

# Texas Business Today

Aaron S. Demerson  
Commissioner Representing Employers  
Second & Third Quarter 2021

Suitable Work: What Does it Mean for  
Unemployment Claims?

All Employees Covered by New Sexual  
Harassment Protection in Texas

Managing Claims, Appeals, and Taxes  
Online

87th Legislative Session  
Employment-Related Bills

# Texas Economy Continues to Bounce Back





# Commissioner's Corner: Texas Economy is Bouncing Back

Dear Texas Employers,

Welcome to our 2021 second and third quarter issue of *Texas Business Today*. We have a lot to report! As we begin to wrap-up our sweltering summer, our Texas economy is bouncing back, showcasing the resiliency of our Texas employers. Texas' unemployment rate is 6.2%, and has decreased for the fourth month in a row. At the height of the pandemic, our unemployment rate climbed to 12.7%, which demonstrates how far our Texas employers have come in the past year and a half by creating new jobs and adapting to new business models.

I want to thank Governor Greg Abbott and our elected leadership for giving our Texas employers the freedom to fully open their businesses and to create new ways to serve their customers safely and efficiently. For example, beer, wine and mixed drinks can now be included in pickup and delivery food orders. This helped a number of restaurants secure a revenue stream made available during the pandemic and is now signed into law.

I also want to thank our 28 Local Workforce Boards for all of their hard work and dedication throughout the last year and a half. They are the boots on the ground in their local area and continue to be a vital piece of the puzzle. Thank you for being flexible, adaptable, and handling business the Texas way.

In addition, Texas continued to lead the way and remains at the top of many lists, even during the pandemic. For the 17th year in a row, Texas was voted by CEO's across the nation as the best state for business. Also, for the record-shattering 9th year in a row, Texas was awarded the Site Selection Governor's Cup for job performance and capital investment. Way to go Texas!

As Texas is fully open again, we will start to host our Texas Conference for Employers in-person as well as providing a virtual option. On August 13th in Georgetown, we hosted our first in-person conference since the pandemic began. The sold-out conference covered a number of employment law topics, including new Covid-19 related material. For upcoming conference dates and information, please visit:

<https://www.twc.texas.gov/texas-conference-employers>

If you are not able to attend a conference, please remember we continue to assist our employers through our Texas employer

hotline at 1-800-832-9394. If you have any questions about running your business, please give us a call!

In regards to the 2021 Unemployment Tax Rate, TWC used legislative authority to set UI tax rates at a stable level, consistent with 2020 rates, to avoid burdening Texas businesses with a significant increase of taxes resulting from pandemic-related closures. For more information on easy ways to check your tax rate, please see the article on pg. 9.

Lastly, the 87th Texas Legislature has come to an end and our office followed bills related to employment law throughout the session. Please see the article on pg. 11 for a brief summary on significant employment law related bills.

To all Texas employers, I want to say thank you for choosing the Lone Star State as your home and helping Texas lead the nation as the #1 state for business! And if you are one of the many new businesses that have relocated here, welcome to Texas! Thank you for all that you do and Let's Continue to Make Progress!

Sincerely,

Aaron S. Demerson  
Texas Workforce Commission  
Commissioner Representing Employers



# Making Connections Across the State



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3.



4.



5.



6.

**1.** ConnectU2Jobs event bringing together employers to create a talent pipeline for the Highway Industry in collaboration with those formerly incarcerated.

**2.** At Lorenzo De Zavala Middle School in La Joya, Texas, celebrating with Arian Gutierrez on winning the TEES-NPI Cleans SMARTS Master Class Finale. He also placed 2nd in the Junior Division, Robotics and Intelligent Machines at the Texas Science and Engineering Fair.

**3.** Attended the Ladders for Leaders graduation ceremony celebrating their intern graduates and employer partners in Round Rock, Texas.

**4.** Gathered on the front steps of the Texas Workforce Commission building with our interns that worked as a part of Texas Interns Unite! over the summer.

**5.** Recognizing Suburban Propane for their efforts in hiring our Nation's heroes through our We Hire Vets program. Their workforce is made-up of 13% veterans and they have 8 offices across Texas.

**6.** Velissa Chapa, one of our Employment Law Attorneys, has accepted a new position in TWC and we will miss her dearly. She was a great asset to the Office of Employers and her expertise and passion for employment law is bar none. Thank you for 7 awesome years and congratulations on the new position!



# Texas Conference for Employers

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.



## 2021 Conference Locations

Live conferences will resume in 2022.



### Topics 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 \$175 (one day) and \$225 (two days). The Texas Workforce Commission and Texas SHRM State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resource professionals attending this conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Conference for Employers, please visit the Texas SHRM website. Also, attorneys may receive up to 6 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference, or 12 hours for the two-day conference (one hour of ethics available). Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

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# Suitable Work: What Does it Mean for Unemployment Claims?

By Mario Hernandez/ Legal Counsel to Commissioner Aaron S. Demerson



*If a worker is on unemployment benefits and rejects the work that is being offered, the employer can notify the TWC of the refusal.*

The COVID-19 pandemic has changed many aspects of our lives, including the ways we live and work. Employers are well aware that the pandemic has resulted in numerous job separations and are interested in connecting workers to jobs. As far as unemployment claims are concerned, one thing to remember in the process of offering a job to someone who is collecting unemployment benefits is the concept of suitable work. This article will provide a brief look at several topics, including identifying what suitable work means, how work is offered to someone, and how suitable work offers could affect an unemployment claim.

## What is Suitable Work?

Two important sections of the Texas Labor Code that deal with suitable work are Sec. 207.008 and Sec. 207.047, which can be found at the following links: <https://statutes.capitol.texas.gov/Docs/LA/htm/LA.207.htm#207.008> and <https://statutes.capitol.texas.gov/Docs/LA/htm/LA.207.htm#207.047>. Whether work is suitable or not is based on several factors that are described in Sec. 207.008. Some of these factors include the individual's work experience and prior earnings, and the distance between work and home. Sec. 207.008

also includes instances in which work would not be suitable, for example, if the work being offered was the direct result of labor disputes such as a strike or lockout. Using the factors found in Sec. 207.008, determinations are made on whether an offer of work is suitable or not.

Sec. 207.047 on the other hand, includes the consequences for failing to return to work. We will revisit Sec. 207.047 later in the article.

## How Can Work Be Offered?

Work can be offered in a variety of ways. For starters, an employer could simply contact individuals directly and offer them the work. The employer should document several items of information related to the work being offered. These items include: "the nature of the work, the wages, hours of work, job location, and other requirements." (See: [https://www.twc.texas.gov/news/eft/ue/ui\\_law\\_qualification\\_issues.html#dq-sw](https://www.twc.texas.gov/news/eft/ue/ui_law_qualification_issues.html#dq-sw).) The employer should explain these items to the individual when offering the work as well. In addition, the employer should document whether the offer of work was refused or if the individual failed to show up to the assignment as instructed.

Another way that work can be offered is by the TWC or Workforce Solutions. TWC or Workforce Solutions can issue a referral to a claimant for a suitable job. For information on applying for and accepting suitable work, please visit: <https://twc.texas.gov/jobseekers/work-search-requirements-unemployment-benefits#applyForAndAcceptSuitableFulltimeWork>.

## Can Someone Be Reported to the TWC for Failing to Accept an Offer of Work?

The answer is yes! The TWC has a webpage that allows for reporting work refusals. You can find the webpage at the following link: <https://twc.texas.gov/news/employer-resources#jobOfferOrReturntoWorkOfferRefusedLetUsKnow>. The Employee Refusal Documentation Form itself can be found at the following link: [https://apps.twc.state.tx.us/EBS\\_REF/ewrd/employeeWorkRefusalDoc](https://apps.twc.state.tx.us/EBS_REF/ewrd/employeeWorkRefusalDoc).

## How Can Offers of Suitable Work Affect Unemployment Benefits?

If an offer of work is found to be suitable and the claimant rejects the offer, the rejection could affect the claimant's unemployment benefits. Readers might wonder to themselves: "...could affect? Why isn't it *will* affect? Shouldn't a claimant's benefits be stopped the moment it's found out that they have rejected an offer of suitable work?" In short, the answer is 'not always.'

A claimant who has rejected an offer of suitable work needs to establish that there was a good cause reason for the rejection to avoid being disqualified from unemployment benefits. For instance, for part

of 2020 and for part of 2021, there were several COVID-19 related reasons for rejecting suitable work that were considered good cause reasons for doing so. In addition, some good cause reasons for rejecting suitable work can involve travel distance and pay rate of the work being offered. If the claimant is successful in establishing that they had a good cause reason for rejecting an offer of suitable work, no disqualification from benefits will result from the rejection.

On the other hand, if the claimant fails to accept an offer of suitable work without good cause, the claimant will be disqualified from benefits. Per Sec. 207.047 of the Texas Labor Code, the disqualification lasts until the claimant returns to employment and works for 6 weeks or earns six times their weekly benefit amount (See <https://statutes.capitol.texas.gov/Docs/LA/htm/LA.207.htm#207.047>).

## Conclusion

In sum, having job offers rejected can be frustrating for employers who need workers to fulfill the duties of the business. If a potential worker is on unemployment benefits and rejects the work that is being offered, the employer can notify the TWC of the refusal and an investigation will occur to determine whether the work being offered is suitable, and if the claimant rejected it, whether the claimant had good cause to do so. By keeping good documentation of the work being offered and communicating with the TWC when work has been refused, employers can help the TWC ensure that suitable work is not being rejected without good cause.



*If an offer of work is found to be suitable and the claimant rejects the offer, the rejection could affect the claimant's unemployment benefits.*





## What Actions Violate the Law?

Under Section 21.142, an employer could be liable for an unlawful employment practice if sexual harassment of an employee occurs and “the employer or the employer’s agents or supervisors know or should have known” that the conduct was occurring and “fail to take immediate and appropriate corrective action.”

Currently, there is no definition of what constitutes immediate and appropriate corrective action. However, employers should not delay in taking action once they are notified that an employee may be the victim of sexual harassment. This is true no matter how the employer learns of the prohibited conduct.

For example, some employers have policies which require the “victim” of sexual harassment to submit a written statement before the employer initiates an investigation. If an employee reports being sexually harassed to the employer, but the employee is reluctant to put the complaint in writing, it should not delay the employer’s response. Under the statute, once the employer knows or should have known about the incident, the employer is obligated to take immediate action. A written statement is not required.

## How Much Time Does an Employee Have to File a Complaint?

The statute of limitations for filing a discrimination complaint with the Texas Workforce Commission under Chapter 22 of the Texas Labor Code is 180 days. Starting on September 1, 2021, the law extends that deadline, only for cases of sexual harassment, to 300 days from the date that the alleged objectionable conduct occurred.

## What Should Employers Do?

It is a good idea for all employers to review their sexual harassment policy. Employers who do not have a sexual harassment policy should quickly implement one since all employers, regardless of size, are potentially liable for failing to take corrective action beginning on September 1st.

Employees should be educated and trained on the policy now, and retrained on the policy later. Training staff repeatedly and on a regular basis is a best practice. Managers and supervisors should receive separate and additional training. Not only do they need to be familiar with the employer’s sexual harassment policy, they should also know what actions to take in case complaints of harassment are reported to them. In addition, managers and supervisors are included in the statute’s definition of “employer” and should be aware of their potential liability.

In conjunction with a policy, employers should develop a plan for the type of prompt and remedial action they expect to take when notified that sexual harassment may have occurred in the workplace. While some employers may prefer to bury their heads

in the sand, thinking that no news is good news, it is ultimately best for employers to be aware that such prohibited behavior is occurring. To that end, employer policies should include “no retaliation” clauses to reassure and protect those who bring these complaints to light. In addition, policies should allow for multiples methods of communication and make it easy to report the harassment to any and all members of management without regard to hierarchy or organizational structure.

For a more thorough analysis and treatment of this issue, employers can review information from *Texas Guidebook for Employers: Especially for Texas Employers* which addresses and provides guidance on minimizing harassment liability: [https://twc.texas.gov/news/eft/harassment\\_minimizing\\_liability.html](https://twc.texas.gov/news/eft/harassment_minimizing_liability.html).

## The Takeaways

Protection against sexual harassment in the workplace applies to individuals employed by all employers, not just those with at least 15 employees. Managers, supervisors, and perhaps others, are now included in the definition of “employer” and could bear individual liability along with, or separate from, the business entity. Employers must act immediately and take corrective action upon learning of any incident that could constitute sexual harassment.

Employees have 300 days from the date of the sexual harassment incident to file a complaint with the Texas Workforce Commission. This is much more time than the usual 180 days for other types of non-sexual harassment or discrimination. And finally, employers should draft sexual harassment policies, train all employees on these policies, and implement a plan of action to quickly address sexual harassment in the workplace.



*Protection against sexual harassment in the workplace applies to individuals employed by all employers, not just those with at least 15 employees.*



# Managing Unemployment Claims, Appeals, and Taxes Online

By **Tommy Simmons** / *Legal Counsel to Commissioner Aaron S. Demerson*

If an employer wants to check up on unemployment claims, chargebacks, tax rates, claim notices and determinations, and appeals, without having to deal with calling Texas Workforce Commission (TWC) offices or sift through mail, there are a number of methods to do so. Use the TWC systems that are available for claimants and employers dealing with unemployment claims and appeals, and for employers dealing with wage reports and unemployment tax payments. During many times when it was practically impossible to reach TWC by phone or fax due to overloaded phone lines, employers could check on many things with just their computer and an Internet connection. This article will highlight a few of those systems.

In addition to all of the details of its tax account, an employer can access a list of all of the company's chargebacks using the Unemployment Tax Services (UTS) system online at <https://twc.texas.gov/businesses/unemployment-tax-services>. Start by logging on to UTS at <https://apps.twc.state.tx.us/UITAXSERV/security/logon.do>, then bring your account up on the screen. Once there, select the "Report Filing (C3)" tab, then click on "Chargeback History" under the Quick Links at the top left, and finally the "View" link for the quarters that show chargebacks. Carefully compare that list with the claim notices and determinations that your company has received and/or responded to or appealed. If your company has chargebacks on its account that you believe should not have been imposed, and you have not already appealed the chargebacks, you may do so

at this time, but since the timeliness of the response or appeal would probably be an issue, you would need to include an explanation of why the claim response or appeal was not filed earlier.

The methods for responding to a chargeback notice, even if the response may be late, are outlined on the TWC website at <https://twc.texas.gov/businesses/employer-unemployment-benefit-chargebacks#respondingToANoticeOfMaximumPotentialChargeback>. Those methods may be used even if your company never received a prior notice. If your company did not receive a claim notice in a case that resulted in a chargeback, explain that your company is responding or appealing late because of non-receipt of whatever claim notice or determination that was sent. Such responses and appeals will require a careful examination by your company of what was and was not received from TWC with regard to each claim.

At any appeal hearing when you are trying to prove non-receipt of a claim notice or determination, the most important witnesses would be the ones who normally receive and process incoming mail for your company. If their testimony is credible and consistent and shows that the company did not receive the chargeback notice, and that the company responded to the chargeback or determination immediately upon learning of it, it will have a reasonable chance of success in overcoming the late response problem.

Instructions for appealing a chargeback determination, or any kind of adverse claim determination, are at <https://twc.texas.gov/businesses/how-appeal-decision-employers>.



*If an employer wants to check up on unemployment claims, chargebacks, tax rates, claim notices and determinations, and appeals, without having to deal with calling TWC offices or sift through mail, there are a number of methods to do so.*

# The Importance of Being Timely

By Elsa Ramos | Legal Counsel to Commissioner Aaron S. Demerson

The Texas Workforce Commission (TWC) sends out claim-related documents to parties that are time sensitive. In order for employers to protect their rights, it is imperative that they timely respond to all claim notices and timely appeal any determination or decision with which they disagree. Submitting late employer responses or appeals is one of the easiest ways for employers to lose otherwise winnable

claims, and thereby suffer dire financial consequences.

Here's a tip: If you receive any unemployment claim document from TWC, chances are that it contains a deadline. **Find it. Know it. Act upon it.** Do not let a late response or appeal result in needless and unnecessary costs to your business.



*A business, in writing, was newly advised  
Of losing a claim, an unpleasant surprise!  
An appeal that was late  
Sealed the company's fate,  
And the company's tax rate was compromised.*

*The company says that they're not to blame.  
They acted as soon as they learned of the claim.  
Correspondence had failed  
To reach them by mail,  
Since recently moving and changing their name.*

*They notified everyone, or so they thought.  
But there was one agency they had forgot.  
And so their delay,  
Of only one day,  
May cost them a little, more likely a lot.*

*You must understand the importance of dates.  
Comply with the deadline the document states.  
If you want to win,  
This is where you begin.  
Cause nothing good follows from filing late.*





# 87th Texas Legislature Employment-Related Bills

By **Tommy Simmons** / *Legal Counsel to Commissioner Aaron Demerson*

The 2021 general session of the Texas Legislature ended May 31, 2021. Here is a survey of the most significant employment-related legislation that passed into law in 2021. The list is organized into subject areas and shows the bill number and the bill caption indicating the subject matter of the bill, as well as a summary of the most important provisions of the bill for employers.

## Civil Rights and Discrimination

HB 21	Relating to the statute of limitations applicable to a sexual harassment complaint filed with the Texas Workforce Commission. This bill has extended the deadline for filing a sexual harassment complaint with the Civil Rights Division of the Texas Workforce Commission from 180 to 300 days.
SB 45	Relating to the prohibition against sexual harassment in the workplace. SB 45 created a new subchapter C-1 in Chapter 21 of the Texas Labor Code that applies the definition of sexual harassment found in Section 21.1065 (pertaining to unpaid interns) to all employees. It adopted a definition of “employer” similar to the one used by the FLSA, i.e., an employer is “a person who: (A) employs one or more employees; or (B) acts directly in the interests of an employer in relation to an employee.” The new law substantially strengthens protections against sexual harassment, since it applies to employers with only one employee, and requires employers, agents, and supervisors to take “immediate and appropriate corrective action” if they know or should know that sexual harassment is occurring.

## Human Resources – General

HB 458	Relating to the collection and enforcement of withholding of income for the payment of child support. This new law extends child support wage garnishment obligations to compensation paid to drivers for transportation network companies and “gig economy” delivery drivers. It does not cover other types of gig-economy workers (however, that kind of coverage could be coming in future years).
HB 1927	Relating to provisions governing the carrying of a firearm by a person who is 21 years of age or older and not otherwise prohibited by state or federal law from possessing the firearm and to other provisions related to the carrying, possessing, transporting, or storing of a firearm or other weapon; creating criminal offenses. This “permitless carry” bill did not substantively change anything about employer’ weapons policy rights in Labor Code Sections 52.061 and 52.062; it only changes which provision in the Penal Code contains the definition of “premises” (Section 46.03(c)(3)). Employers retain the legal ability to prohibit employees from bringing any kind of weapon, including handguns and other kinds of firearms, into the workplace or into company vehicles. [For background information on the legal issues of workplace weapons policies, see <a href="https://twc.texas.gov/news/eft/weapons_at_work.html">https://twc.texas.gov/news/eft/weapons_at_work.html</a> .
HB 3529	Relating to consent for the use or possession of personal identifying information under the Identity Theft Enforcement and Protection Act. HB 3529 requires employers to have a parent’s or guardian’s permission to obtain, possess, transfer, or use personal identifying information from a minor or an individual with a mental illness or intellectual disability.

SB 271	Relating to applicants for employment at assisted living facilities. This new law prohibits employment by a licensed assisted living facility of an applicant who fails to submit information regarding prior criminal offenses under Section 250.006 of the Health and Safety Code (generally, serious felonies involving harm to people or animals or health care fraud).
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**Immigration/ E-Verify**

SB 766	Relating to sexually oriented businesses, including a requirement to participate in the federal electronic verification of employment authorization program, or E-verify, and restricting the age of persons employed by or allowed on the premises; creating criminal offenses. This comprehensive bill amended Labor Code Section 51.016 to increase the minimum age for working at a sexually-oriented business to 21; requires use of E-Verify by such businesses for all hiring; amended Section 43.251(a)(1) of the Penal Code to define “child” as anyone younger than 21; prohibits anyone younger than 18 from being on the premises of such a business; provides that TABC-regulated businesses that are sexually-oriented may suffer loss of licensure if minors are on the premises; and provides that such businesses become “common nuisances” for purposes of civil liability if they violate those age restrictions. [Very similar to SB 315 – see below.]
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**Pay/ Wage and Hour Law**

HB 867	Relating to the issuance of a qualified domestic relations order for the payment of spousal maintenance and child support obligations. HB 867 amended the Family Code to provide that spousal maintenance and child support payments may include retirement, pension, and other employee benefits payable to the obligor (the one who owes the support payment).
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**Regulatory/ Criminal Liability**

SB 315	Relating to restrictions on the age of persons employed by or allowed on the premises of a sexually oriented business; creating a criminal offense. SB 315 amended Section 51.016 of the Labor Code to prohibit contracts for performance of work or services at a sexually-oriented business with individuals younger than 21; and like SB 766, the bill amended Section 43.251(a)(1) of the Penal Code to define “child” as anyone younger than 21 and provides that minors may not be on the premises of such a business. The new law further provides that TABC-regulated businesses that are sexually-oriented may suffer loss of licensure if minors are on the premises and that such businesses become “common nuisances” for purposes of civil liability if they violate those age restrictions. [Very similar to SB 766 – see above.]
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## Regulatory/ Criminal Liability Continued

SB 424	Relating to state agency enforcement of laws regulating small businesses. This new law provides substantial relief in administrative violation actions to first-time violators that are small businesses (defined as for-profit, independently owned and operated, and with fewer than 100 employees or less than \$6 million in annual gross receipts). The bill provides that such small businesses must be given a chance to remedy a violation prior to a penalty being imposed. The relief specifically does not apply to “an action taken by the Texas Workforce Commission if the action is required to conform to or comply with federal law.” That particular provision of the law has to do with penalties that may be necessary for TWC to impose as a condition for receiving federal funds for administration of certain programs.
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## Unemployment Insurance

HB 7	Relating to the computation of the replenishment ratio used to determine an employer’s unemployment compensation contribution tax rate. HB 7 is easily the legislation in 2021 that had the greatest overall benefit for Texas employers. Under the new law, TWC was able to exclude benefits ineffectively charged due to the pandemic from the computation of the replenishment ratio, which is a central component of the unemployment tax rate for an employer with any chargebacks during the preceding three years. Without this legislation, state unemployment tax rates could have been close to double what they were in 2021 for employers with chargebacks. This law will allow Texas to distribute the impact of the pandemic over a number of years, and employers will have much more stable tax rates while the state recovers from the economic problems associated with the pandemic.
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*Information provided by employment law attorneys in the Office of the Commissioner Representing Employers at the Texas Workforce Commission*

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