allow tipped employees to keep all of their tips; no exception for tip pools or credit card fees).
HB 169	Relating to the requirement that contractors verify compliance with wage payment laws in governmental contracts with governmental entities.
HB 194	Relating to the minimum wage. (\$15.00/hour)
HB 222	Relating to prohibiting a municipality from requiring an employer to provide paid sick leave.

## Pay / Benefits / Wage and Hour (continued)

HB 328	Relating to authorization for a county or municipality to establish a local minimum wage.
HB 399	Relating to the period during which an employee may file a claim for unpaid wages with the Texas Workforce Commission. (deadline extended from 180 days to one full year)
HB 640	Relating to the requirement that certain employers provide advance notice of employee work schedules.
HB 820	Relating to the minimum wage. (\$10.10/hour)
HCR 30	Urging Congress to raise the federal minimum wage to \$15 an hour.
HJR 45	Proposing a constitutional amendment establishing an increased minimum wage. (\$10.10/hour)
SB 113	Relating to the minimum wage. (\$10.10/hour)
SB 161	Relating to authorization for a county or municipality to establish a local minimum wage.
SB 162	Relating to a database of employers penalized for failure to pay wages or convicted of certain offenses involving wage theft.
SJR 22	A joint resolution proposing a constitutional amendment establishing an increased minimum wage. (\$10.10/hour)

## Regulatory / Finance / Enforcement / Criminal Penalties

HB 579	Relating to the criminal offense of unlawfully prohibiting an employee from voting.
SB 370	Relating to employment protections for jury service.

## Unemployment Insurance

HB 572	Relating to eligibility for unemployment compensation for employees who leave the workplace due to sexual harassment.
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## Workers' Compensation

HB 750 / SB 163	Relating to required provision of workers' compensation insurance coverage for employees of building and construction contractors and subcontractors.
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## Workforce Miscellaneous

HB 285	Relating to work requirements and employment and training services for certain persons receiving benefits under the supplemental nutrition assistance program.
HB 459	Relating to the placement and use of video recording equipment in certain child-care facilities.

# Texas Business Today

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