Fourth Quarter 2017

Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

Hurricane Harvey Relief Efforts ■ Holiday Observance ■ FAQs from Employers

Hurricane Harvey Relief Efforts

Commissioner's Corner

Dear Texas Employer,

Welcome to our fourth quarter issue of *Texas Business Today*. As we continue to tackle the aftermath of Hurricane Harvey, the Texas Workforce Commission (TWC) is providing available resources and services to the affected areas.

On September 7th, Governor Abbott charged the Tri-Agency Partners, TWC, the Texas Education Agency (TEA), and the Texas Higher Education Coordinating Board (THECB), to develop an education and workforce training plan to support the rebuilding of communities impacted by Hurricane Harvey and put Texans back to work.

Since the Governor's charge, we held Tri-Agency Regional Forums in Coastal Bend, Gulf Coast, Southeast Texas, and Central Texas in order to support the communities impacted. I want to thank all of the attendees from each community for taking the time to assess the damage and resulting needs regarding their short-term and long-term workforce training requirements.

In the first four weeks after Hurricane Harvey, TWC had already received over 150,000 applications for unemployment insurance assistance because of the disaster. Our TWC representatives worked tirelessly to take calls from claimants applying for Disaster Unemployment Assistance (DUA). I had the privilege of visiting the call centers in North Dallas and San Antonio, and saw first-hand the dedication and sympathy the operators embodied while processing these claims for employees and employers alike.

Listening to a Disaster Unemployment Assistance call during my visit to the San Antonio Call Center.

As your Commissioner Representing Employers, I am dedicated to ensuring our state resources and services are provided to impacted businesses, individuals, and communities. I know Texans will face this challenge with the same resilience and perseverance that makes us all proud to live in the Lone Star State.

In other TWC news, on September 1st, we celebrated the first year of the Department of Assistive and Rehabilitative Services being a part of TWC. As we continue to fully integrate, we recognize the many abilities this population brings to the workforce. We are very fortunate to have them as part of our agency.

As we prepare for Veteran's Day and our sixth annual Hiring Red, White & You! Statewide Hiring Fair, we are pleased with the participation in our "We Hire Vets" employer recognition program. We have recognized many employers, large and small, whose Texas workforce is comprised of at least 10% veterans. To find out more information, go to: **http://www.twc.state.tx.us/jobseekers/texas-operation-welcome-home#WeHireVets.**

Lastly, on September 25-30, we held our Career in Texas Industries Week in all 28 Workforce Board areas across the state to raise awareness about careers in our state's in-demand industries. These career exploration events encouraged students to explore careers in growing Texas Industry Clusters and helped students, parents, and educators understand in-demand industries through networking with industry professionals and internship opportunities. We know this investment in our youth will reap dividends in promoting career opportunities they may not have otherwise known existed.

In conclusion, as we prepare for the upcoming holiday season, we recognize our many blessings and continue to look for ways to support our fellow Texans in our rebuilding efforts. We also look forward to continuing to promote high-wage, high-demand jobs that keep Texas economically competitive.

Sincerely,

Ruth R. Hughs
Texas Workforce Commission
Commissioner Representing Employers

Making Connections Across the State

1. Check presentation at Eastfield College in partnership with The Bottling Group, LLC to provide customized training in the manufacturing industry.
2. Presenting Kendra Scott the Retailer of the Year award at the Governor's Business Forum for Women in Houston.
3. Recognizing the Lubbock Police Department during our "We Hire Vets" Employer Recognition Ceremony.
4. Visiting with Administrator of the Small Business Administration, Linda McMahon, at the Governor's Business Forum for Women in Houston.
5. Check presentation in partnership with Alamo Colleges and Methodist Healthcare to train students in the health care industry.
6. Visiting with employer participants at the Careers in Texas Industries Week exploration event hosted by Workforce Solutions Capital Area.
7. Presented at the Hiring Our Heroes Transition Summit alongside Medal of Honor recipient Dakota Meyer, hosted at Joint Base San Antonio.

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.

For a list of our 2018 conference locations, visit www.texasworkforce.org/tbc or for more information, call 512-463-6389.

Commissioner's Corner 2

Making Connections Across the State 3

Watch It! Surveillance Measures at Work 5-6

Holiday Observance: Desired or Required? 7-8

Partial Unemployment – What is it and How Does it Work? 9-10

'Twas the Eve of the Party 11

Business and Legal Briefs 12-13

Frequently Asked Questions From Employers Answered 14-15

Watch It! Surveillance Measures at Work

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

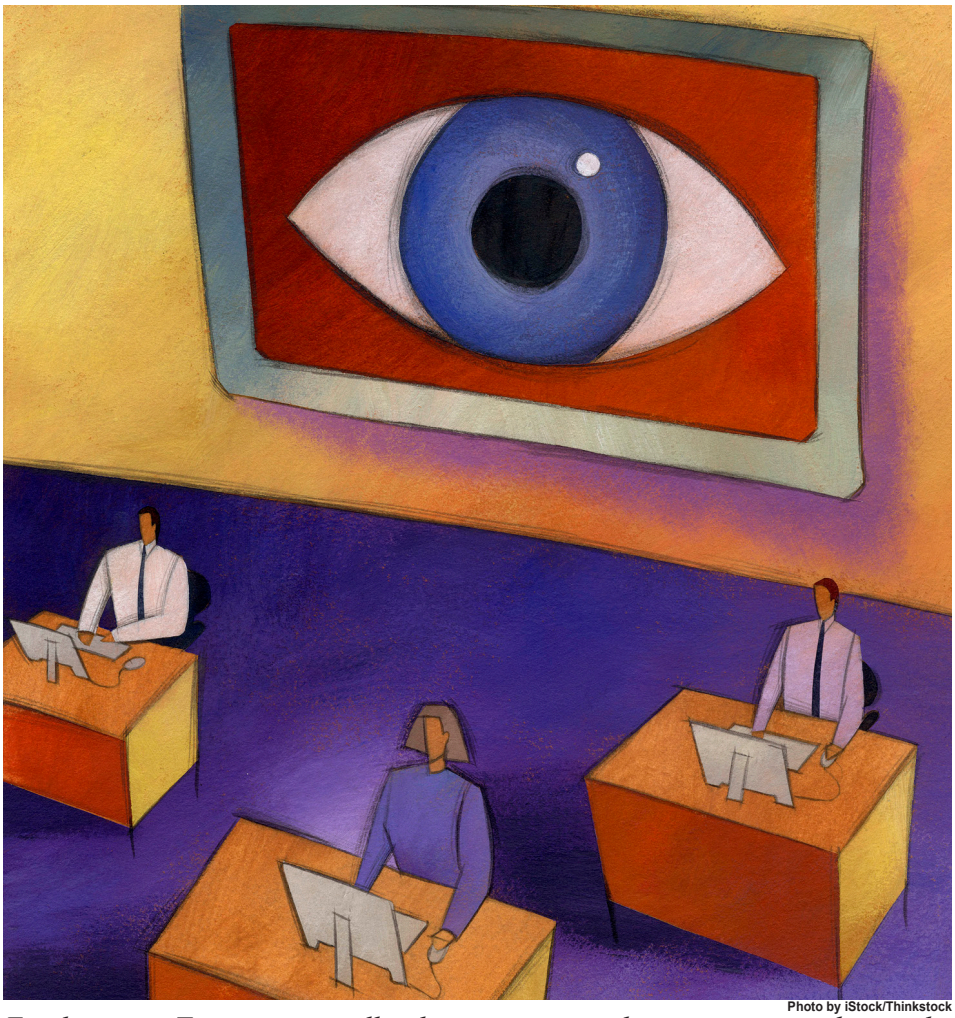
Some may remember a catchy and well-known song from the 1980's by American singer Rockwell, titled "Somebody's Watching Me." It tells the story of a man who believed he was constantly being watched by someone while in his home, and that his privacy was thus severely compromised. Because more companies are now using monitoring and surveillance systems to watch over their businesses, employers may now hear similar refrains from their employees.

There are many reasons for employers to implement surveillance measures at work. These include: to provide safety and security for persons and property on the employer's premises, to ensure satisfactory job performance by staff, to confirm that the employer's rules or policies are followed, to maintain quality control standards when dealing with customers or clients, to corroborate timekeeping records, or to oversee inventory control protocols. This is by no means an exhaustive list. There are almost as many reasons for using electronic surveillance as there are questions raised by employers when they first consider putting employee monitoring systems into place. Here are some basics.

Can Employers Videotape Employees?

Yes. Employers in Texas can install video cameras on their premises and record the activities of their employees, as well as those of customers/clients. If only video is recorded, notice and consent for the recording is not mandatory, but it is always a good idea. Of course, employers should never place video cameras in locations where employees have an expectation of privacy, such as bathrooms and locker rooms. For a sample video surveillance policy, review this link from our employer handbook, *Especially for Texas Employers:* **http://www.twc.state.tx.us/news/efte/video_surveillance_policy.html.**

Be aware that Texas Penal Code § 21.15 INVASIVE VISUAL RECORDING prohibits the recording and transmitting of an image of a person's intimate area, such as a person's genitals, if the person has a reasonable expectation that the intimate area is not subject to public view. The statute also prohibits photographs or electronic recording of another person in a bathroom or changing room. An offense under this section is a state jail felony. For complete text of the statute, see: **http://www.statutes.legis.state.tx.us/docs/pe/htm/pe.21.htm**.



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Employers in Texas can install video cameras on their premises and record the activities of their employees, as well as those of customers/clients.

Can Employers Record Employee Conversations?

It depends. In Texas, it is legal to record a conversation without first providing notice and obtaining consent of all parties if at least one party to the conversation is aware of the recording and consents. However, under Texas Penal Code § 16.02 UNLAWFUL INTERCEPTION, USE, OR DISCLOSURE OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS, it is a felony offense to record any communication if no party involved in the conversation has provided consent. See the full text of the statute here: **http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.16.htm**.

Therefore, if an employer would like to record audio in the workplace, the employer should provide notice to employees and obtain written consent. See our sample consent form from *Especially for Texas Employers*: **http://www.twc.state.tx.us/news/efte/video_surveillance_policy.html.**

The same holds true for members of the public who may enter the employers' premises and be subject to being recorded. Employers should post a sign at the entrance to work locations or job sites and inform everyone who enters that, by doing so, they are subject to being recorded.

Can Employers Monitor Computer Usage?

Yes. According to a fact sheet titled "Workplace Privacy and Employee Monitoring" from the Privacy Rights Clearinghouse, a non-profit consumer education and advocacy organization, "Almost everything you do on your office computer can be monitored. Such monitoring is virtually unregulated." See the complete fact sheet here: **https://www.privacyrights.org/consumer-guides/workplace-privacy-and-employee-monitoring**.

Employers have a lot of flexibility when monitoring computer usage at work. However, they will want to have policies that address such monitoring. Our employer handbook, *Especially for Texas Employers* explains that, "Every employer needs to have a detailed policy regarding use of company computers and resources accessed with computers, such as e-mail, internet, and the company intranet, if one exists." For a sample internet, e-mail, and computer use policy, see: **http://www.twc.state.tx.us/news/efte/internetpolicy.html**.

For a more thorough discussion on monitoring use of company computers, please review: http://**www.twc.state.tx.us/news/efte/monitoring_computers_internet.html#companycomputers**.

But Wait! If Employers Can Record Video and Audio, Can Employees Do the Same?

Yes, if they follow the guidelines above. Technology has made it possible for employees to carry on their persons at all times a device that can easily record audio and video. While many employers choose to implement cell phone policies to minimize distractions, to protect client confidentiality, and to prevent potentially embarrassing incidents from going viral on social media sites, employers should be wary of "no-recording" policies that bar all recording of workplace interactions. Such policies may violate the National Labor Relations Act (NLRA).

The National Labor Relations Board (NLRB), the entity which enforces the NLRA, has held that such a blanket ban on recordings unlawfully interferes with the rights of employees to engage in protected employee activity, such as employee discussions of their terms and conditions of employment. On June 1, 2017, a United States Court of Appeals upheld an NLRB finding that an employer's no-recording policy was overbroad and violated the NLRA. *See*: **https://www.newyorkemploymentattorneyblog.com/files/2017/06/Whole_Foods_Market_Group_v_NLRB.pdf**.

Bottom Line

Employers in Texas have a lot of discretion when implementing surveillance and monitoring systems in the workplace. As discussed, instituting such measures serves to further many valid business purposes. However, in order to avoid costly and serious consequences, it is important for employers to ensure compliance with applicable state and federal laws. For questions about this issue, or other employment law related topics, please call our employer hotline at 1-800-832-9394.

Holiday Observance: Desired or Required?

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

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Employers are not required to close down to observe a holiday, regardless of the number of employees in the company or whether the holiday is religious in nature.

As the holiday season approaches, employers may have questions concerning the laws surrounding holiday leave. Employers in past years have contacted our Texas Workforce Commission (TWC) employer hotline (800-832-9394) with questions about this issue, and many were surprised to hear the answers. This area of the law can be difficult for employers to navigate due to the variables involved. The following information should serve to clarify how employers may approach issues involving holidays and the workplace.

Observance vs. Granting Requests for Time off

Employers should first note that there is a difference between an employer closing temporarily to observe a holiday and an employer granting an employee's request for holiday time off from work. Regarding observance, employers are not required to close down to observe a holiday, regardless of the number of employees in the company or whether the holiday is religious in nature.

Similarly, employers are generally not required to grant an employee time off for non-religious holidays, such as Labor Day or New Year's Eve, to name a few.

Holidays Connected to National Origin

Employers with 4 or more employees should reasonably accommodate an employee's request for time off to celebrate a holiday that is connected to his or her national origin (e.g.: Chinese New Year). Terminating an employee who missed work to celebrate such a holiday could potentially result in a violation of the Immigration Reform and Control Act

of 1986 (IRCA). For more information on IRCA, please review the following link: **https://www.eeoc.gov/laws/types/nationalorigin.cfm**.

Less Than 15 Employees

Employers with less than 15 employees are not required to grant time off for religious holidays. However, employers are often encouraged to do so in order to foster goodwill with employees and boost company morale.

15 or More Employees

Employers with 15 or more employees are covered by Title VII of the Civil Rights Act of 1964. This federal law prohibits religious discrimination and requires employers to reasonably accommodate employees who request time off for a sincerely held religious belief. Employers should be careful not to deny a request simply because the employee's religious beliefs changed over time, as that factor alone does not establish that the belief is not sincere.

Reasonable accommodation for observance of a religious holiday is not optional for employers in this category. If an employer refuses to offer a reasonable accommodation, it must show that the accommodation would have caused an undue hardship for the business. According to the Equal Employment Opportunity Commission, undue hardship exists if the accommodation "would cause more than de minimis cost on the operation of the employer's business." Relevant factors include monetary costs as well as other effects on the workplace, such as workplace safety concerns, infringement on the rights or benefits of other employees, or the effect it would have on workplace efficiency. For a more in-depth analysis of reasonable accommodation for religious beliefs or practices, please see the following link: **https://www.eeoc.gov/policy/docs/qanda_religion.html**.

Must Leave be Paid?

Concerning hourly workers, the short answer is no. Employers are not required to pay hourly employees for time they do not work. This includes holidays, regardless of whether the employer closed for the holiday or if the employee requested to be off for the holiday. Employers should also note that such paid holiday leave does not count towards time worked for overtime purposes, because the hourly employee did not work those holiday hours.

The answer to this question is more complicated for salaried workers. If the employer chooses to shut down for a holiday (e.g.: Labor Day, Thanksgiving, Christmas, etc.), the salaried worker must be paid the full salary for the entire workweek. Under this scenario, hourly employees may feel as if they are being treated unfairly compared to salaried workers. In order to remedy this issue, employers can consider several options. One option is to offer paid holidays for the hourly workers in order to strike a good balance. Other employers will elect to give hourly employees an additional day of paid time off to add to their leave banks.

The rules for salaried workers are different in cases where the business is open but the employee requests time off for a holiday. In this scenario, the employee's request would count as personal time off from work. If the employer wants this time off to be unpaid, the employer should first check if there is any time in the employee's leave bank. If so, the employer could take the time from the leave bank. If the employee does not have any leave time available, the employer may deduct a full day's pay, but the employer should obtain written permission from the employee before doing so. For guidance, employers are encouraged to review a sample wage deduction authorization agreement at the following link: **http://www.twc.state.tx.us/news/efte/wage_deduction_authorization_agreement.html** (number 12 on the list covers this particular scenario). Employers should note that partial day deductions are not allowed under law, even with the employee's written consent.

Holiday Policy Recommended

Employers should have a holiday policy in writing so that each employee fully understands the employer's rules. Employers should also note that even though the law does not require paid holiday leave, the employer's written policy will be enforceable under state payday laws. Whatever the employer has stipulated in the policy or agreement is what will be enforced. Therefore, employers should be very mindful of how the policy is written and should avoid vague, ambiguous, or misleading language.

A holiday policy should also cover what happens if an employee works during a paid holiday. For example, does the employee get double pay for the day, or will the employee get another day off with pay to add to the leave bank? More information on this issue, as well as a sample holiday policy, can be found here: **http://www.twc.state.tx.us/news/efte/holiday_policies.html**.

These basic rules on holiday leave may generate additional questions for employers. Those employers who seek additional assistance or clarification are encouraged to contact our TWC employer hotline at the number provided at the beginning of this article.

Partial Unemployment – What is it and How Does it Work?

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

The unemployment insurance (UI) system has many provisions that regulate the administration of unemployment benefits to individuals who are out of work through no fault of their own. However, what does it mean to be out of work? Believe it or not, claimants can receive partial unemployment benefits while earning wages if they meet certain requirements. This article will explore the concept of partial unemployment benefits and some of the major details associated with them.

How Does a Partial Unemployment Scenario Occur?

A partial unemployment scenario can arise if the employer reduces an employee's hours by a certain amount. While the employer may have a very good business reason to reduce an employee's hours (i.e., lack of work or lack of revenue), it is still a reduction that is initiated by the employer that leaves the employee with less weekly earnings.

The Texas Workforce Commission's (TWC) Appeals Policy and Precedent Manual contains precedent cases dealing with various types of work separations, including partial unemployment. For instance, there is a precedent case dealing with a claimant being entitled to partial benefits due to a decline in business (*see* TPU 455.05 Appeal No. 87-04539-10-031687 in TWC's Appeals Policy and Precedent Manual).

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A partially unemployed person is someone whose pay, due to a reduction in work time, is below 125% of the weekly benefit amount to which he or she would be entitled if totally unemployed.

What Does It Mean to be Partially Unemployed?

The controlling law for partial unemployment can be found in §201.091 of the Texas Labor Code (**http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.091**). The law might look complex for those who are uninitiated in reading legal statutes. However, a good encapsulation of what the law says can be found in our *Especially for Texas Employers* online handbook. In essence, "…a partially unemployed person is someone whose pay, due to a reduction in work time, is below 125% of the weekly benefit amount to which he or she would be entitled if totally unemployed" (*see*: **http://www.twc.state.tx.us/news/efte/ui_law_eligibility_issues.html#partialui2**).

Moreover, much like people who are totally unemployed, partially unemployed individuals can file for and draw unemployment benefits so long as they continue to report their earnings and do not earn 125% or more than their weekly benefit amount. The reported earnings also work as an offset to their partial unemployment benefit amount. For more information about partial unemployment benefits, please visit the link immediately above.

Are There Limitations to Partial Unemployment Benefits?

In addition to the employee's continuing obligation to report earnings while receiving partial unemployment benefits, there are other stipulations that are associated with these benefits as well.

For instance, if an employee requests that his or her hours be reduced, the employee would likely not qualify for partial unemployment benefits because the reduction in hours would have been initiated by the employee. A best practice would be to get any such request in writing from the employee. Additionally, an employee may experience challenges in qualifying for partial unemployment benefits if the reduction in hours was due to disciplinary action that resulted from misconduct connected with the work.

To summarize, the big limitations on partial unemployment benefits consist of earning 125% or more than one's weekly benefit amount, failing to report earnings while receiving partial unemployment benefits, and reductions in hours that take place due to the request or fault of the employee. An employee will also be ineligible to receive partial unemployment benefits if the employee is working his or her customary full time hours.

What Do Partial Unemployment Benefits Mean for Employers?

Some employers are startled to find that an employee who is currently working for them can collect unemployment benefits. This discovery can also lead to another question: Do partial unemployment benefits work any differently than regular unemployment benefits in terms of their effect on the employer's unemployment tax account?

The answer is that partial unemployment benefits can be charged back to the employer's account just like regular unemployment benefits, if the employer has reported base period wages for the employee in question (for more information on the base period, please visit: **http://www.twc.state.tx.us/jobseekers/eligibility-benefit-amounts)**. However, affected employers will still get notice of the claim, and will have the opportunity to respond. This is important to remember because it gives the employer the chance to explain why the reduction of hours occurred in the first place – and as noted earlier, if the employer is successful in showing the reduction in hours was initiated by the employee, it could have a good chance in prevailing on the claim.

Conclusion

As seen in our *Especially for Texas Employers* handbook, the "reason that the law provides for partial UI benefits is to encourage employees whose hours are reduced to stay with the job and work the available hours, thus promoting employment, rather than quitting altogether and going on total unemployment." While these benefits could affect an employer's UI tax account, the employer also gets the benefit of keeping a working employee. As such, employers should be knowledgeable of the existence of partial unemployment benefits, and what these benefits mean for their workers and companies.

'Twas the Eve of the Party

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

‘Twas the eve of the party, and all through the land,
All employees were stirring the drinks in their hands.

The bosses declared this a booze-free event,
In hopes of avoiding last year’s incidents.

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

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

The last thing that anyone here wants to see,
Are digital scans of his anatomy.

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

The women don’t think that his antics are cute,
A repeat of last year may bring us a lawsuit.

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

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

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

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

She could hurt other people in case of a crash.
Many lives changed forever in only a flash.

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

Ignoring instruction this year once again
May lead us to incidents causing much pain.

Employers and workers, I ask, heed these words.
A drama-free party is really preferred.

Please know there’s a way out of all this – a fix.
Alcohol and holiday parties don’t mix.

Business and Legal Briefs

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

Hurricane Harvey Update

As of early October, 2017, the Texas Workforce Commission (TWC) had taken over 150,000 disaster-related claims, of which almost 130,000 were for regular unemployment insurance benefits and a little over 20,000 were for federally-funded disaster unemployment assistance (DUA). The agency has comprehensive information on such claims on its website at **http://www.twc.state.tx.us/jobseekers/disaster-unemployment-assistance**. As a reminder for employers whose employees filed disaster-related claims, the law allows chargeback protection for employers in the private sector that pay quarterly unemployment taxes, and the federally-funded DUA benefits are not charged back to employers at all.

TWC's resource page for disaster recovery assistance available for businesses is at **http://www.twc.state.tx.us/hurricane-harvey-resources**. The National Federation of Independent Business has an outstanding summary of hurricane-related employment law information, along with links to similar articles from law firms, on its website at **http://www.nfib.com/content/legal-compliance/management/navigating-employment-issues-after-the-storm/**. The Small Business Administration's Disaster Assistance page for Hurricane Harvey is at **https://www.sba.gov/disaster-assistance/hurricane-harvey**, and similar pages for other recent storms are linked at **https://www.sba.gov/disaster-assistance**.

Top Five List

If a business owner could follow only five recommendations to avoid most employment-related problems, what would be on that list? Here is what this article's author would suggest:

1. Hire for fit - train for skills - promote, transfer, discipline, or fire for documented cause.
2. New hire documentation – first priority: Form W-4; second priority: Form I-9; third priority: everything else.
3. Have specific, written wage agreements with each employee, and get specific written authorization for any wage deductions that are not ordered by a court or required or specifically authorized by a law.
4. To minimize the risk of claims and lawsuits, treat employees fairly and consistently according to known, job-related rules and standards, follow stated policies as closely as possible, and avoid exceptions whenever possible.
5. In handling unemployment claims, file timely claim responses and appeals, present testimony from firsthand witnesses, and present clear documentation of warnings, policies, and other relevant facts.

A more detailed list of the top ten tips for employers is in the book *Especially for Texas Employers* online at **http://www.twc.state.tx.us/news/efte/top_ten_tips.html**.

Alert: New I-9 Form Requirement

The U.S. Department of Homeland Security's Customs & Immigration Services Bureau (USCIS) has issued a new, updated Form I-9 for employers to use. Beginning September 18, 2017, an employer must use the new I-9 form for all new hires. Employers may download the form directly from the USCIS website at **https://www.uscis.gov/system/files_force/files/form/i-9.pdf?download=1**. Other I-9 resources available for use in complying with I-9 requirements are found on the general I-9 page at **https://www.uscis.gov/i-9**, including Publication M-274, I-9 *Handbook for Employers*, which is an invaluable guide for handling the I-9 process as the law requires. The direct link for the *I-9 Handbook* is **https://www.uscis.gov/i-9-central/handbook-employers-m-274**. Probably the most important things to remember about the I-9 requirements are the following:

- Use only the latest version of the form when hiring new employees in the future. Existing employees do not have to complete the new form.
- Follow the I-9 process with respect to all new hires, without exception.
- Follow the instructions on the form *exactly*.
- Complete the process within the first three business days after hire.
- When checking the new

employee's documentation, use only unexpired documents from the lists shown on the last page of the form.

- When in doubt about a document offered by an employee, consult the I-9 Handbook or call USCIS's toll-free number 1-800-375-5283.
- I-9 records must be kept for three years following the date of hire, or for one year after the employee leaves, whichever is later. However, many employment attorneys recommend keeping all employment records for at least seven years after an employee leaves employment, as discussed in our book at **http://www.twc.state.tx.us/news/efte/general_recordkeeping_requirements.html**.

Important ADA Case

In *Severson v. Heartland Woodcraft, Inc*., 2017 U.S. App. LEXIS 18197, 2017 WL 4160849 (7th Cir. September 20, 2017), the Seventh Circuit Court of Appeals held that an indefinite leave of absence for further medical recovery following exhaustion of FMLA leave benefits is not necessarily a reasonable accommodation under the Americans with Disabilities Act (ADA). As the court observed in its opinion, "The ADA is an antidiscrimination statute, not a medical-leave entitlement. The Act forbids discrimination against a "qualified individual on the basis of disability." *Id*. § 12112(a). A "qualified individual" with a disability is a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position." *Id*. § 12111(8). So defined, the term "reasonable accommodation" is expressly limited to those measures that will enable the employee to work. An employee who needs long-term medical leave cannot work and thus is not a "qualified individual" under the ADA. *Byrne v. Avon Prods., Inc.,* 328 F.3d 379, 381 (7th Cir. 2003). "*Byrne* is sound and we reaffirm it: A multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA." The court's opinion is online at **http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D09-20/C:15-3754:J:Sykes:aut:T:fnOp:N:2032346:S:0**.

Waivers of Class Action Lawsuits

In the case of *Convergys Corp. v. NLRB*, 866 F.3d 635, **http://caselaw.findlaw.com/us-5th-circuit/1869998.html** (5th Cir. 2017), the 5th Circuit Court of Appeals overruled the National Labor Relations Board's (NLRB) ruling that the employer could not legally enforce a class action waiver contained in the standard new hire agreement that all employees must sign. The court held that the National Labor Relations Act does not prohibit such waivers. According to the court, the right to file a class action lawsuit is a procedural right that can be waived, rather than a substantive right that cannot. There is a pending U.S. Supreme Court case that could resolve the matter once and for all: that case is *NLRB v. Murphy Oil USA, Inc., cert. granted*, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017).

Frequently Asked Questions

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

The following questions were compiled from past Texas Business Conferences around the state and questions from Texas employers on our employer hotline (1-800-832-9394) and via e-mail at **employerinfo@twc.state.tx.us.**

Q: ***We have an hourly employee who works as a recruiter during the normal Monday through Friday workweek at location A. This same business has a second location (location B) where the employee would like to work on Saturdays and Sundays as a medical technician. At location A, the employee makes $16 an hour and is paid overtime if he works over 40 hours as the recruiter. If he were to work as a med tech, his earnings would be $15 an hour. Two questions: can we give schedules in those jobs that change from week to week, and if he works overtime, how would we calculate it?***

A: Your company can definitely schedule the employee for any mix of hours and duties – see **http://www.twc.state.tx.us/news/efte/work_schedules.html** in our book *Especially for Texas Employers*. As to the overtime issue, U.S. Department of Labor regulation 29 C.F.R. § 778.115 requires an employee who is paid at two different rates for two different jobs to have any overtime hours paid according to the "weighted average" method of calculating overtime pay. You can find a detailed explanation of that method at **http://www.twc.state.tx.us/news/efte/i_employees_two_rates.html**, along with a calculator utility that you can use to see how a particular combination of hours and pay rates results in a weighted-average regular rate of pay and a gross pay amount for a workweek.

Q: ***I have a question with regard to our salaried non-exempt teammates. If a salaried non-exempt employee misses time from work, they are not required to make up that time, are they? If they miss an entire day, are they required to use vacation time?***

A: Whether the salaried non-exempt employees make up missed time is not really a legal question, since Texas employers have an almost unlimited right to schedule adult employees as they see fit (*see* **http://www.twc.state.tx.us/news/efte/work_schedules.html** in our book). By all means, if an employee misses work, and the work needs to get done, and the employee is available to make the time up, the company should feel free to tell the employee that he or she needs to make the time up within a certain time frame by working extra hours until the undone work gets done. Similarly, whether the employee applies available paid leave to such an absence is a matter of company policy. Keep in mind that the Texas Payday Law governs paid leave policies if they are in written form, so it would be important to follow whatever paid leave procedures are prescribed in writing. For more information on the interaction of paid leave policies and the Texas Payday Law, see **http://www.twc.state.tx.us/news/efte/fringe_benefits.html** and **http://www.twc.state.tx.us/news/efte/vacation_sick_and_parental_leave_policies.html** in the book.

Q: ***Is a salaried employee exempt from Davis-Bacon Wage determinations if they are working onsite in a mechanic or laborer capacity? Under 29 C.F.R. Part 541 (541.400), computer employees can be exempt, but I don't believe installing cable lines, security cameras, and wireless equipment, etc. qualifies. Also, do we have to pay them weekly? I know we have to report it weekly, but is it required that we pay them weekly as well?***

A: The U.S. Department of Labor's (DOL) Wage and Hour Division is the federal agency that enforces federal contractors' compliance with the Davis-Bacon Act and related statutes. You can find DOL's official guidance on the Davis-Bacon Act and other prevailing wage laws at **https://www.dol.gov/whd/govcontracts/dbra.htm**. Based on the underlying statute, 40 U.S. Code § 3142(b-c) (*see* **https://www.law.cornell.edu/uscode/text/40/3142**), the prevailing wage requirements would not apply to any company staff other than the workers who do the actual work on the construction involved in the contract, i.e., the "laborers and mechanics," which would not include the company's supervisory staff who are at the level of an exempt, salaried employee (as determined under the FLSA). See DOL regulation 29 CFR § 5.2 (online at **https://www.law.cornell.edu/cfr/text/29/5.2**), subsection (m) of which excludes salaried exempt employees (executive, administrative, and professional) and also clerical / office staff from the prevailing wage requirements. You are correct about the cable line and security camera installers – those workers are simply skilled technicians and would not be classified as computer professionals. They would be entitled to prevailing wages and to overtime pay if they work overtime. Regarding weekly pay requirements, DOL regulation 29 CFR 5.5(a)(1)(i) (online at **https://www.law.cornell.edu/cfr/text/29/5.5**) provides that workers must be paid "not less often than once a week. . . ." For more information on prevailing wage laws, see **http://www.twc.state.tx.us/news/**

efte/prevailing_wage_issues.html in our book online.

Q: ***What are the pros and cons of paying non-exempt employees a salary?***

A: Pros: None - I cannot think of any reason to recommend paying non-exempt employees by any method other than an hourly or performance-based rate, such as piece rate, job rate, book rate, commission, or something similar. In so answering, I am including "day rate" in the same category as salary, since the ordinary meaning of a day rate is that an employee earns the day rate by working any part of a day, which may not be entirely profitable for the company if the employee misses a substantial amount of work time.

Cons: Here are what I would say are the biggest drawbacks to paying non-exempt employees a salary:

1. The company must keep exact records of all days and hours worked by non-exempt employees, including the ones who are paid a salary.
2. When divided by the total hours worked in a workweek, the resulting regular rate of pay must equal at least the current minimum wage (still $7.25/hour as of October, 2017).
3. Any overtime pay calculation for a salaried non-exempt employee ranges from cumbersome to extremely complicated, particularly when a company also pays semi-monthly. See **http://www.twc.state.tx.us/news/efte/h_regular_rate_salaried_nx.html** in our book for a description of the DOL overtime calculation requirements in such situations.
4. If the employee misses time from work and is unable to make up the missed time, and the company wants to deduct money from the employee's pay to cover any absence that is not covered by paid leave, the deduction would have to be authorized by the employee in writing (due to the Texas Payday Law).

Q: ***Our company (200+employees) currently covers 100% of its employees' healthcare insurance premiums. We are changing our policy: the employer will continue to pay 100% of premiums for employees who submit to a free health screening survey. If an employee chooses not to participate in the health screening survey, the employee becomes responsible for paying a portion of the monthly premiums through payroll deductions. My questions are as follows:***

1. Are there any aspects of the change in policy that might conflict with existing labor and employment standards?

2. What steps, if any, must an employer take to protect the employee from disclosure of the screening results or election not to participate?

A: Those proposed changes sound like they would be considered part of a wellness program by the Equal Employmeny Opportunity Commission (EEOC). Basic information on EEOC's wellness standards is found in an FAQ document at **https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm**. Since the program would discriminate in terms of health plan costs against employees who do not want to undergo medical testing, I would say that the medical testing would have to be job-related and consistent with business necessity in order to comply with the Americans with Disabilities Act (ADA). Since the ADA can be very complicated, it would be best to discuss those changes with the EEOC itself – you can call 1-800-669-4000, or one of the local numbers listed in the field office directory at **https://www.eeoc.gov/employers/contacts.cfm**, or else send an e-mail inquiry to **info@eeoc.gov**. Regarding steps to take to protect the employee from disclosure of the screening results or the election not to participate, those would be the same steps applicable to any medical information pertaining to employees, i.e., keep such records in secure locations in confidential medical files that are separate and apart from other employee records, subject to strict access control procedures under which only those who have a job-related need to know the information can ever see the files.

Q: ***If a departing employee is provided with severance pay and the pay reflects a gross amount and a lesser, post-applicable taxes/net amount, but there is no specific itemization or accounting for whatever deductions occurred, can an employee demand such an accounting?***

A: Yes. It's not required under Texas law - an accounting pertaining to a severance payment would fall into the same category as an earnings statement pertaining to a regular paycheck, and current Texas law does not require earnings statements (even though they are a good idea– see **http://www.twc.state.tx.us/news/efte/delivery_of_wages.html** (paragraph 3)). I believe federal law, the Employee Retirement Income Security Act of 1974 (ERISA), would require such an accounting. Severance pay may fall under the definition of "welfare benefit" under ERISA. Given the broad language of DOL's reporting and disclosure regulation in 29 C.F.R. § 2520.104b-1 (*see* **https://www.ecfr.gov/cgi-bin/text-idx?SID=c9ff5bf0bece99f76546f3bd46cfa3f4&mc=true&node=se29.9.2520_1104b_61&rgn=div8**), an administrator of an ERISA-covered severance pay plan should disclose to a participant the deductions made from a severance payment, as it would be necessary for a participant to determine whether the employer is substantially complying with the plan terms. Ultimately, it should be easy for an employer or third-party plan administrator to explain how the payment was determined. Detailed questions may be answered by DOL's Employee Benefits Security Administration (**https://www.dol.gov/agencies/ebsa**); their number is 1-866-444-3272.

Texas Business Today

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