

First Quarter 2017

Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

New Year for Texas Employers



2017

Key Aspects in Earnings Verification ■ Social Media: To Friend or Not to Friend ■ DOL Updates

A New Year for Our Texas Employers

Commissioner's Corner

Dear Texas Employer,

Happy New Year and welcome to 2017! The beginning of each new year provides us with a few moments to reflect on the past twelve months, and on our many accomplishments. It also gives us meaningful time to plan out an even more extraordinary year to come. 2016 was a successful year for our Texas employers and I wanted to take a moment to highlight a few of our achievements from this past quarter.

In November, TWC partnered with the Office of the Governor, the Texas Veterans Commission, and the 28 local workforce development boards to host the 5th Annual Hiring Red, White & You! (HRWY!) hiring fair. These events connect Texas veterans and their spouses with Texas employers who value the experience, discipline, and other exceptional qualities inherent with a military background. Nearly 10,000 job seekers attended the job fairs along with 1,500 employers at 30 locations throughout the state. Since its inception in 2012, this event has benefited more than 52,000 veterans. I would like to thank Workforce Solutions of Central Texas for inviting me to kick off their HRWY! event in Killeen.

In December, I had the privilege of visiting Laredo to present a \$322,500 Jobs and Education for Texans (JET) grant check to Laredo Community College. This grant provided simulated medical training equipment and created new opportunities in the medical profession for the south Texas area. To give you a better perspective



Klein Tools Inc. was named Texas Workforce Solutions 2016 Small Employer of the Year at the Texas Workforce Conference. Pictured are representatives from Klein Tools Inc. and TWC Commissioners.

of the importance of this grant: by 2022, there will be 410 new nursing job vacancies, which is a 22 percent increase for registered nurses in the south Texas workforce area. I was able to witness firsthand the realistic simulators and technological tools that will provide the students with life-like experiences, producing the highest quality of nurses trained on the most up-to-date equipment.

To wrap up the year, TWC hosted the 20th Annual Texas Workforce Conference in Houston. We also announced the winners of the 2016 Texas Workforce Solutions Small and Large Employers of the year. Lockheed Martin was awarded Large Employer of the Year. Emerson of Sherman, and James Avery Craftsman Inc. were finalists. Klein Tools Inc. won Small Employer of the Year. The other top finalists were Falls Community Hospital and Clinic, and State Farm Agent Samuel Garcia. Congratulations to all of the award recipients on a job well done!

In January, we hosted our first Benefits of Hiring People with Disabilities Forum. The sold-out event brought together Texas business owners, human resource professionals, and managers interested in information about hiring employees with disabilities. I want to thank all of the employers

and guest speakers who made the first forum a success!

In this issue of Texas Business Today, you will find a guest article about our Unemployment Insurance (UI) Program and the UI Trust Fund, as well as helpful articles on employment law issues and the latest updates on U.S. Department of Labor (DOL) rules.

My office remains a strong advocate for employers working with local stakeholders to promote and support an effective workforce system. We want to ensure our employers have the opportunity to achieve economic prosperity. I look forward to working with you in the new year, and may 2017 be the most remarkable year yet for our Texas employers! 🇹🇽

Sincerely,

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



TEXAS BUSINESS CONFERENCES EMPLOYMENT LAW UPDATE

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

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

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

The non-refundable registration fee is \$125 (one-day) and \$199 (two-days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. Also, attorneys may receive up to 5.5 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Business Conference, please visit the Texas SHRM website. Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

2017 CONFERENCE DATES

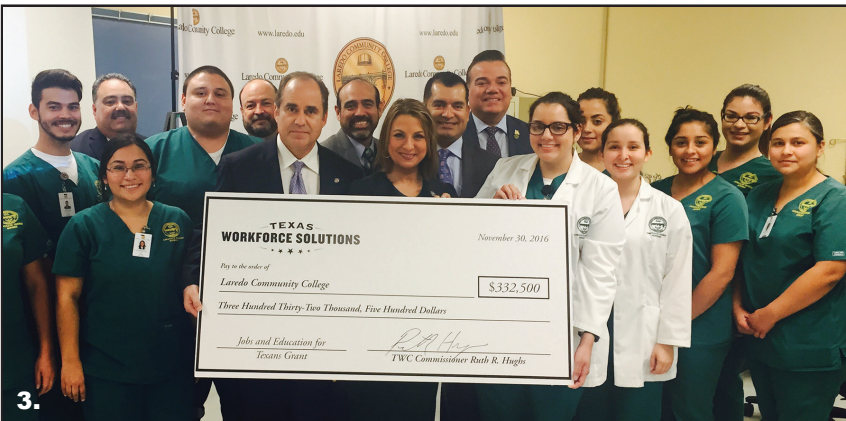
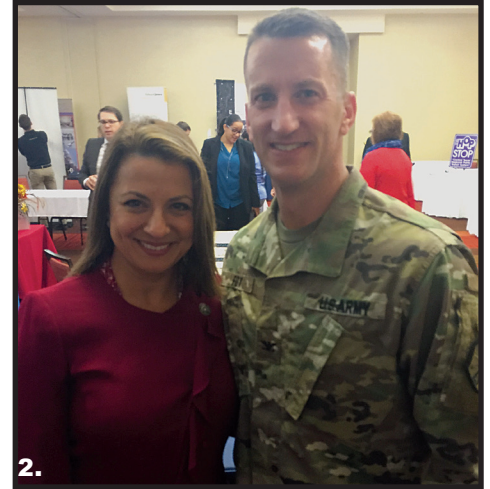
- LaredoFebruary 17**
- Brownsville.....March 24**
- GrapevineApril 27-28**
- TempleMay 19**
- Bastrop-Lost PinesJune 2**
- Fort Worth June 16**
- Beaumont.....July 14**
- Lubbock..... August 25**
- San Antonio.....Sept. 14-15**



To register, visit www.texasworkforce.org/tbc

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Making Connections Across the State



1. Meeting with local leaders and employers at Workforce Solutions Cameron in Brownsville.
2. Kicking off Hiring Red, White & You! Hiring Fair in Killeen with Garrison Commander Colonel Todd Fox.
3. Presenting a Jobs and Education for Texans grant to Laredo Community College.
4. Visiting with Workforce Solutions Middle Rio Grande in Uvalde.
5. Awarding a Skills Development Fund grant to Texas State Technical College.
6. Meeting with local leaders and employers at Concho Valley Workforce Solutions in San Angelo.
7. TWC Annual Thanksgiving Luncheon in Austin.



Unemployment Insurance Program Helping Prevent Fraud

The Texas Workforce Commission (TWC) strives to improve its ability to protect the integrity of the Unemployment Insurance (UI) program and the UI Trust Fund. Thanks to Texas employers promptly reporting new-hire information, TWC successfully used a cross-match early-detection strategy to detect and establish an estimated \$14.7 million in potential improper UI benefit payments during state fiscal year 2016. This early-detection strategy relies on employers reporting new hires and rehires within 20 days of employment to the Office of the Attorney General of Texas, and to report the new employee's work and earnings information to TWC. In order to improve TWC's ability to discover and prevent other types of UI benefits fraud, TWC developed and launched the Improve Fraud Discovery (IFD) project, which provides TWC with a business intelligence capability.

Before fielding IFD, fraud cross-match detection strategies helped TWC detect, identify, and establish improper payments for collection, but did not provide *early detection* to prevent some fraudulent payments. Other than cross-matches, TWC had to rely on hotline complaints, tips, and chance encounters to discover undetected suspected fraudulent activity.

Once detected, TWC investigators lacked electronic tools to help them investigate suspicious claims. It was a laborious and time-intensive process to track and document suspected fraud. Too often, TWC had already paid out benefits before it was determined that a claim was fraudulent. TWC needed an early detection system to identify fraudulent claims before payment. In addition, organized identity theft was a massive problem that stressed



agency resources. The cases that could be identified consumed nearly all of TWC's investigative capabilities, and left open the possibility that more fraudulent activity was going undetected.

The IFD project uses existing data from multiple internal and external data sources to perform data analytics and provide business intelligence. In addition to data cross-matches and a robust ad hoc research and reporting capability, the system employs two customized and highly sophisticated predictive analysis algorithms for making determinations that would not be feasible for a human to evaluate. This combination of capabilities improved TWC's ability to prevent and stop criminal activity related to the Texas UI Trust Fund.

TWC investigators additionally developed their own set of queries using the system's "Workforce Reporter" tool, which took the system vendor's supplied analytics to a more detailed level. TWC estimates that IFD reduced the time required to detect, research, and document suspicious UI activity by 50%, without requiring direct support from IT or UI subject matter experts. This additional

productivity, coupled with IFD's ability to detect and associate related fraud, helped TWC identify and stop fraud schemes that would have paid out over \$2 million to date.

To address the growing ID theft problem, TWC expanded the project's original scope by collaborating with a vendor to develop a new and more comprehensive predictive analysis capability to identify high risk claims more quickly. Since implementing this new capability in October 2015, TWC has prevented more than \$9.2 million from paying out of the UI Trust Fund by detecting and stopping 1,314 fraudulent ID theft claims.

Based on the project's results, the Center for Digital Government selected TWC's Improve Fraud Discovery project for the "2016 Best of Texas Best Data Analytics/Business Intelligence Project" award. This award recognized TWC for designing and deploying a data analytics and business intelligence tool that resulted in a more efficient and effective deployment of government resources and improved compliance with regulations. 🇹🇽

Brad Ward
RID-Office of Investigations

Social Media: To Friend or Not to Friend?

Hiring the right employee for a job can be stressful. Employers may have no idea who they are hiring and must rely on the application and interview process to choose the right candidate. Unfortunately, these concerns don't go away once the worker is hired. In many cases, employers feel even more pressure to make sure the employee is not doing anything that could hurt the company.

One seemingly beneficial solution to this problem is to monitor an employee's social media activity. What makes this option so appealing is hearing the stories of employers who have managed to prevent harm to their businesses after discovering their workers engaging in inappropriate, dishonest, or illegal activity via social media. However, before being seduced by these stories, employers should understand how the risks of such monitoring can easily outweigh the benefits.

One of the biggest dangers is exposure to a lawsuit. Yes, social media activity can show inappropriate employee conduct, but it can also reveal information that employers should not know, such as medical conditions, disabilities, relationships, or religious beliefs. Mere employer access to this information is enough to open the door for employees to argue that they were discriminated against because the employer allegedly knew this information.

While employers may think that they are safe because they never actually used this knowledge in their decision-making, the fight against perception is a steep and costly uphill battle. Employers have spent significant time and money to defend their positions, and in many cases, have ended up settling for thousands or even millions of dollars.



Social media activity can show inappropriate employee conduct and can also reveal information that employers should not know.

For that reason alone, anyone who is in the employer lane—owners, managers, and supervisors, for example—should avoid being friends on social media with workers over whom they have actual or perceived control. In fact, this concept should extend beyond that of a social media relationship. Employers should avoid being friends with their employees in general. The reality is that these relationships can create discord within the company, and employees can (and often do) use these friendships against the employer.

If the threat of a lawsuit isn't enough, employers run additional risks when monitoring employee social media activity. A social media friendship adds complexity to the relationship that can blur the boundaries in frustrating ways.

The issues start with the friend request itself. Employers sending friend requests to their employees can place employees in a precarious position; they may want to keep their work and personal lives separate, and a friend request from their boss can place unwanted pressure on

them. This can make employees feel uncomfortable if they decline the request.

If the employee accepts the friend request, they may become wary of discussing work-related issues on social media, which many employers see as a benefit. However, this can cause a chilling effect on an employee's federally protected right to discuss working conditions, resulting in a violation of the National Labor Relations Act (NLRA). For more information on the NLRA, see the following links: texasworkforce.org/news/efte/salary_discussions.html, and texasworkforce.org/news/efte/social_media_issues.html.


Employers should also realize that a social media relationship with their workforce could damage their own images. For one, adding that level of informality to the relationship can cause a decline in the manager's authority. It can also open the door to favoritism and make it difficult to perform crucial tasks, such as providing feedback, enforcing policies, or disciplining workers.

Such a relationship can also damage an employer's image as a leader. The constant evolution of social media platforms makes it difficult to control what content is viewed by the public. Keeping up with these changes is an arduous task, and the changes can be so immediate that no amount of maintenance will completely shield employers from the risk of being connected to an inappropriate post, photograph, or video. For many employers, it is simply not worth it.

Despite this bad news, there is a silver lining. Co-workers are generally allowed to be friends both inside and

outside of the office. If a co-worker brings inappropriate conduct to an employer's attention, the employer may take disciplinary action. In these cases, the co-worker who revealed this information to the employer should write a statement of what happened. The statement should cover the basics: who, what, when, where, and why- the more detail, the better. Employers should also write a similar statement of their involvement with the discovery, preserve the evidence, and place it in the employee's file. This way, employers will have evidence of the social media post and can show that it

was brought to their attention via a co-worker instead of through an authority figure within the company.

While this recommendation may be a disappointing one to hear, remember that the ultimate goal is to protect the business by closing off any roads that may lead to a lawsuit, decreased morale, or loss of credibility. If further clarification is desired, employers may contact the TWC Employer Hotline at **800-832-9394**. 

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



Top 10 Things You Will Learn from attending a Texas Business Conference

Are you an employer, human resource professional, business owner, or manager? Do you have any legal questions associated with employing workers? The Texas Business Conference provides employers with practical, up-to-date information for operating a successful business and techniques to more effectively manage employees. Participants also receive the latest edition of the popular publication, *Especially for Texas Employers*, which addresses basic legal issues regarding hiring, post-employment, and work separation policies.

1. What you should and shouldn't ask applicants before hiring them
2. The essential documents to get new hires to fill out or sign before they do any work
3. The critical differences between employees and independent contractors
4. The most important employee policies that any employer needs to have
5. The worst personnel policies and procedures that every employer must avoid to minimize the risk of claims and lawsuits
6. How to deal with employee injury claims and getting injured employees back to work as soon as possible
7. Which employees can be exempt from overtime pay
8. Which deductions are legal to make from employees' pay
9. How to effectively defend the company if an unemployment claim is filed
10. How to get straight, honest, and confidential help from TWC – at no cost – if you are concerned about an employment problem, employees, or independent contractors

An Employer's Key Role in the Earnings Verification Process



The earnings verification process exists to make sure unemployment benefits are paid out both properly and correctly.

If you are an employer that is involved with unemployment benefits or reimbursements, you have likely received various kinds of correspondence from the Texas Workforce Commission (TWC). This kind of paperwork can consist of unemployment claims, appeal packets, and even audit notices. Another type of document that an employer may receive in its interactions with TWC is an earnings verification form. This form can appear as a “Request for Earnings Information,” or simply as an “Earnings Verification Form.” It is important for employers to be familiar with these forms since they are vital tools in efficiently managing the unemployment insurance system.

Why Earnings Verification?

We frequently receive calls on our Employer Hotline (800-832-

9394) that deal with responding to earnings verification forms. Questions can arise if an employer has not previously dealt with the process before or if the employer needs assistance in determining what information is being requested. However, at its heart, the earnings verification process exists to make sure unemployment benefits are paid out both properly and correctly.

The earnings verification process is also required by federal law. If unemployment benefits are inappropriately paid out, claimants can receive benefits beyond the amount to which they are entitled. This is called an overpayment and can be recouped. However, the Computer Matching and Privacy Protection Act (CMPPA) provides that a state agency must satisfy several statutory requirements before acting on certain types of overpayments. Accordingly, the

earnings verification process is a method that allows TWC to comply with the CMPPA.

How Does an Employer Receive Notice to Verify Earnings?

Before an employer can respond to a request to verify earnings, the request itself has to be generated. For a better understanding of how this occurs, a description of how earnings verification forms get created is helpful.

The Regulatory Integrity Division (RID) is the main department of TWC that manages the earnings verification process. Specifically, the Benefit Payment Control (BPC) Investigations unit of RID analyzes large amounts of unemployment claims data through two automated cross-matching processes.

The first cross-matching process takes place on a weekly basis and compares unemployment claim data to state and national new hire databases. A match will be detected if a claimant was hired during the same week he or she was collecting unemployment benefits.

In addition, TWC has a second cross-matching process that takes place on a daily basis. Referred to as the “Wage Benefit Cross-match,” this process centers mostly on the quarterly reports furnished by employers to TWC. A match will result if the information reveals that the claimant may have earned money during a period where he or she was collecting unemployment benefits.

If a match is identified, an earnings verification form is quickly

mailed to the employer to obtain earnings information. The design of the form is intended to accurately collect the requested information the first time in order to minimize inconvenience to the employer.

Engaging in the Earnings Verification Process

Employers play a pivotal role in the earnings verification process and it all starts with a form being mailed to their doorsteps. Once the employer has received an earnings verification form from TWC, there are two different ways to respond. The “Request for Earnings Information” letter provides instructions for employers to submit the requested information online and is the method of response most encouraged by TWC. The logon page will prompt you to enter the claimant’s social security number and an Access Key (provided on the actual “Request for Earnings Information” letter), so be sure to have those handy. You can visit TWC’s Unemployment Benefits Earnings Verification page here: www.twc.state.tx.us/businesses/

unemployment-benefits-earnings-verification.


Alternatively, an employer can call TWC’s automated system to request a paper “Earnings Verification Form” to submit the information via regular mail if it prefers not to use the online method.

Since a big part of unemployment benefit calculation revolves around wages reported by employers, verifying that information through the earnings verification process is critical. When providing TWC with the information requested on the form, be sure to report the gross earnings in the week the claimant did the work and not the week in which he or she got paid. Another helpful tip when responding to earnings verification requests is to remember that TWC requires earnings to be reported on a Sunday-Saturday basis for each affected week. It is also important to note that the “Request for Earnings Information” letter advises employers to respond within 10 business days.

For further questions or concerns about responding to an earnings verification form, please feel free to

contact TWC’s BPC Investigations unit at **800-950-3592** or **512-372-6161**.

In Sum: It Pays to Verify

The earnings verification process is integral to the unemployment insurance benefits system. By participating in this process, employers actively assist in protecting the unemployment insurance trust fund. Making sure that unemployment benefits are being paid properly can also lead to reduced taxes for employers and possible chargeback reductions. As such, engaging in the earnings verification process is a great way to ensure the smooth flow and administration of the unemployment insurance system. 

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

HRCI

MCLE

Texas SHRM

New Professional Development Credit at Texas Business Conference

Attorneys may receive up to 5.5 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference. Information needed for the credit hours will be made available to all attorneys who sign an MCLE attendance roster at the registration table.

As a co-sponsor with TWC’s Commissioner Representing Employers, Texas SHRM offers SHRM and Human Resources Certification Institute (HRCI) recertification credits, targeted specifically for human resource professionals attending the conferences. Certificates for the Texas SHRM Professional Development Credits will be handed out to those attending the Texas Business Conference (TBC). For more information on how to apply for these professional development credits upon attending a TBC, please visit the Texas SHRM website.

In addition, certified public accountants who attend can earn continuing education credit hours and other conference participants may qualify for general professional credit.

Service Animals and the ADA



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The ADA defines a service animal as a dog that is individually trained to do work or perform specific tasks.

Pets provide their owners with companionship, affection, and, in some cases, even beneficial therapeutic effects. For purposes of the Americans with Disabilities Act (ADA), it's important to learn which animals properly fit the category of "service animals."

Service Animal Defined:

Title III of the ADA, which applies to public accommodations, defines a service animal as a dog that is

individually trained to do work or perform specific tasks for people with disabilities. Some examples of the work these dogs perform include guiding visually impaired people within their surroundings, alerting deaf people to hazards, reminding persons with mental illness to take their medication, and helping individuals who are at risk for falls. www.ada.gov/service_animals_2010.htm.

The ADA does not require that service animals wear vests or specific

identification designating them as service animals. Furthermore, certification and registration that the dog has been trained as a service animal is not required. However, they are still subject to vaccination requirements and all local dog licensing and registration provisions.

Comfort Animal Defined:

In addition to the services for which they were trained, most service dogs also provide their owners with other intangible benefits, such as companionship, love, and affection. However, a dog whose sole function is comfort or emotional support is not considered a service animal under the ADA.

While dogs may help the well-being of people struggling with mental illness, there is a distinction between service animals and emotional support animals. For example, if a dog has been trained to sense that an anxiety attack is about to happen and takes specific action to avoid the attack or lessen its impact, then that dog is a service animal. However, if the dog's mere presence provides a sense of safety, comfort, or calm to an individual who suffers from anxiety, the dog is not a service animal under the ADA. The difference between the two is the specialized training that the dog has received to perform explicit tasks related to a person's disability.

Service Animals in Areas Open to the General Public:

Entities that serve the public, e.g. state and local governments, for-profit and non-profit businesses, must allow service animals in areas

where the public is allowed. Under the ADA, entities can insist that the animals be harnessed or leashed, unless this interferes with the animal's work duties. Regardless of whether the animal is secured or restrained, the dog's handler is responsible for the dog's behavior and must maintain control at all times.

When it's not obvious what service the dog provides its owner, an entity may ask: 1) if the dog is a service animal required due to a disability, and 2) what work or task the dog has been trained to perform. However, one can't ask about an individual's disability or medical condition, or require medical documentation of a disability. In addition, the ADA prohibits asking for proof of the dog's training. Likewise, businesses can't require that dogs be registered as service animals as a condition of being permitted in public areas. Such a requirement would violate the ADA.

If company employees have allergies or fear of certain dog breeds, under the ADA, potential allergic reactions and generalized fears are not valid reasons for denying access or refusing service to people using service animals. Entities facing these situations should try to accommodate both its employees and the individuals requiring service dogs. However, businesses can request that service animals be removed from their premises if the dogs are not housebroken, or if the handlers don't have effective control of animals that pose a direct threat to the safety of others.

For more information about service animals in Texas, please visit the Texas Workforce Commission at: www.twc.state.tx.us/jobseekers/tips-tools-about-service-animals.

Service Animals and Requests for Workplace Accommodation:

Under Title I of the ADA, which deals with employment, employers with 15 or more employees must provide reasonable accommodation to employees with disabilities, unless doing so would impose an undue hardship on the employer. See our article in the 3rd Quarter 2016 issue of this newsletter: www.twc.state.tx.us/files/twc/texas-business-today-3rd-quarter-2016-twc.pdf.

According to the Equal Employment Opportunity Commission (EEOC), allowing an employee to bring a service animal to work may qualify as a reasonable accommodation for an individual with a disability. Because Title I of the ADA does not define "service animal," employers should address a request for a service or comfort animal just like any other accommodation request.

Under the ADA, employers can request documentation that a certain accommodation is needed. Documentation is important as it informs the employer of an employee's specific needs and assists the employer with ADA compliance. Furthermore, employers have the right to require that animals be fully trained and capable of functioning appropriately in the employer's work settings to avoid disruptions in the workplace and unnecessary safety risks to other employees.

Because there is no one-size-fits-all approach to an individual's request for accommodation, employers should do their best and, of course, document



Photo by iStock/Thinkstock

Regardless of whether the animal is secured or not, the dog's handler is responsible for the dog's behavior.

the process. The Job Accommodation Network is a great resource for employers with questions about providing reasonable accommodation to its employees: <https://askjan.org/>.

Conclusion:

Animals of all types may provide therapeutic benefits and contribute to the well-being of those with and without disabilities. However, a business entity's compliance with the ADA relies on properly identifying the animal in question as a "service animal." 🇺🇸

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

Business and Legal Briefs

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



Photo by iStock/Thinkstock

Expect increased attention to protecting whistleblowers.

Update on the New Minimum Salary Regulations

As many of you have heard by now, in the case of *State of Nevada, et al v. U.S. Department of Labor, et al*, (No: 4:16-CV-00731), the federal district court in Sherman, Texas has issued a nationwide injunction against enforcement of the Department of Labor’s (DOL) new overtime rule, which would have increased the minimum salary for a white-collar overtime exemption (executive, administrative, professional, or computer professional employee) from the current level of \$455/week by over 100% to a new minimum of \$913/week, up to 10% of which could have consisted of bonuses and/or commissions if non-discretionary and paid at least

quarterly. The new regulations would have also increased the minimum salary for a “highly-compensated employee,” which has an easier duties test to meet, to \$134,004 per year. DOL’s official announcement on the injunction and its appeal to the 5th Circuit Court of Appeals is at the following link: www.dol.gov/whd/overtime/final2016/litigation.htm. The court ruled that the drastic increase in salary was so high that it effectively deleted the duties test for the exemption, which was inconsistent with the intent of Congress when the law was first passed many decades ago. The court also held that the rule’s provision for automatic increases in the minimum salary every three years exceeded the agency’s authority. The bottom line is that as a result of the court ruling, employers do not have to do anything to increase anyone’s salary at this time. On December 8, 2016, the 5th Circuit court announced that it would expedite the appeal and hold a hearing sometime toward the middle of February 2018. As far as next steps for the salary increase are concerned, it is unknown if the new administration will want to continue the appeal process in court, and another open question is whether a new Secretary of Labor would try to reissue a salary-related regulation, at least in the immediate future. Since that issue could be revisited at any time, and court actions can be difficult to predict, it would be a good idea to frequently check the latest developments on the U.S. Department of Labor’s Wage and Hour Division website at www.dol.gov/whd/.

What Can Employers Expect in 2017?

Although predicting future events is notoriously tricky, many employment law attorneys are expecting the following for their employer clients in 2017:

- More debate about an increase in the minimum wage: some in Congress want to raise the federal minimum wage to \$10.10 or even \$15.00 per hour, and many states have been considering their own increases in the state minimum wage. In Texas, several bills increasing the Texas minimum wage to \$10.10 or \$15.00 per hour have been filed as of the end of 2016.
- Higher risk of compliance audits: Agencies such as the Equal Employment Opportunity Commission (EEOC) and DOL added hundreds of investigators in the past several years, and the residual effects of programs developed to increase compliance and audit activity will continue to mean that employers must try their utmost to stay abreast of developments in workplace laws and stay on the right side of their employees, at least to the extent possible.
- Increased attention paid to protecting whistleblowers and others who file employment-related claims or complain about working conditions: The National Labor Relations Board (NLRB), EEOC, OSHA, and the Wage and Hour Division of the U.S. Department of Labor



An employee on FMLA leave due to medical inability to work does not meet the eligibility requirement that applies to all UI claims.

have all stepped up their efforts to minimize retaliation against those who bring workplace problems to light.

- U.S. Supreme Court ruling on transgender restroom access: although the case on appeal has to do with a challenge by several states to U.S. Department of Education guidance for schools and students, the ruling may influence other courts when it comes to similar issues affecting employees' workplace rights.
- More difficulty in competing for the best talent: The younger workers entering the workforce now have an easier time imagining themselves spending less time in particular jobs than their older counterparts did 10, 20, and even 30 years ago. Employers must be ready with innovative ways to attract, motivate, and retain the best employees for their customers.

New Guidance from EEOC on National Origin Discrimination

EEOC has issued some very detailed and updated guidance on how it implements Title VII's prohibition on national origin discrimination. The guidance document features many useful examples of discrimination based on an applicant's or employee's national origin, and the extremely detailed footnotes include listings and descriptions of many court decisions illustrating how national origin discrimination might occur and how an employer might avoid such liability. Reading the guidance is like taking an entire HR course on the subject. Employers can access the new guidance online at www.eeoc.gov/laws/guidance/national-origin-guidance.cfm.

No Unemployment Benefits for Employee on FMLA Leave

In the case of *Texas Workforce Commission v. Wichita County*, 02-15-00215-CV, 2016 Tex. App. LEXIS 13046 (Tex. App.-Fort Worth, December 8, 2016), the court ruled that a county government employee who was on FMLA leave could not draw unemployment benefits while on FMLA leave. The court reasoned that since FMLA leave is job-protected, and the employment relationship does not end during the period covered by FMLA leave, the claimant was not "unemployed" to the point where she could file a valid UI claim. In addition, an employee on FMLA leave due to medical inability to work does not meet the eligibility requirement that applies to all UI claims (i.e., a claimant must be medically able to work while filing UI benefit claim certifications). Finally, the court found that paying an employee who is on FMLA status unemployment benefits is incompatible with the FMLA's provision stating that FMLA leave does not have to be paid. 🇹🇽

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

Texas Legislation: 85th General Session – 2017

(all bills effective September 1, 2017 unless otherwise noted)

The 2017 general session of the Texas Legislature will extend from January through the end of May 2017. It will be very important for Texas employers 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 the end of 2016. The list is organized into subject areas and shows the bill number, the sponsor, and the bill caption indicating the subject matter of the bill (companion or similar bills may be shown together):

Civil Rights – Discrimination

HB 192	Bernal, Diego	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 225 SB 165	Johnson, Eric Rodriguez, Jose	Relating to the prohibition of employment discrimination based on sexual orientation or gender identity or expression.
HB 228 SB 223	Thompson, Senfronia Menendez, Jose	Relating to unlawful employment practices regarding discrimination in payment of compensation.
HB 258	Anchia, Rafael	Relating to a prohibition on the award of a state agency contract to a person in a state with laws allowing or requiring discrimination based on sexual orientation or gender identity or expression.
HB 290	Johnson, Eric	Relating to a prohibition on sex discrimination in compensation.
SB 92	Hall, Bob	Relating to prohibition of certain regulations by a county, municipality, or other political subdivision.
SB 165	Rodriguez, Jose	Relating to the prohibition of certain discrimination based on sexual orientation or gender identity or expression.
SB 296	Hinojosa	Relating to the liability of the state for a violation of the federal Americans with Disabilities Act.

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Employee / Family Leave

HB 88	Martinez, Armando	Relating to an unlawful employment practice by an employer whose leave policy does not permit an employee to use leave to care for the employee's foster child.
HB 629	Howard, Donna	Relating to leave for certain veterans obtaining medical and mental health care.
HB 656	Minjarez	Relating to employment leave for certain family or medical obligations.
HB 718	Wu, Gene	Relating to family care leave for certain employees.
SB 73	Nelson, Jane	Relating to leave policy and procedures for state employees.
SB 191	Garcia, Sylvia	Relating to the ability of a nonexempt employee to participate in certain academic, disciplinary, college and career readiness, and developmental activities of the employee's child or grandchild.
SB 285	Watson, Kirk	Relating to the right of an employee to time off from work to obtain an election identification certificate.

Human Resources – General

HB 252	Hernandez, Ana	Relating to the requirement that certain employers provide advance notice of employee work schedules.
HB 317 (see also HB 334)	Canales, Terry	Relating to the consideration by certain employers of the consumer credit reports of certain employees and applicants for employment.
HB 329	Gonzalez, Mary	Relating to breast-feeding policies of state agency worksites.
HB 334 (see also HB 317)	Collier, Nicole	Relating to the consideration by employers of the consumer credit reports or other credit information of employees and applicants for employment.
HB 548 (contrast with HB 577)	Deshotel, Joe	Relating to the consideration of criminal history record information regarding applicants for employment.
HB 568	Israel, Celia	Relating to authority for certain state employees to work flexible hours and to work from home or other authorized alternative work sites.
HB 577 (contrast with HB 548)	Workman, Paul	Relating to the authority of a political subdivision to adopt or enforce certain regulations regarding whether a private employer may obtain or consider an employment applicant's or employee's criminal history record information.
SB 75	Nelson, Jane	Relating to the requirement for parental consent for a minor to join a labor union.
SB 279	Zaffirini, Judith	Relating to expression of breast milk in the Capitol and other public buildings.

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SB 369	Garcia, Sylvia	Relating to the right of a public employee to representation in certain internal investigatory interviews.
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Immigration / E-Verify

SB 23 SB 254	Schwertner, Charles Seliger, Kel	Relating to requiring state contractors to participate in the federal electronic verification of employment authorization program, or E-verify.
SB 85	Hall, Bob	Relating to the verification of employment authorization by state contractors and state grant recipients, including the use of the federal E-verify program, and to authorization for the suspension of certain licenses held by private employers for the knowing employment of persons not lawfully present in this state; authorizing a fee.

Pay / Benefits / Wages and Hours

HB 202	Gonzalez, Mary	Relating to a database of employers penalized for failure to pay wages or convicted of certain offenses involving wage theft.
HB 253	Hernandez, Ana	Relating to the period during which an employee may file a claim for unpaid wages with the Texas Workforce Commission.
HB 285 HB 475	Alonzo, Roberto Reynolds, Ron	Relating to the minimum wage. (\$15/hour or federal minimum wage, whichever is higher)
HB 326	Canales, Terry	Relating to the payment of gratuities to certain employees.
HB 373	Romero, Ramon, Jr.	Relating to administrative penalties assessed by the Texas Workforce Commission against certain employers for failure to pay wages.
HB 510 SB 13	Davis, Sarah Huffman	Relating to payroll deductions for state and local government employee organizations.
SB 70	Zaffirini, Judith	Relating to the required earnings statement provided by employers.
SB 229	Menendez, Jose	Relating to the minimum wage. (\$10.10/hour or federal minimum wage, whichever is higher)

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Public Accommodations

HB 192	Bernal, Diego	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.
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Regulatory Integrity / Enforcement / Criminal Penalties

HB 563	Israel, Celia	Relating to whom certain violations of the law by a state or local governmental entity may be reported.
HB 665	Canales, Terry	Relating to the requirement that contractors verify compliance with wage payment laws in contracts with public bodies.
SB 283	Watson, Kirk	Relating to the offense of unlawfully prohibiting an employee from voting.

Unemployment Insurance

HB 230	Canales, Terry	Relating to the eligibility of school bus drivers for unemployment compensation benefits.
HB 463	Dale, Tony	Relating to the disqualification from receiving unemployment benefits of certain individuals who are terminated from employment after giving notice of resignation.

Workforce Miscellaneous

HB 92	Guillen, Ryan	Relating to the entitlement of spouses of certain veterans with disabilities to a veteran’s employment preference.
HB 108	Alvarado, Carol	Relating to the creation of the Recruit Texas Program to facilitate the relocation to or expansion in this state of employers offering complex or high-skilled employment opportunities.
HB 148	Schaefer, Matt	Relating to electronic benefits transfer cards used for recipients of benefits under certain assistance programs.
HB 436 SB 268	King, Ken Nelson, Jane	Relating to the drug testing of certain persons seeking benefits under the Temporary Assistance for Needy Families (TANF) program.
HB 595	Workman, Paul	Relating to a franchise tax credit for entities that employ certain students in certain paid internship or similar programs.

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Frequently-Asked Questions From Employers Answered

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

Q: *I need help with credit card reward points. We have many employees that have a company credit card used only for company purchases. There is a reward point system linked to the credit cards. Do these points belong to the company to use, or do they belong to the individual employees?*

A: Texas and federal laws do not directly address the issue of ownership of credit card points or the value of loyalty programs. As a general matter, the following things would apply:

1. The points belong to the owner of the credit card used to accrue them.
2. They do not belong to an agent of the owner, such as an employee.
3. The employees are using a credit card for which the employer has financial responsibility.
4. The employees are using the card for work-related purposes, while on company time.
5. Many companies apply the points accrued to work-related purchases in the future.
6. All that having been said, a company can certainly choose to allow individual employees to accrue points and use them for personal benefit. That would be a matter of company policy.
7. Of course, a company should be as clear as possible in its credit card policy regarding acceptable and unacceptable use of the cards, and regarding what, if anything,

happens to points accrued under customer loyalty programs. Your company might want to see whether the sample company credit card policy online at www.texasworkforce.org/news/efte/company_credit_cards.html would help deal with these issues.

Q: *Do employers have the option to give or not to give pay stubs to employees who get direct deposit?*

A: Under current Texas law, pay stubs are optional, but are recommended based on the fact that a well-designed and informative pay stub tends to settle pay-related questions before they arise. You can find more about pay stubs in the following topic in our book *Especially for Texas Employers*: www.texasworkforce.org/news/efte/delivery_of_wages.html (third paragraph). By the way, most companies that use direct deposit for paying employees send the employee an electronic earnings statement / pay stub via e-mail, or else have it on a company intranet site.

Q: *If an employer has pay day posted, can they delay the pay day by one day due to a holiday?*

A: A posted pay day can be delayed until the next regular business day if it falls on a day that the company is not normally open for business. That might be a Saturday, a Sunday, or a holiday on which the office is closed—see the second paragraph of the following topic in the book: www.texasworkforce.org/news/efte/

[frequency_of_pay.html](#).

Q: *We recently fired an employee. He had a company vehicle that he took home that we picked up yesterday evening. He had some personal items in the vehicle (dirty clothes and so on) that he was unable to get out before we gained possession of our truck. We contacted him this morning (on our company phone which he is using as his personal phone right now) to meet to finalize everything and get our company property returned (cell phone, cell phone charger, work tools, five company shirts, and a truck ice chest). At first, he did not respond, but now he is refusing to come by the office to meet and exchange property; instead, he is demanding that we return his ‘stolen property’ to his home. Is it unreasonable that we are saying he must come to the office to pick up his stuff, return our property, and when all property is returned in good working order, we will provide his final paycheck?*

A: The employee’s duty to return your company’s property is separate from your duty to pay him on time. This agency would have no authority to require him to do the right thing, but if he files a wage claim for non-payment or late payment of wages, it would have the authority to penalize your company for not paying him on time. Your company must ensure that he gets his final pay within six calendar days of the date on which he was fired. The benefit to your company of avoiding the hassle of a wage claim would be worth



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Final pay deadline for an employee who was involuntarily separated from employment is 6 calendar days from the date of discharge.

almost anything you might have to do (within reason) to avoid it, so arrange a meeting to give him his final pay in front of a witness, and when you give him his check, ask him in as civil a manner as possible to return the company property. If he fails to return the company property, you would have the right to contact law enforcement.

Q: *My company discharged a problem employee. She is demanding her paycheck and W-2 immediately. At a Texas Business Conference (see www.texasworkforce.org/tbc), I heard that I have six (6) calendar days to get her the last check and I assume the W-2 can be processed when I process the rest. Do I also have to pay her for her accrued vacation leave?*

A: You heard correctly about the final pay deadline for an employee who was involuntarily separated from employment – your company has six calendar days from the date of discharge to give her the final pay. That deadline does not apply to a W-2 – the W-2 for that employee can be sent out at the same time that the company sends out the W-2s for all of the other employees. If she gets upset about that, refer her to the local office of the IRS

and suggest that she give them a call. Concerning a payout for her accrued vacation leave, that is required only if your company has a written policy that promises such a payment. Without a written policy, it is not required to pay an employee for any unused vacation.

Q: *I have an employee that turned in her resignation yesterday with her last day being December 30. That is a four-week notice. We want to pay her for the full four weeks, but release her now. Do we have to wait until she only has two weeks left before we can release her (with pay)? I remember there was a rule for this, but I cannot find it.*

A: There is nothing under general Texas or federal employment law that would prevent your company from accepting the employee's notice anytime within the notice period at your convenience. In unemployment claims, TWC follows a general principle known as the "two-week notice rule." Detailed information on how TWC implements that rule is in our book at www.twc.state.tx.us/news/efte/types_of_work_separations.html#2-weeknotice.

To increase the chance that TWC will call an early acceptance of the notice a resignation, instead of treating it like a discharge, be sure to use wording consistent with resignations, such as "We've decided that you will not need to work out the entire notice period. We'll just go ahead and accept your resignation effective today." Accepting the notice more than two weeks out, but paying the employee through the end of the notice period, has the effect of preserving the voluntary nature of the resignation. 🇺🇸

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Texas Business Today

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