

Texas Business Today

Chair Ruth R. Hughs
Commissioner Representing Employers

BALANCE in the Workplace

Post-Separation Pay and
Unemployment Claims

Overtime Pay for Tipped Employees

Recording Job Interviews

Texas is America's Top State for Business



Commissioner's Corner:

New Tools for the New Year

Dear Texas Employer,

Welcome to our 4th quarter issue of *Texas Business Today*! We are on our way to closing out another successful year and Texas employers continue to contribute to our state's success.

Texas' unemployment rate fell to a record low of 3.8 percent in September and we experienced 27 consecutive months of employment growth. Also, *CNBC* announced Texas as America's Top State for Business in 2018. These numbers and accolades demonstrate the competitive advantage and market opportunities available to our Texas employers and world-class workforce.

In addition to our low unemployment rate, there was plenty to celebrate last quarter. For instance, National Disability Awareness Month, National Manufacturing Day, and Women Entrepreneurship Week took place, as well as Careers in Construction month, which Governor Abbott newly declared in October. Texas prides itself on its diverse industries and superior talent pipeline, so it is important that we recognize these events throughout the year.

We also continue to promote making Texas the #1 state for women-owned businesses. In support of these efforts, Central Texas, Lower Rio Grande, and Gulf Coast Workforce Development Boards hosted Women Entrepreneurship Boot Camps to provide resources for women-owned businesses. The high number of participants is a testament to the growing number of women-owned businesses in our state.

In honor of Veterans Day, TWC hosted their 7th annual Hiring Red White & You! (HRWY) Statewide Hiring Fair on November 8th in 29 cities across Texas to connect veterans and their spouses with employers. I want to express our deepest gratitude for the dedication of our brave men and women in our Armed Forces. It is our honor and duty to ensure they have career opportunities when they transition back into civilian life. If you are interested in participating next year, please visit: <https://twc.texas.gov/hiring-red-white-you>.

Additionally in November, TWC announced a statewide career exploration campaign and website called "Jobs Y'all: Your Career. Your Story." The campaign is designed to provide career awareness tools that will inspire young Texans to discover and explore the state's in-demand industries and learn about skills needed to enter the workforce. We listened to employers who requested support in reaching our future workforce.



TWC announced a statewide career exploration campaign and website called "Jobs Y'all: Your Career. Your Story."

This campaign will raise awareness of Texas industries and encourage students to learn more about in-demand careers in order to bolster future job creation and maintain our economic competitiveness in the 21st century. To learn more about this campaign, please visit: JobsYall.com.

Finally, I want to thank everyone that attended our 2018 Texas Business Conferences in 15 locations across the state. There were over 5500 attendees and our goal is to continue spreading the word about these employment law conferences and continue to serve as the #1 resource for Texas employers. Our 2019 set locations can be found on page 4.

In this issue of *Texas Business Today*, we provide helpful articles discussing balance in the workplace, overtime pay for tipped employees, and recording job interviews.

As we prepare for 2019, please be assured that my office is here for you. We are committed to supporting employers, keeping UI taxes low, and connecting you to Texas' first-class talent pipeline. Please do not hesitate to contact my office if you need any assistance.

Sincerely,

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

Making Connections Across the State



- 1.** Participating in the Texas Tribune Festival and speaking on the Deployment to Employment Panel along with CEO of IAVA, Paul Rieckhoff, Representative Jodey Arrington, and Director of Military Affairs at Texas A&M-San Antonio, Richard Delgado.
- 2.** The S&B Women in Construction Apprenticeship Program focuses on encouraging women to enter the construction industry.
- 3.** YOU Choose! Career Expo marked their 2nd annual career fair with a special ribbon cutting ceremony alongside key members of the Coastal Bend community.
- 4.** Houston Community College hosted a Women Entrepreneurship Boot Camp, presented in Spanish, that focused on learning about smart techniques and resources to inspire women entrepreneurs in Houston.
- 5.** TWC hosted a TX Hires Vets forum for local area employers in the Houston area to learn about best practices for hiring veterans. The forum featured an employer panel including Tenaris, Shell, Adaptive Construction Solutions, and Gaylord Hotels.
- 6.** Skills Development Fund grant awarded to Brookhaven College in partnership with Thomas Reuters, which created 46 new jobs and upskilled 199 current employees.
- 7.** The South Texas College Technology Campus in McAllen is one of the best in the nation to learn advanced skills and acquire real world experience in high-demand industries.





TEXAS BUSINESS CONFERENCES EMPLOYMENT LAW UPDATE

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

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

2019 Conference Locations

Houston • Brownsville • Dallas • Corpus Christi

Eagle Pass • San Antonio • Texarkana • Fort Davis

Horeshoe Bay • Lubbock • Midlothian • Longview

Wichita Falls

For a list of our 2019 conference locations and dates, visit: www.texasworkforce.org/tbc or for more information, call: **512-463-6389**



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

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

The non-refundable registration fee is \$125 (one day) and \$175 (two days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. 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 (ethics hours available). 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.

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BALANCE in the Workplace

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

Employers and employees are often seen as having competing interests. Employers ask, “How can I get more from my employees? More production. More results. More work. More commitment.” While employees ask, “How can I get more from my employer? More money. More time off. More satisfaction. More appreciation.” Finding a balance between these two seemingly conflicting interests is not easy. However, by implementing **BALANCE** in the workplace, employers may find that investing in employee satisfaction could pay off in better overall employee performance and retention.

Boundaries

Work and home are not one the same. Just as much as employers prefer that employees keep their home drama at home, employees prefer not having work interfere with their home time. To that end, when feasible, employers should direct employees to leave work at the end of their shift, not contact employees when they are off duty, and draft policies that encourage employees to use accrued vacation or other available paid time-off.

B oundaries
A ppreciation
L istening
A utonomy
N eeds
C onsistency
E ngagement

With today’s technology it is easy to reach out to employees at any time of the day or night. However, employers should refrain from doing this if possible. Interference with an employee’s time at home contributes to employee stress, which in turn contributes to burnout. However, respecting, valuing, and encouraging an employee’s time away from work contributes to job satisfaction.

Appreciation

A little appreciation goes a long way. Most people, employees included, are creatures of positive reinforcement. Often, attention is paid to what employees do wrong and not much is said about what they do right. Employers may show positive recognition by use of pay raises and bonuses, special occasion presents, or the occasional free lunch, but not all employee appreciation needs to involve a monetary investment. Words of praise, a simple thank you, or noticing and acknowledging that someone went above and beyond what was expected, can all make a big difference in how employees feel about their jobs.

Listening

People seeking help in resolving problems do not like to be ignored, and this is no different in the workplace. Companies should listen to work-related employee complaints and concerns, take them seriously, and act accordingly. If employers act to remedy employee concerns, they not only prevent small problems from becoming big problems at work, but they may also avoid liability in unemployment claims and potentially costly lawsuits. When employers listen to employees and take action when appropriate, employees learn to trust that their issues will be addressed.

Autonomy

Autonomy in the workplace can refer to how much freedom employees have while working, or how much control and independence they have in deciding how their work should be done. Studies have shown that autonomy in the workplace leads to higher job satisfaction and better productivity. It has also been linked to an increase in employee motivation and a decrease in employee turnover. Where possible, employers should try providing employees some control over their work environment. While it is not feasible to do this in every



position for every employee, autonomy can also be implemented for groups or teams of employees who work together. Employees who have some control over decisions related to their work feel a sense of ownership and responsibility for the work they do and become accountable for their outcomes.

Needs

It is difficult to do a job well without the necessary tools and materials. Fulfilling employee needs is crucial for both employees and employers. Employers should provide employees the resources they need to best perform their jobs. This applies not only to tangible resources, such as tools, equipment, supplies, and suitable work spaces, but also to those less tangible such as training, education, and skills development. When thinking about needs, it is easy to focus on “things” and forget that people are resources, too. Employees benefit from having the support of the right people, such as managers, team leaders, co-workers, and other staff. Consequently, when employees have what they need to improve their performance, employers benefit in turn.

Consistency

Lack of consistency in employee relations creates morale and trust issues for employees, which negatively affect the workplace. With regard to work performance, employees should know what is expected of them, and the consequences for succeeding or failing to meet these expectations. These consequences should be consistent across the board. The same is true for application of employer policies; employees should be able to reasonably rely on a company’s policies and procedures. Employers should not discipline some employees for violations and ignore infractions from others, nor should they grant benefits to some and deny them to others. All should be treated consistently under the rules.

Engagement

Employee engagement has been talked about for years as an element of employee satisfaction and an area of employer distress. There is no one agreed upon definition for engagement. It has been defined as the commitment and motivation to contribute that employees have to an organization’s goals and values. It is also that quality that drives employees to do their best in their jobs every day. Engagement may not be simple to achieve. Employers could share their goals with employees and ask for input on how to achieve them. In addition, organizations could ask for employee suggestions, involve them in the process of structuring their jobs, find out what motivates them, and show them that their contributions matter.

BALANCE in the workplace focuses on what an organization can do for its employees, with the goal of improving employee satisfaction. This in turn improves employee performance and decreases turnover. Former Campbell's Soup CEO, Doug Conant, once said, "To win in the marketplace you must first win in the workplace." He and other business leaders have learned that employees are a company’s most important asset. Thus, efforts to increase employee satisfaction are time and energy well spent. 📌



Post-Separation Pay and Unemployment Claims

Mario R. Hernandez | *Legal Counsel to Chair Ruth R. Hughs*

The song "Everybody Wants to Rule the World" from the band Tears For Fears contains lyrics that state "nothing ever lasts forever." Employers understand that principle can apply to working relationships. In many instances, employers offer post-separation payments to employees when they become separated from their jobs. If such an employee later files an unemployment claim, these types of payments can have financial consequences for both the employee and the employer.

What is Post-Separation Pay?

Post-separation pay can often be referred to as severance pay. In other instances, post-separation pay is categorized as wages in lieu of notice. Here are some key differences between the two:

- 1) Severance pay is a form of post-separation payment that the employer has obligated itself to provide through a verbal or written agreement. The amount of payment is usually based on a formula that involves the years of service or longevity that the affected employee has had with the company.
- 2) Wages in lieu of notice is a form of post-separation payment that the employer has not obligated

itself to provide. It is a payment that the employer makes because of a lack of notice of separation. No obligation + no notice = wages in lieu of notice.

Are All Post-Separation Payments Treated as Severance Pay or Wages in Lieu of Notice?

The answer is no. There are some types of post-separation payments that constitute neither severance pay nor wages in lieu of notice. For instance, per [§207.049\(b\) of the Texas Labor Code](#), severance pay does not include any remuneration received by an employee under:

- (1) a release of claims or settlement agreement entered into between the employee and the employer:
 - (A) based on an alleged violation of the Civil Rights Act of 1991 (Pub. L. No. 102-166); or
 - (B) pursuant to a claim or cause of action filed in connection with the employment relationship; or
- (2) a written contract, including a collective bargaining agreement, negotiated with the employer before the date of separation from employment of the employee.

In addition, liquidated damages are neither severance pay nor wages in lieu of notice.



How Do Post-Separation Payments Affect an Unemployment Claim?

Claimants can be disqualified from unemployment benefits for the period in which they are receiving severance pay or wages in lieu of notice. Whether the claimant is disqualified on this basis is determined by the conditions attached to the payment. For instance, if the payment is due to any of the circumstances described above in §207.049(b), the payment will not be viewed as disqualifying in an unemployment claim. This means that the claimant can collect both the payment and unemployment benefits at the same time.

On the other hand, if the post-separation payment is found to be wages in lieu of notice, or severance pay that is not conditioned on any of the factors in §207.049(b), then the payment will disqualify the claimant from unemployment benefits for the period that the payment is intended to cover. In other words, the claimant cannot “double dip” in this scenario.

What Else Would be Helpful to Know About Severance Pay and Wages in Lieu of Notice?

As mentioned above, severance pay or wages in lieu of notice can disqualify a claimant from unemployment benefits for the period that the payment is intended to cover. However, if a departing employee receives such a payment and then files an unemployment claim, the disqualification does not occur without further ado.

Severance pay can be paid in a lump sum or installments. If an employer has made a severance payment to a worker who has filed an unemployment claim, the employer should be sure to notify the Texas Workforce Commission (TWC) about the payment. It is very important for the employer to alert TWC of the dates that the severance pay is intended to cover. It is also a best practice to put the dates of coverage on the departing employee’s earnings statement, or the memo line of the severance pay check being issued. If the employer or the claimant do not provide the dates that the additional pay covers, the claimant will only be disqualified from benefits for the week in which the payment was received. This guidance also applies to wages in lieu of notice.

Employers also have child support withholding obligations in relation to severance pay and wages in lieu of notice. Employers can find more information about this type of withholding here:

<https://portal.cs.oag.state.tx.us/wps/portal/WageWithholding-SeverancePay>

In addition, both severance pay and wages in lieu of notice constitute wages for unemployment tax purposes per TWC’s Tax Department Law Manual Section 4.2.2.10 dealing with dismissal payment. See: <https://twc.texas.gov/tax-law-manual-chapter-4-taxes-1#4.2.2.10>.

Conclusion

Post-separation pay takes on a variety of forms that can be disqualifying or non-disqualifying in an unemployment claim. Dates matter, so it is key that employers provide TWC with the dates of coverage for the severance pay or wages in lieu of notice in any response to a claim for benefits. By being familiar with these concepts, employers will be in a better position to properly handle unemployment claims that include severance pay or wages in lieu of notice. 🇹🇽

For More Information on Severance Pay and Wages in Lieu of Notice, please visit:

https://twc.texas.gov/news/eft/final_pay_severance_benefits.html

https://twc.texas.gov/news/eft/severance_pay.html

https://twc.texas.gov/news/eft/ui_law_qualification_issues.html#dq-wiln

https://twc.texas.gov/news/eft/ui_law_the_claim_and_appeal_process.html#ui-wiln



Overtime Pay for Tipped Employees

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

A common question concerns how to calculate overtime pay for tipped employees. The main thing to remember is that the tip credit of \$5.12 per hour does not vary for overtime hours. A minimum wage tipped employee who would get \$10.88 per hour in the absence of a tip credit would get \$5.76 for each overtime hour with the tip credit.

Specifically, with regard to the issue of how overtime pay is affected by “excess tips,” i.e., the amount of tips that tipped employees receive from customers that is in excess of the tip credit amount, below is the relevant guidance from the U.S. Department of Labor’s (DOL) Wage and Hour Division:

From Fact Sheet #15 (see <https://www.dol.gov/whd/regs/compliance/whdfs15.htm>), toward the end of that fact sheet, the following guidance appears:

Overtime Problems

Where the employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger FLSA 3(m) tip credit for an overtime hour than for a straight time hour. Under certain circumstances, an employer may be able to claim an additional overtime tip credit against its overtime obligations.

From DOL’s Field Operations Handbook, Section 32j18(e) (see page 42 of the PDF document at https://www.dol.gov/whd/FOH/FOH_Ch32.pdf):

(e) Determining the regular rate for tipped employees

The regular rate for a tipped employee is determined by dividing the total remuneration in any workweek, minus statutory exclusions, by the total hours worked. See 29 CFR 778.109. The regular rate can never be less than the highest applicable minimum wage. See 29 CFR 778.5. For example, in a state with a state minimum wage of \$9.00, the regular rate cannot be less than \$9.00 per hour.

An employer may claim a tip credit and also provide board, lodging, or other facilities (see 29 CFR 531 and FOH 30c). In determining the regular rate for a tipped employee, all components of the employee’s wages must be considered (i.e., cash, board, lodging, facilities, and tip credit). Tips in excess of the allowable tip credit are not considered wages and are not considered in determining the regular rate (see 29 CFR 531.60).

From DOL’s wage and hour regulation 29 C.F.R. § 531.60 (see https://twc.texas.gov/news/eftw/whpart531.html#531_60):

§ 531.60 Overtime payments

When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, the employee's regular rate of pay is determined by dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid (see part 778 of this chapter for a detailed discussion of overtime compensation under the Act). In accordance with section 3(m), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer per hour (not in excess of the minimum wage required by section 6(a)(1) minus \$2.13), the reasonable cost or fair value of any facilities furnished to the employee by the employer, as authorized under section 3(m) and this part 531, and the cash wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.

Excess tips, i.e., tips from customers that are over and above the tip credit taken by the employer, do not count toward the overtime pay calculation.



As that guidance from DOL makes clear, excess tips, i.e., tips from customers that are over and above the tip credit taken by the employer, do not count toward the overtime pay calculation.

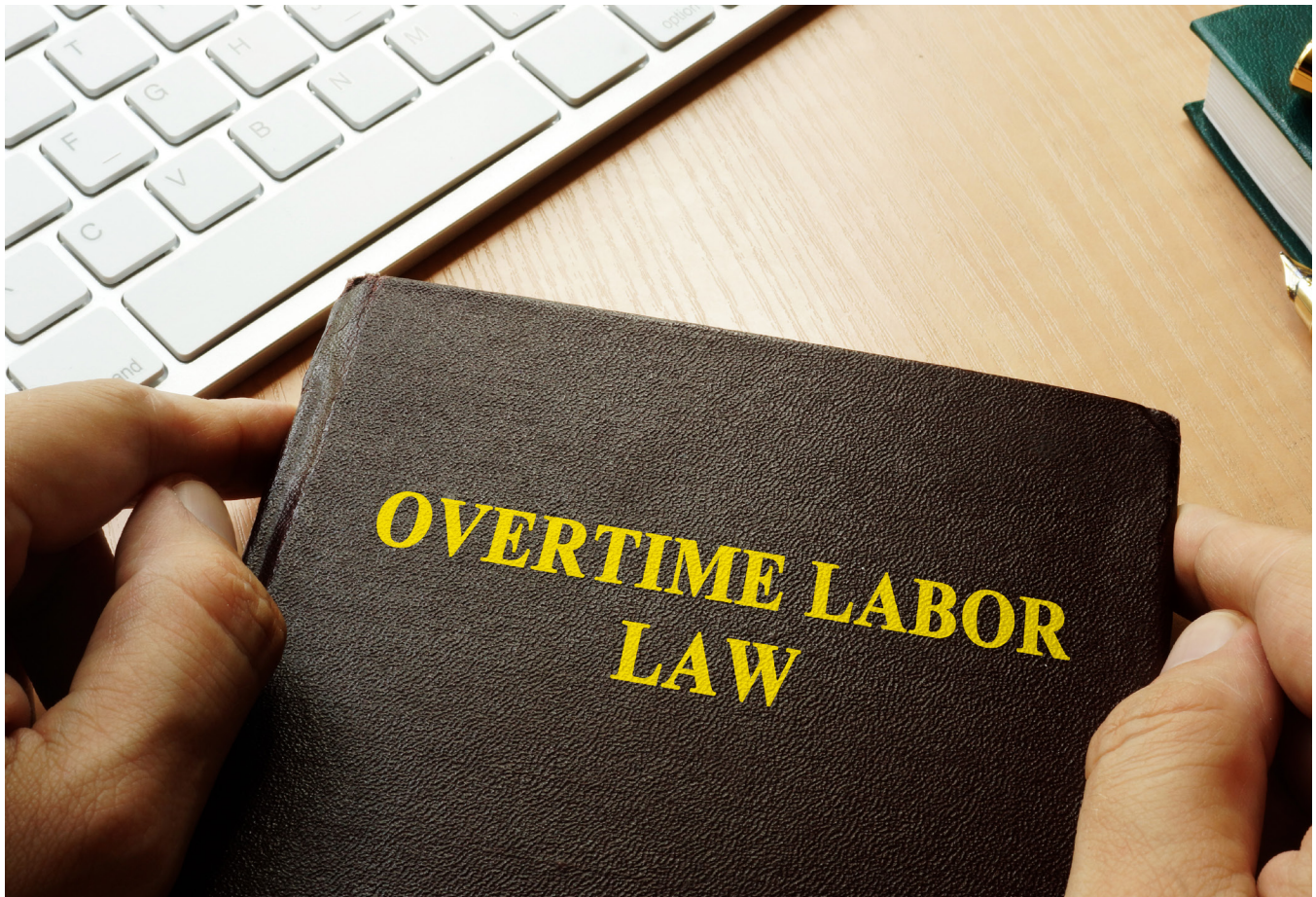
Concerning how to pay tipped employees in general, DOL has revised some of its guidance recently in response to Congressional action (Consolidated Appropriations Act, 2018 (Act), Pub. L. No. 115-141, Div. S., Tit. XII, § 1201).

Here is the latest guidance from the DOL regarding tips for tipped employees: https://www.dol.gov/whd/FieldBulletins/fab2018_3.htm.

Under that guidance, pending further regulatory action by DOL, tip pools for non-server staff can be permissible if the tipped employees are paid a cash wage of at least \$7.25 per hour (meaning that the employer does not take the tip credit), but owners and managers cannot take part in those tip pools or keep any portion of the tips.

Employers may also look at DOL Fact Sheet #15, which explains the general rules for tipped employees, including a note at the top of the document about the sections of the regulations dealing with tip pools not applying due to the statutory revision discussed in the first linked guidance above: <https://www.dol.gov/whd/regs/compliance/whdfs15.htm>.

This is a very complicated area of wage and hour law, and the recent statutory amendment and DOL guidance leave some questions still open. Employers may obtain further assistance by visiting the linked sites, calling the U.S. Department of Labor help line at 1-866-487-2365, and/or contacting a private-sector employment law attorney who is experienced in wage and hour law. 🇺🇸



Recording Job Interviews

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

We are living in a time where recordings are commonplace in our society. Technology has made it easy and tempting to record what is happening in our lives. From dash cam videos to “secret” audio recordings, there are countless reminders of how recording events can help to preserve a memory or establish a fact. After all, recordings have the potential for use as both a sword and shield.

Due to the increased use of recorded materials, employers have become inspired to use recordings in the workplace. Some employers wish to start from the very beginning and record job interviews. While this sounds like an attractive option, employers should fully understand the laws and risks associated with such a practice before moving forward. The following information should help employers in making that decision.

How can Employers Legally Record an Interview?

It depends on the type of recording. As Texas has one-party consent for audio recordings, it is legal for a person to record a conversation without the knowledge or consent of others, as long as the person doing the recording is participating in the conversation. (On that note, be aware that the applicant might be recording the interview without the employer’s knowledge, and such a recording would be discoverable in a discrimination claim or lawsuit).

However, section 16.02 of the Texas Penal Code does prohibit recording when there is a reasonable expectation of privacy. Recording in-person communications in a public place—such as a lobby or open office—is permissible because people do not have an expectation of privacy in those areas. Recordings in a private restroom, for example, would not be permissible.

As employers should generally hold interviews in a private, quiet location, it would be best to be up front about the recording, even though that is not required. Video recordings without audio fall under the same rules.

Employers who wish to record audio and video, however, must give notice and obtain written consent before conducting the interview.

The Benefits of Recording a Job Interview

Recording interviews can help employers preserve details that an applicant shares. It can serve as backup to written notes, and adds that extra



level of comfort knowing that the interview was preserved. Employers also use recordings to verify what job duties were discussed, in case hired applicants refuse to perform their job.

Audio recordings are sufficient for those goals, but employers often desire to have video recording as well. For one, video recordings can be useful in helping to identify applicants, which is tempting for employers who benefit from putting a face to the name. Some employers also wish to have video recordings to eliminate fears of fraudulent allegations of physical violence by the employer. Sometimes the employer is asked to record the interview as a form of reasonable accommodation for applicants with certain disabilities. In those cases, employers should comply with the request and document it for their records.

The Risks of Recording a Job Interview

The risks of recording an interview can be significant and often far outweigh the benefits. The primary concern is that recordings may cause employers to categorize, hire, or reject certain applicants based on protected characteristics such as race, color, national origin, religion, age, gender, disability, and pregnancy. Recorded applicants who are rejected for the job may allege illegal discrimination because these protected characteristics were documented by the employer and could have played a part in the decision-making process.

While the truth may be that such information



played no part in the hiring decision, that can often be difficult to prove, especially in cases where there are multiple managers with hiring power and oversight is lacking. Perception often wins over reality, and recording the interview is enough to expose the employer to a lawsuit because applicants can easily allege that they were rejected due to those protected characteristics.

Recording interviews can also cause applicants to feel nervous and can cause a loss of trust in the employer. Disclosing intent to record is a best practice, and is required when a recording contains audio and video. Many qualified applicants have rejected job offers or have left companies because they find this practice to be inappropriate, unnecessary, and invasive.

Best Practices

After weighing the benefits and risks, many employers choose not to record interviews unless they are doing so as a form of reasonable accommodation. The risks can be substantial, and the benefits can be achieved in other ways. The concerns about maintaining good notes, verifying job duties, and avoiding fraudulent allegations of physical violence can all be solved by having a third employer witness present in the room during the interview. Employers may also give the applicant a written

list of job duties to sign. Further, identifying applicants can be done by taking great notes about the applicant's answers to questions and qualifications for the job.

For more information on job interviews, see the following link:

<https://twc.texas.gov/news/eft/interviews.html>.

Conclusion

While it is legal to record job interviews if the proper steps are taken, employers should exercise great caution when doing so, for the reasons listed above. For more information, employers are encouraged to call the TWC Employer Hotline at 800-832-9394. 🇹🇽



'Twas the Eve of the Party

Elsa G. Ramos / Legal Counsel to Chair 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.**

**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.**

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

**Ignoring instructions 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.**

Frequently Asked Questions

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

Q: This morning, a young woman came in wanting to apply for a job. We have no positions that are vacant and told her exactly that. She told us we are required to let her submit a job application. That does not sound accurate, but I thought I should confirm that with TWC.

A: If your company has no job openings and does not need additional workers, you are not required to accept job applications from anyone or to keep them on file for the future in case an opening comes up. It would be legal to simply inform her that your company is not hiring.

What might really help her is if you give her the contact information for the nearest workforce center – a list of all Workforce Solutions centers around the state is online at <https://twc.texas.gov/directory-workforce-solutions-offices-services-0>. The staff there could certainly give her some assistance in her work search.

Q: I am looking for some information on guaranteed pay, and what we as a company need to do to be in compliance with federal and state law. Is there somewhere you can direct me to?

A: Assuming that guaranteed pay refers to minimum wage, Texas' minimum wage is indexed to the federal minimum wage, so both Texas and federal law provide a guaranteed minimum wage of \$7.25 per hour. The U.S. Department of Labor's (DOL) basic information is on its website at https://www.dol.gov/whd/regs/compliance/whd_fs.pdf. What minimum wage really means is that no matter what pay method an employer uses for its employees, all of the employees who are not salaried exempt employees must receive the equivalent of at least \$7.25 per hour for each hour actually worked, plus overtime pay at time and a half based on the regular rate of pay. For example, a minimum wage employee would earn overtime pay at \$10.88 per hour. For exempt salaried employees, there is also a type of guaranteed wage in the form of a minimum salary of at least \$455 per week (see DOL fact sheet #17A at https://www.dol.gov/whd/overtime/fs17a_overview.htm).

Aside from the minimum wage and the minimum salary for a salaried exempt employee, any employee's wage level can be "guaranteed" in the sense that the employee has an enforceable right to receive the wage that is specified in the wage agreement that is in effect when the employee performs the work. That wage level is guaranteed in that the employer must pay that amount for work that is already performed, since retroactive pay cuts are always against the law. Cuts in pay can be legal if they are announced to the affected employees in advance of the effective date of the change, and it is a best practice to always give clear written notice of such changes in pay or benefits. You can find detailed information on these issues by looking at the pay-related articles in Part II of our book *Especially for Texas Employers* – click on the following link to access that part of the book online: <https://twc.texas.gov/news/efte/toc2.html#tocpayandpolicies>.

Q

My company is a licensed professional employer organization in Texas, and we have 65 employees on our regular company staff, in addition to several hundred employees who work at our dozens of client companies. One new client is very small - only 12 employees. That client has an employee who is pregnant and will need some time off to deal with her family situation. My question is, will we need to give her any amount of leave time under the Family and Medical Leave Act? We have heard conflicting things about our obligations as a PEO and about whether our client has to count the non-client PEO employees toward its FMLA coverage.

A

The applicable U.S. Department of Labor (DOL) regulation is 29 C.F.R. § 825.106, which you find online at https://www.ecfr.gov/cgi-bin/text-idx?SID=3199c551a151b18687c07b12360c1e50&mc=true&node=se29.3.825_1106&rgn=div8. As noted in subsection (d) of that regulation, “In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.” The first sentence of the following subsection (e) notes that “Job restoration is the primary responsibility of the primary employer.” That same information is included in DOL Fact Sheet # 28N at <https://www.dol.gov/whd/regs/compliance/whdfs28n.htm> under “Responsibilities of Primary Employers.”

Based on the DOL regulation, the last bullet item under “Practical Implications for PEOs” would be correct in indicating that 1) the small client with only five employees would be the primary employer, and 2) the employee’s eligibility under the FMLA would be based on the number of employees employed by the client. Since the client has only five employees, its employees would not be individually eligible for FMLA leave, and the client would not have to restore the employee to her position under the FMLA. As a side note, an employee returning from maternity leave would have the protection of the pregnancy discrimination laws, but since those laws apply only to employers with 15 or more employees, the small client company would also lack coverage under that law. That being the case, your PEO's client (the small company with only 12 employees) is too small in terms of the number of employees to be covered under any law pertaining to family leave. Still, it would be important to furnish whatever leave is promised in a written policy of the client or your PEO pertaining to client employees, and if the employee does not return from maternity leave and later files an unemployment claim, explain that the claimant stopped working due to a medical condition.

Q

My company will be adding a new salaried employee who has two child support garnishments. He will earn monthly incentive checks in addition to his salary. Are incentives considered as part of the child support deduction in this case?

A

According to the Child Support Division of the Texas Attorney General’s Office, all components of an employee’s paycheck are subject to a child support order. That would include commissions, bonuses, and other types of incentive payments for an employee. That information is covered on page 42 of the Child Support Handbook for Employers, which you can download from <https://portal.cs.oag.state.tx.us/OAGStaticContent/EmployerOneStopProject/EmployerOneStop/HelpfulInformation/EmployerHandbook.pdf>. How to deal with multiple orders is discussed on pages 44 – 45. It would be a “payroll best practice” to ensure that all components of each paycheck, as well as any deductions from pay, are accurately reflected on each earnings statement given to an employee.

The questions above 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.

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