

Third Quarter 2017

Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

Telecommuting: Will it Work for Your Business?

Missing an Unemployment Hearing ■ Disciplinary Actions ■ FAQs from Employers

Future Talent Pipeline a Priority for Employers

Commissioner's Corner

Dear Texas Employer,

Welcome to the 3rd quarter of *Texas Business Today*! We wrapped up last quarter with National Small Business Week, and I would like to thank the small businesses that participated in all of the events across the state of Texas. The Texas Workforce Commission (TWC) appreciates our Texas employer's hard work in starting and growing businesses in the Lone Star State. We have had a busy last quarter, and I would like to share a few highlights.

Collaboration with employers and colleges through our Skills Development Fund (SDF) Grant continues to play a big role in the success and growth of Texas. I presented six SDF grants to colleges partnering with local employers totaling in the amount of over \$2,600,000. These grants also created 344 new jobs and upgraded the skills of 1600 workers. Our SDF grant is just one of the premiere job-training programs that continues to give Texas that competitive edge. For more information, please visit: www.twc.state.tx.us/partners/skills-development-fund.

We recognize the need to allow students an opportunity to explore career options earlier. Workforce Solutions Coastal Bend in Corpus Christi hosted its first Youth Opportunities Unlimited (YOU!) Career Expo, and Workforce Solutions for the Heart of Texas hosted their 10th annual Youth Employment Solutions (YES!) Expo, which provided youth with a clear understanding of career opportunities from local employers in high-demand occupations. It was a pleasure to attend these milestones, and I want to


congratulate them on their successes.

To continue these efforts, TWC in partnership with 28 local workforce development boards and Tri-Agency partners, will host statewide career exploration events for middle and high school students on September 25-30 as a part of Careers in Texas Industries Week. The week is designed to increase awareness among students, parents and counselors about the opportunities of in-demand careers in Texas industries. The events will enable students to explore careers and provide employers with opportunities to showcase the exciting and rewarding careers in their industries. I want to encourage our Texas employers to participate in our Careers in Texas Industries Week to educate our students about the diverse range of career opportunities and the skills needed to acquire these jobs. Reaching out to the talent pipeline of the future is key to keeping our Texas economy strong, and this event will pave the way for our youth to contribute to the economic sustainability of our great state. For more information, please visit: <http://www.twc.state.tx.us/partners/careers-texas-industries-week>.

In July, TWC partnered with the Texas Veterans Commission and Texas Workforce Solutions Offices to announce the "We Hire Vets" employer recognition program to recognize Texas employers for their commitment to hiring veterans. Through this program, employers whose workforce is composed of at least 10 percent military veterans are eligible to receive a "We Hire Vets" decal to display on the employer's storefront as well as an electronic decal to display on the employer's website. Veterans bring a level of leadership, integrity, and honor to a company that will strengthen



any business. For more information on the "We Hire Vets" employer recognition program or to download the "We Hire Vets" nomination employer form, visit www.twc.state.tx.us/jobseekers/texas-operation-welcome-home.

In this issue of *Texas Business Today*, we will take a look at some recommended polices and best practices which will assist employers in avoiding some of the common mistakes in the workplace. My office is committed to being a number one resource for Texas employers. Please do not hesitate to contact us if you need assistance. We will continue to work diligently and respond to your workforce needs. 

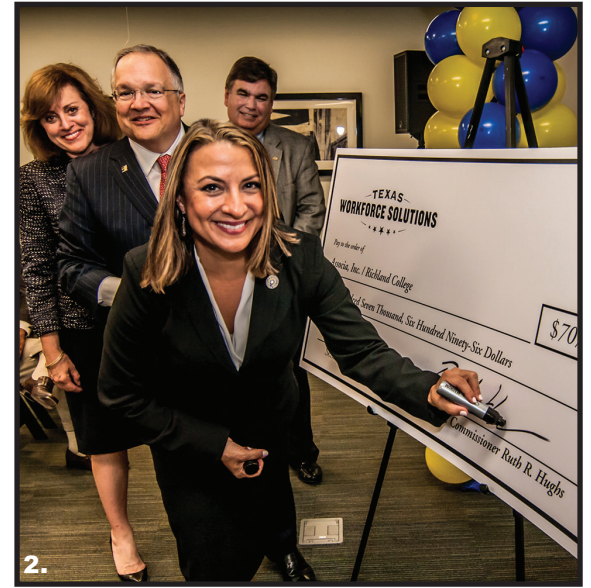
Sincerely,

Ruth R. Hughes
Texas Workforce Commission
Commissioner Representing Employers

Making Connections Across the State



1.



2.



3.



4.



5.



6.

1. Taking a tour of the Corpus Christi Naval Air Station with local leaders of Corpus Christi, TX to learn about the support and service they provide for the area.
2. Check presentation at Associa Inc. in Richardson, TX in partnership with Richland College.
3. Announcing partnership between the Texas School for the Deaf and Austin Community College to provide support and funding for dual-credit programs.
4. We had a special visit from our Workforce Solutions Borderplex mobile unit at our Texas Business Conference in Alpine, Texas.
5. Pictured with the winners at the Small Business Awards Ceremony in San Antonio, TX during National Small Business Week.
6. It was a privilege to sit on the 2017 Greater San Marcos Economic Outlook Panel to discuss the rapid growth of their area.
7. Visiting the Center for Education and Economic Development facility located in Brownsville, TX.





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.

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, or 11 hours for the two-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

Lubbock..... August 25

GalvestonSeptember 8

San Antonio.....September 14-15



To register, visit

www.texasworkforce.org/tbc

or for more

information call 512-463-6389.

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Is Telecommuting an Option?

By Elsa G. Ramos

Legal Counsel to Commissioner Ruth R. Hughs

Working from home sounds like a great idea to many employees. Not only are they able to avoid the grind of the daily commute and work in their pajamas if they so choose, but the time invested in traveling to and from work is now free and available to be used in other pursuits. With the current advances in technology, many employers find that they are now able to provide employees with the opportunity to work from home, or telecommute. However, before employers seriously contemplate offering their employees the option of performing all or part of their work from home, they should first consider some factors in order to successfully implement a telecommuting plan.

Time Tracking

Employers are required to accurately track and record employees' worktime in order for non-exempt employees to be paid at least minimum wage and overtime in compliance with the Fair Labor Standards Act (FLSA). It comes as no surprise that tracking the work time of an employee working remotely may prove to be a challenge. Employers have more flexibility with employees who are exempt from overtime requirements and may find it easier to provide a satisfactory telecommuting arrangement for their salaried exempt employees, depending on their job duties. For more information on employee recordkeeping requirements, see our employer handbook, *Especially for Texas Employers*: http://www.twc.state.tx.us/news/efte/recordkeeping_general.html

However, if employers wish to have hourly employees telecommute, employers will need to consider



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With the current advances in technology, many employers find that they are now able to provide employees with the opportunity to work from home, or telecommute.

how to accurately keep track of work time. Software applications exist that allow employers to track an employee's computer work and usage, and such a system may suffice. Scheduling teleconferences and video conferences throughout a work shift, requiring that emails be answered within a short and specific period of time, or using webcams to document daily work performance, can all assist employers in ensuring that employees who work away from the office or job site are available and accessible as required by the employer.

In addition, having specific work schedules and clear worktime policies will help control unnecessary or unauthorized overtime. Regardless of the system or method an employer chooses, having a plan in place before any telecommuting work is done will help manage an employee's expectations and avoid potential FLSA problems in the future.

Quality Control

Having employees carrying out the majority of their assigned duties from home can be great for employee morale, but it may make it harder for employers to stay abreast of the quality of the work output depending on the type of work performed. For this reason, employers should ensure that they have a system in mind for monitoring the quality of telecommuters' work. This could consist of regular reports outlining work progress and milestones reached, or scheduled visits to the worksite to perform some of the job duties onsite under supervision. Managers could then monitor the quality and quantity of the work performed to ensure that the output meets the employer's expectations.

It's easy for telecommuters to become isolated working from home and to feel insulated from the rest of their co-workers. This could lead to a loss of the sense of teamwork and accountability that often accompanies working together with

others. It will be up to employers to draft a telecommuting game plan that preserves an employee's sense of duty to perform good work, while providing an atmosphere of collaboration and cooperation with co-workers, without sacrificing the flexibility that telecommuting offers.

Employee Injuries

Texas employers have the option of providing Workers' Compensation insurance for its employees. Workers' Compensation provides medical benefits, income benefits, and death benefits to employees who were injured on the job, regardless of who was responsible for the injury, if the injury was sustained during "the course and scope of employment." Read more about Workers' Compensation in our employer handbook, *Especially for Texas Employers*: www.twc.state.tx.us/news/efte/workers_compensation.html.

Employers who allow employees to telecommute should be aware that if employees are injured at home while on the job, they could be looking at a Workers' Compensation claim even if the injury did not occur at the employer's normal work premises. And while employers will not be able to completely control and prevent employee accidents, employer involvement in the design and execution of a telecommuter's home-based work area could help minimize such claims. Employers can set specific guidelines for designated work spaces and can provide training related to safety in the workplace, including pointers for establishing safer work layouts.

Employers who are not covered by Workers' Compensation run the risk of personal injury lawsuits from employees who are injured on the job, including telecommuters.

Security Concerns

Employers nowadays handle and store a lot of data, including personally identifiable or privileged

information of clients or customers, as well as confidential information of the company and the company's employees. If telecommuters are to access this type of information during the performance of their day-to-day work, employers should institute some form of security plan to safeguard this information.

Some issues to consider: Are employees allowed to store this information on their devices at home, or to transport this information on portable storage devices? Who should be able to access this information? Should this information be communicated in emails? If employees travel with their devices, what security measures are in place on their work computers, phones, etc.? Who has access to passwords and how often are these passwords changed? Do non-employees have access to the devices or the information?

This is hardly an exhaustive list, but simply illustrates the point that certain information security safeguards that are taken for granted at the employers place of business need to be considered and possibly expanded for those who telecommute. For tips on avoiding security risks, see www.flexjobs.com/employer-blog/employers-can-avoid-telecommuting-security-risks/.

So Why Do It?

Telecommuting offers employees the opportunity for more flexibility and autonomy in their work—two factors which tend to increase employee morale and job satisfaction. And let's face it: rolling out of bed and working in pajamas is pretty hard to beat.

But the advantages don't stop there; employers also benefit from employees who perform all or part of their work from home. According to some studies, telecommuting employees had higher productivity at work and an increase in work quality overall, possibly because

they appreciated the option to work from home and the greater freedom it afforded them. Offering telecommuting options may also act as a recruitment and retention tool, assisting employers to attract and keep quality employees.

Furthermore, telecommuting could reduce employer costs, thereby boosting a business' bottom line. For example, GlobalWorkplaceAnalytics.com estimates that a "typical business would save \$11,000 per person per year." And for employers concerned with their environmental impact, telecommuting potentially benefits the environment by helping to lower carbon emissions. For statistics and more information on telecommuting benefits, see: www.newsroom.cisco.com/press-release-content?articleId=5000107 and <http://globalworkplaceanalytics.com/telecommuting-statistics>.

Conclusion

Overall, both employers and employees may benefit from telecommuting. While some jobs may never be able to be performed away from the work site, for the many employers offering positions which are now able to be carried out away from the office, telecommuting may be a viable option. However, the key to a successful telecommuting venture is for employers to prudently consider the various factors involved and to develop a plan addressing them before fully embracing the concept of working from home. 🇺🇸

Are you an employer?

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Employers can:

- Recruit and train candidates
- Diversify talent pool
- Fill in-demand jobs
- Build your workforce pipeline

TXInternshipChallenge.com

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In Texas Industries Week

September 25-30, 2017

#TXCareers

Promote your industry!

Careers in Texas Industries Week encourages students to explore careers, understand in-demand industry clusters, network with professionals, and pursue internships.

Learn more:

texasworkforce.org/careerstxindustries



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LEX FRIEDEN EMPLOYMENT AWARDS

The Governor's Committee on People with Disabilities seeks nominations to recognize employers who consistently go above and beyond to hire Texans with disabilities. Self-nominations are encouraged.

NOMINATION FORM: https://gov.texas.gov/organization/disabilities/awards/employment_awards

**NOMINATION
DEADLINE:
August 31, 2017**



QUESTIONS CALL 512-463-5739 OR EMAIL: GCPD@GOV.TEXAS.GOV

Exploring Good Cause for Missing an Unemployment Hearing

By Mario R. Hernandez

Legal Counsel to Commissioner Ruth R. Hughs



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If an employer fails to attend a scheduled unemployment appeal hearing, its unemployment tax account could be affected. However, if the employer had good cause for missing the appeal hearing, it could succeed in re-opening the case.

Employers in our great state undoubtedly have many tasks to complete and customers to serve on a daily basis. Not only do employers have to oversee that the workers of their companies are performing at satisfactory levels, but they are also responsible for ensuring that the administrative side of their operations are given proper attention. For many employers, one of those administrative operations includes handling an unemployment claim. If an employer fails to attend a scheduled unemployment appeal hearing, its unemployment tax account could be affected. However, if the employer had good cause for missing the appeal hearing, it could succeed in re-opening the case.

How Does the Issue of Good Cause Arise for an Employer?

The journey of an unemployment claim can take many twists and turns. When a job separation occurs, a former employee may file an unemployment claim with the Texas Workforce Commission (TWC). After the claim gets processed, the parties involved in the claim receive a determination on whether the claimant is entitled to unemployment benefits. If the determination has awarded the claimant benefits, the employer may file an appeal to the determination with the Appeal Tribunal.

After the appeal has been filed, the parties involved will receive an appeal hearing packet, which notifies the

parties when the appeal will happen, what time to call in for the hearing, and instructions for preparing for the appeal hearing. If a party fails to attend or is late to the hearing, the party will not be allowed to participate, and a decision will be rendered based on the evidence available to the hearing officer (which could include sworn testimony from the opposing party if it showed up properly for the hearing).

Under these circumstances, when the non-appearing party receives the appeal tribunal decision, it may wish to appeal the decision. This type of appeal is called a Rule 16 appeal, and usually results in a new hearing being set. The first issue that will be explored will be why the party failed to appear at the previous appeal tribunal hearing.

What Constitutes Good Cause for Missing an Appeal Hearing?

As mentioned, the first issue to be discussed during a Rule 16 hearing is whether or not a party had good cause to miss the prior Appeal Tribunal hearing. Whether the party had good cause to miss the hearing will deal largely with the reason given for the non-appearance.

Generally speaking, a party has a good chance for success in re-opening the case if it can demonstrate that its non-appearance was due to circumstances beyond its control. For instance, if a party does not receive written notice with the time and date for the Appeal Tribunal hearing, the party will have good cause for its failure to participate (see MS 30.00 Case No. 1679010 in TWC's Appeals Policy and Precedent Manual). In addition, if a party's chosen representative is prevented from participating in the hearing due to an unforeseen medical emergency, good cause will likely be found (see MS 30.00 – MS 30.00(2) Case No. 201718 in TWC's Appeals Policy and Precedent Manual).

However, there are also situations where a party will not have good cause for its non-appearance. For example, a party will not have good cause for missing an appeal hearing if the reason for the non-appearance was due to incorrectly recording the date or time of the hearing on one's personal calendar (see MS 30.00(3) Appeal No. 95-004107-10*-032796 in TWC's Appeals Policy and Precedent Manual). Similarly, a party that fails to appear for an appeal hearing due to misreading the hearing notice will generally not be found to have good cause for its non-appearance (see MS 30.00(4) Appeal No. 89-08533-10-081189 in TWC's Appeals Policy and Precedent Manual, *see also*: Appeal No. 93-012042-10*-082093 holding that "if a party's misreading of a hearing notice is a reasonable error and the party makes a good faith effort



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In addition, if a party's chosen representative is prevented from participating in the hearing due to an unforeseen medical emergency, good cause will likely be found.

to participate after discovering the error, the party will have good cause to reopen under Commission Rule 16," in TWC's Appeals Policy and Precedent Manual).

While the above mentioned precedent cases highlight common scenarios involving good cause, it is not an exhaustive list. For more information on these precedent cases, and other TWC precedent cases (including others dealing with good cause), please visit www.twc.state.tx.us/unemployment-benefits-appeals-policy-precedent-manual.

Did You Know?

Sometimes, employers confuse the concepts of good cause for missing an unemployment hearing with the timeliness of an appeal. The former situation happens when a party does not attend a scheduled Appeal Tribunal hearing, and the latter situation occurs when a party simply does not appeal by the deadline listed on a decision. It is important for employers to understand both scenarios because good cause explanations can be persuasive for a party's non-

appearance, but will not be persuasive if the issue relates to an untimely appeal, as there are no good cause exceptions to the timeliness rules.

In Conclusion

It is inevitable that emergency situations will pop up from time to time, or that intervening events will cause unpredictable upheaval in a person's schedule. It might further be the case that such events could happen during a time an employer is scheduled for an unemployment hearing. As a result, employers should be familiar with the types of circumstances that constitute good cause for missing an unemployment hearing in case a non-appearance is unavoidable. 🇹🇽

Disciplinary Action: Options and Consequences

By **Velissa R. Chapa**

Legal Counsel to Commissioner Ruth R. Hughs



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Employers have a variety of disciplinary options at their disposal for employees who break the rules.

Throughout history, humans have relied upon common myths when making decisions. For example, during the late 19th and early 20th centuries, tobacco company advertisements stated that their products were “physician tested” and that smoking cigarettes could relieve asthma, cough, and fever. In fact, one “health cigar” from a 1930 advertisement even promised to *remove* toxic and cancer-causing chemicals with each inhale.

The result was the creation of a widespread myth that smoking was healthy, and many who smoked in response were devastated when they discovered that smoking harmed them. The painful lessons learned were that relying on myths hurt us and that actions had consequences.

These same lessons also apply to the world of unemployment claims. Employers have a variety of disciplinary options at their disposal for employees who break the rules. However, each option comes with

consequences if the employee later files for unemployment. The following information should debunk any unemployment claim myths surrounding these options.

Paid and Unpaid Suspensions

Texas employers may suspend an employee for violation of a company policy or procedure. Regarding paid suspensions, the rules are simple: an employer has the right to suspend an employee with pay for any preferred length of time. During that time, the employee is still employed, which means that there is no work separation and therefore, no unemployment claim issues. However, the consequence here is workplace dissatisfaction, in that choosing this option may cause a decrease in company morale. Co-workers may feel that the employee is being rewarded for wrongdoing by getting a paid “vacation.” Therefore, employers should consider this

possible concern before moving forward with paid suspensions.

Unpaid suspensions fall under different unemployment claim rules. An unpaid suspension of more than 3 days results in a job separation. In that case, the job separation would be categorized as a discharge, and the employer would have to prove misconduct connected with the work to win the unemployment claim.

The problem with this scenario is that the job separation occurred based on a technicality. The employer only intended to suspend—and not discharge—the employee. It is difficult to prove a discharge for misconduct when discharge was not intended. To avoid this issue, employers should consider allowing unpaid suspensions of only three days or less.

While this does sound like mostly bad news, there is an exception to this rule. Sometimes, an employee is placed on an unpaid suspension while the employer conducts an investigation, with the idea that the employee will be terminated if the investigation confirms the violation. In those cases, if the employer can prove the violation, the employer may be able to prove misconduct and win the unemployment claim. If the investigation does not confirm a violation, the employee can likely qualify for unemployment.

Demotions/Change in Job Duties

Demotions usually involve a change in job duties, and Texas employers are generally free to demote their employees. However, keep in mind that if an employee quits soon after the change, he or she may qualify for unemployment benefits. Employees who quit for

good, work-related reasons may qualify to receive unemployment benefits. Under Texas Workforce Commission (TWC) rules, a substantial change to the hiring agreement can provide an employee with good cause to quit. Therefore, the analysis will compare the old job duties to the new ones to see if the changes were substantial enough to induce an employee to quit. For example, demoting a manager to a non-management position is usually considered a substantial change to the hiring agreement, which could qualify the employee for unemployment benefits.

Cutting Hours or Pay

Similarly, cutting hours or pay may give an employee good cause to quit if the cut constitutes a “substantial change” in the hiring agreement. Two TWC rules are important here. The first is known as the “20% rule.” A 20% cut in hours or pay gives an employee good cause to quit and receive unemployment. To avoid issues with this rule, employers should stay under a 20% cut of pay and hours. If, for example, an employee quits due to a 17% cut in pay, the employee would likely be denied unemployment because the cut was not enough to be considered “substantial” under current TWC rules.

The second rule is the “25% rule.” In cases where the cut is in response to the employee’s work-connected misconduct, the employer may cut the employee’s hours or pay up to 25%. The catch here is that the employer must “clearly establish” the misconduct that led to the cut. This means that the employer would need to prove: 1) what the policy was, 2) that the employee knew or should have known about the policy, and 3) that the policy was violated. If the employee quits in response to the cut and the employer proves these elements, the employee will likely be denied unemployment. Employers who wish to avoid this extra work should elect to

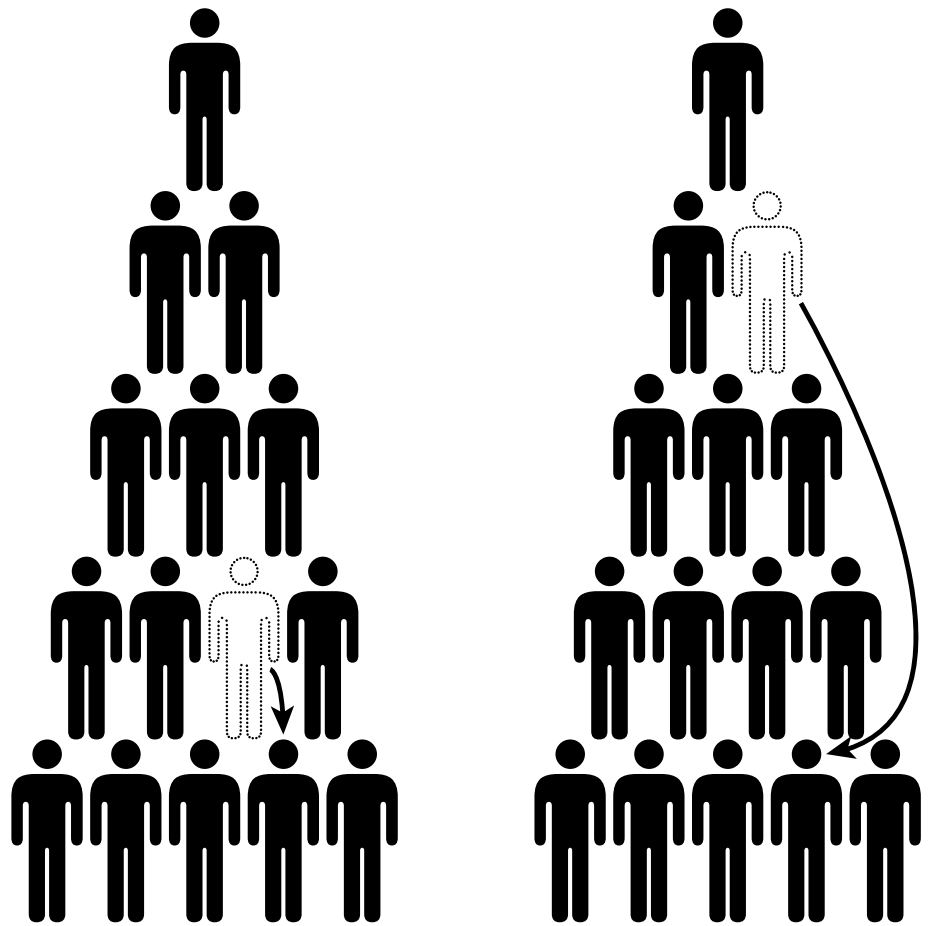


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Demoting a manager to a non-management position is usually considered a substantial change to the hiring agreement, which could qualify the employee for unemployment benefits.


keep the cut under 20%.

Probationary Periods

Contrary to popular belief, probationary periods do not affect the outcome of an unemployment claim. The fact that an employee was under a probationary period when he or she was separated will not, by itself, prevent the receipt of unemployment benefits. This is because the Texas unemployment rules follow a fault-based system, which means that the focus will be on why the job ended. The question is whether the employee was discharged for misconduct or whether the employee quit with good cause connected with the work. An employee’s status as a probationary employee is generally irrelevant because it does not answer that question. Therefore, employers

should not rely on an employee’s probationary status to win the unemployment claim.

Conclusion

Unemployment claims can be tricky with all of the laws and rules surrounding them. Keeping the above rules in mind should help alleviate some of the frustration employers feel when handling these claims. If further clarification is desired, employers may contact our employer hotline at **800-832-9394** or email at employerinfo@twc.state.tx.us. 

Business and Legal Briefs

By William T. (Tommy) Simmons

Legal Counsel to Commissioner Ruth R. Hughs

Best Practices for Faxed Documents

In light of the fact that the Texas Workforce Commission's (TWC's) rule on faxed claim documents sets the date of filing of a claim response



or appeal sent by fax as the date on which TWC's fax machine receives the transmission (which is not necessarily the date

that your machine might send it), some extra precautions are recommended:

- Do not wait until the last minute.
- Ensure that the correct date and time are on your machine.
- Double-check that you are using the exact TWC fax number shown in the response or appeal instructions – call TWC with any questions.
- Watch and ensure that the fax goes through, and print out a full successful transmission report.
- Set the print quality as high as possible, i.e., 600dpi, instead of 300dpi.
- Keep that documentation in the file.
- Cover two bases by mailing the document or by using TWC's online utility for claim responses or appeals (see www.twc.state.tx.us/businesses/unemployment-claim-management-appeals).

New Resources from the Job Accommodation Network

The Job Accommodation Network (JAN) has many useful resources for employers and employees to work together on finding reasonable accommodations for disabilities. Here are two such resources that recently became available:

- “Accommodation and Compliance Series: Personal Assistance Services (PAS) in the Workplace,” which is a

publication on Personal Assistance Services (PAS) in the workplace. Although it is oriented toward helping federal agency employers deal with accommodations in the workplace, it is also helpful for any other employer that would like some helpful ideas on disability accommodations. The direct link is <https://askjan.org/media/PAS.html>.

- Just-in-Time Training Modules: JAN now offers a Multimedia Training Microsite with a large variety of online training modules that are ideal for self-paced learning for managers and HR personnel who need more information on workplace accommodations. The topics that are currently available cover the following issues: what JAN is (both English and Spanish), applying the Americans with Disabilities Act (as amended), the interactive process, return of investments for hiring individuals with disabilities, disability awareness, assistive technology, workplace ergonomics, reasonable accommodations for Post Traumatic Stress Disorder, accommodating brain injuries, and transitioning from school to work. Employers may access these modules online at <https://askjan.org/training/library.htm>.

Office of Federal Contract Compliance Programs Help Desk



The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) monitors employers' compliance with various executive orders pertaining to affirmative action and employment

discrimination that apply to most federal contractors and grantees, and it offers a Help Desk for affected employers to obtain assistance on the often-complicated issues that arise. The two methods for accessing the Help Desk are over the phone (**1-800-397-6251** (TTY: **1-877-889-5627**)) and online (www.dol.gov/ofccp/askofccp.htm).

Failure to Try Defeats an ADA Claim

In the case of *Dillard v. City of Austin*, 837 F.3d 557 (5th Cir. Tex. 2016) (see www.ca5.uscourts.gov/opinions/pub/15/15-50779-CV0.pdf), the employer defended against a charge of disability discrimination by showing that it reasonably accommodated an employee whose job injury necessitated a reassignment from manual work to clerical duties. The evidence showed that the employee was unhappy with the idea of doing clerical work in an office setting and essentially gave up, stopped trying, and spent most of his time “playing computer games and surfing the internet, sleeping, making personal calls, and applying for other positions within the City.” The city also offered firsthand testimony that the employee “repeatedly missed work without proper notice, came late and left early, and lied about his time.” Noting that “the interactive process is a two-way street; it requires that employer and employee work together, in good faith, to ascertain a reasonable accommodation,” the 5th Circuit held that under the facts in this case, the employee could not make a successful claim of discrimination.

Words Matter – Not Age, Says EEOC

According to a press release on the Equal Employment Opportunity

Commission (EEOC) website at www.eeoc.gov/eeoc/newsroom/release/5-9-17.cfm, that federal agency has filed an age discrimination suit against an IT staffing company for refusing to refer an older applicant to a client because of his age. The EEOC lawsuit alleges that after the staffing



company found out the applicant's date of birth, the company sent him an e-mail letting him know that he would not be considered for the job because "he was born in 1945" and "age will matter." Of course, the age discrimination statutes under both Texas and federal law provide that age should not matter, at least with respect to employees and applicants who are in the age-protected group (those who are at least 40 years of age). How the case will turn out in court is difficult to predict, but the employer's e-mail to the applicant certainly will not help the company prove that it did not discriminate on the basis of age. What are the takeaways? Treat applicants and employees as individuals based on their own abilities, attitude, and conduct, rather than on things that people cannot control, such as age, gender, ethnicity, and so on. Further, tired stereotypes about people are trouble waiting to happen. Finally, give people a chance to prove how they can get a job done – do not assume based on outward appearances that a given person will not have the necessary skill set and attitude needed for a job.

Even Commas Matter, Says the First Circuit

In a fascinating case showing how important punctuation can be in making a particular document clear and understandable (*O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. Me. 2017) (see <http://media.ca1.uscourts.gov/pdf/opinions/16-1901P-01A.pdf>), the First Circuit Court of Appeals held that the lack of a serial

comma (also known as the "Oxford comma") rendered a Maine statute regarding an overtime exemption for certain drivers ambiguous, leaving it up to a court to interpret in favor of the affected employees. Lesson: good grammar and punctuation are always important, and in order to give your company the best chance of defending itself in a case where words matter, do your best to express job offer letters, employment and wage agreements, employee policies, and company forms as clearly and unambiguously as possible. Remember, in the event of a claim or lawsuit, many people whose stock in trade are words will be micro-analyzing each word in your documents. Take no chances, leave no room for doubts, and proofread, proofread, proofread!

FMLA Leave to Care for Grandparents

In *Coutard v. Municipal Credit Union*, 848 F.3d 102 (2d Cir. N.Y. 2017), the Second Circuit Court of Appeals ruled that FMLA leave to care for grandparents may be necessary if the grandparent for whom the care is needed stood in a relationship of *in loco parentis* ("in the place of a parent") to the employee. The court also ruled that an employer needs to give an employee who requests such leave an opportunity to prove that such a relationship existed.

Quick Picks:

- For the latest on EEOC's new focus on age discrimination, see www.eeoc.gov/eeoc/newsroom/release/6-14-17a.cfm.
- Occupational Safety and Health Consultation Program's first YouTube video: youtu.be/nn7b5k90MmM (remember, OSHCON's Occupational Safety and Health Administration compliance assistance is free and confidential to small and medium-sized, private-sector, Texas employers).
- The Texas Supreme Court held that appraisal review board members are

employed by their appraisal districts and are not exempt from Texas unemployment taxes: *Harris Cnty. Appraisal Dist. v. Tex. Workforce Comm'n*, 2017 Tex. LEXIS 452, 60 Tex. Sup. J. 949, Unemployment Ins. Rep. (CCH) P8500, 2017 WL 2023616 (Tex. May 12, 2017) (see www.txcourts.gov/media/1438108/160346.pdf).

■ The Texas Supreme Court also ruled that Texas does not recognize "compelled self-publication" as a valid cause of action: *Exxon Mobil Corp. v. Rincones*, 2017 Tex. LEXIS 479, 60 Tex. Sup. J. 1054, 130 Fair Empl. Prac. Cas. (BNA) 265, 2017 WL 2324710 (Tex. May 26, 2017) (see www.txcourts.gov/media/1438178/150240.pdf).

■ The 10th Circuit held that DOL's tipped employee regulations do not apply to employees whose basic rate of pay is minimum wage or higher: *Marlow v. The New Food Guy, Inc., et al*, No. 16-1134, 2017 U.S. App. LEXIS 11678 (10th Cir. June 30, 2017) (see www.ca10.uscourts.gov/opinions/16/16-1134.pdf).

■ The 8th Circuit held that extreme disloyalty and over-the-top disparagement are not protected activities under the National Labor Relations Act: *MikLin Enterprises, Inc., dba Jimmy John's v. NLRB*, No. 14-3099 and No. 14-3211, 2017 U.S. App. LEXIS 11792 (8th Cir. July 3, 2017) (see <http://media.ca8.uscourts.gov/opndir/17/07/143099P.pdf>). 🇺🇸

Texas Legislation: 85th General Session – 2017

By William T. (Tommy) Simmons

Legal Counsel to Commissioner Ruth R. Hughs

All bills effective September 1, 2017 unless otherwise noted.

This article is a brief survey of the most significant employment-related bills that were passed by the Legislature and signed into law by the Governor during the 85th general session of the Texas Legislature in 2017. Some listings include comments where employers will be affected soon. In the next issue of *Texas Business Today*, we will highlight a few of the bills that will have the greatest impact on the majority of Texas employers.

Although the Governor called a special session of the Legislature that started on July 18, 2017, no results of any bills filed during the special session are available at the time that this issue went to press. If any new legislation is enacted that affects employers, we will cover such legislation in the next issue of this newsletter. 🇹🇽

Employee / Family Leave

HB 88	Martinez	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. *Sick leave to care for a foster child must be allowed on the same basis as sick leave to care for biological or adopted children.
SB 73	Nelson	Relating to leave policy and procedures for state employees. *Emergency leave is only for employees who are expected to return; annual report to Comptroller of employees who take more than 32 hours of emergency leave in a year, of the reasons for each granting of such leave, and of the total hours of such leave taken by each employee listed; up to 15 hours of emergency sick leave for veterans eligible for Veterans Affairs health benefits; emergency leave policy must be posted by each agency on its public website.

Human Resources – General

HB 2486	Stucky	Relating to restoration of the position of public employees when relieved of duty from the Texas military forces or a similar unit. <i>Effective immediately.</i>
SB 745	Kolkhorst	Relating to the exemption of certain services performed by certain employees from the sales and use tax. *Excludes services of temporary staff from temporary employment services from sales and use tax.
SB 588	Lucio, Jr.	Relating to information regarding private employers who have veteran's employment preference policies. *Texas Workforce Commission (TWC) will post a list on its website of private employers that have given notice to TWC that they have veteran's employment preference policies.
SB 2065	Hancock	Relating to the licensing and regulation of certain occupations and activities. *Amends Chapter 92 regarding temporary common worker employers; regulation of labor halls by local governments; restrictions on wage deductions; new requirements for recordkeeping and audits.
HB 3270	Bohac	Relating to criminal background checks for persons employed by certain public school contractors.

Continued on page 15



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Open Records / Data Sharing

SB 256	Taylor, Van	Relating to the confidentiality of home address information of certain victims of family violence, sexual assault or abuse, stalking, or trafficking of persons. <i>Effective immediately</i>
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Pay / Benefits / Wages and Hours

HB 490	Anderson, Rodney	Relating to health benefit plan coverage of hearing aids and cochlear implants for certain individuals.
HB 2443	Gonzalez, Mary	Relating to the electronic submission of a wage claim to TWC. *Employees and former employees alleging improper pay under the Texas Payday Law will be able to file their wage claims electronically.

Public Accommodations

HB 1463	Smithee	Relating to procedures for actions alleging failure to comply with certain standards to accommodate persons with disabilities. *A party charging disability discrimination at a public accommodation must give the charged party at least 60 days' advance notice of a lawsuit based on a violation of public accommodations statutes and a chance to remedy the violation prior to filing suit.
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Regulatory Integrity / Enforcement / Criminal Penalties

HB 29	Thompson, Senfronia	Relating to prostitution and the trafficking of persons, civil racketeering related to trafficking, the prevention, investigation, and prosecution of and punishment for certain sexual offenses and offenses involving or related to trafficking, reimbursement of certain costs for criminal victims who are children, and the release and reporting of certain information relating to a child; increasing criminal penalties; creating criminal offenses. *Includes a requirement that all CDL programs at truck driver schools include "education and training on the recognition and prevention of human trafficking;" TWC would adopt rules and work with the Attorney General's office to establish the content of such courses; English and Spanish signage requirements for sexually-oriented businesses as of March 1, 2019, notifying victims of human trafficking to call a national help hotline.
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Continued on page 16

SB 7	Bettencourt	Relating to improper relationships between educators and students and reporting of educator misconduct; creating a criminal offense and expanding the applicability of an existing offense; authorizing an administrative penalty. *Designed to curtail rehiring of school staff who have been suspended or discharged due to improper relationships with students; stricter regulation of social media contacts and of job references.
SB 1381	Longoria	Relating to photo identification for certain debit or credit card transactions. *Would affect use of unemployment benefit debit cards. <i>Effective Jan. 1, 2018.</i>
SB 1625	Uresti	Relating to the Texas Physician Assistant Board and the licensing and regulation of physician assistants.

Unemployment Insurance

HB 100	Paddie	Relating to the regulation of transportation network companies; requiring an occupational permit; authorizing a fee. *Extensive regulation of transportation network companies; possibility for drivers to be independent contractors. <i>Effective immediately.</i>
HB 1432	Vo	Relating to restrictions or conditions on certain payments to TWC. *Allows TWC to cash a check or warrant with a restricted or conditional endorsement without settling the amount of money due to TWC. <i>Effective immediately.</i>

Vocational Rehabilitation

SB 748	Zaffirini	Relating to transition planning for a public school student enrolled in a special education program. <i>Effective immediately.</i>
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Workers' Compensation

HB 451	Moody	Relating to waiver of immunity in certain employment discrimination actions in connection with a workers' compensation claim. *Sovereign immunity under Labor Code Section 451.001 is waived with respect to first responders; damages limited to \$100,000 for an individual and \$300,000 for a single incident or policy resulting in a violation affecting "one or more employees concurrently."
HB 2112	Romero	Relating to certain workers' compensation reporting requirements. *Requires the Texas Department of Insurance Division of Workers' Compensation to refer workers' comp recipients to TWC's Vocational Rehabilitation (VR) Division if they can benefit from VR services; participation in such services is required for continued eligibility for supplementary income benefits. <i>Effective immediately.</i>

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Workforce Development

HB 108	Alvarado	Relating to the use of the Skills Development Fund to facilitate the relocation to or expansion in this state of employers offering complex or high-skilled employment opportunities.
HB 136	Bell	Relating to inclusion of career and technology education in the mission of public education. <i>Effective immediately.</i>
HB 2413	Burkett	Relating to certain identifying information regarding career school or college students. *TWC's legislative proposal related to the protection of student records and students' identifying information.
HB 2431	Deshotel	Relating to the participation of public state colleges in the Jobs and Education for Texans (JET) Grant Program. <i>Effective immediately.</i>
HB 2729	Lucio, III	Relating to an inventory of credentials and certificates that may be earned by a public high school student through a career and technology education program. <i>Effective immediately.</i>
HB 3349	Gervin-Hawkins	Relating to creating an abbreviated certification program and probationary and standard certificates for trade and industrial workforce training.
HB 4038	Bohac	Relating to the definition of "qualifying job" for purposes of certification by the comptroller of public accounts as a qualifying data center. <i>Effective immediately.</i>
SB 22	Taylor, Larry	Relating to the establishment of a Pathways in Technology Early College High School (P-TECH) program and to the repeal of the tech-prep program.
SB 276	Watson	Relating to an adult high school diploma and industry certification charter school pilot program.
SB 805	Lucio, Jr.	Relating to Texas women veterans. Designed to promote services for women veterans reentering the civilian labor force.
SB 1677	Lucio, Jr.	Relating to information about services for women veterans provided through certain state agency applications.
SB 1748	Hinojosa	Relating to use of tax revenue by certain development corporations for job-related skills training. <i>Effective immediately.</i>
SB 2105	Miles	Relating to the requirement that the Texas Workforce Commission provide certain employment information for secondary school students.

basic information on progressive disciplinary systems, including a sample final written warning, appears on pages 63 – 64 (and online at www.twc.state.tx.us/news/efte/discipline.html).

8. Strategies for designing time records appear on page 109 (www.twc.state.tx.us/news/efte/e_timecard_policies_and_strategies.html).

9. When delivering a final warning, it might help get the message across that if the employee continues to fail to cooperate with the timekeeping policy, the company will set him or her free to find another company that does not care as much about the importance of time records.

Q: *I have two employees every night who are on call to monitor a*

phone line for customers. How do I properly pay them for that time?

A: The U.S. Department of Labor regulation (29 C.F.R. § 785.17 at www.twc.state.tx.us/news/efte/wh_part785.html#785_17) would govern how much of that on-call time is compensable. The following main points would apply:

1. It sounds like the employees whose duty it is to answer a company cell phone during certain evening hours are “on call” during that time.

2. Presumably, the employees can monitor the cell phone from any location, including home, a restaurant, a personal vehicle, a shopping mall, or while walking in a park.

3. As long as no calls come in during the on-call hours, the

employees can use that time effectively for their own purposes.

4. The law would require the employees to be on pay status while responding to calls. The employees should log all calls that come in on that phone and the time spent on such calls. The aggregate time so logged would be the time that would be compensable. The time spent between calls would not be compensable, as long as the company makes it clear, and the employees understand, that they are free to do whatever they want to when not actually dealing with calls.

5. The time they spend logging each call would count as work time – tell them to include that time in their time entries for each call. 🇹🇽



ABILITY

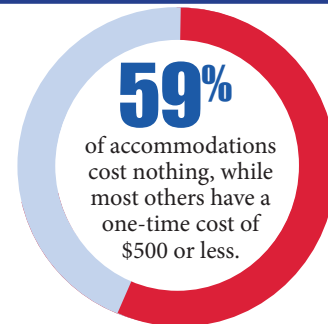
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For conference locations, see pg. 4.

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