

Texas BusinessToday

Aaron S. Demerson
Commissioner Representing Employers

First Quarter 2021

Mandating Employee Vaccines

Best Practices for Maintaining a Safe
Workplace

Quarantine Queries

UI Tax Rate Update



OPENING HOURS
MON-FRI am-3pm
SAT-SUN 8am-4pm



Commissioner's Corner

Texas Continues to Lead the Way in 2021

Dear Texas Employers,

Welcome to our 2021 first quarter issue of *Texas Business Today!* This newsletter is designed to address topics, as well as new issues, that are emerging in employment law. Our office creates these articles based on the most frequently asked questions we receive. We know it is important to keep you up-to-date on all information that is beneficial to you and your business.

In most recent news, on March 2nd, Governor Abbott issued a new Executive Order, which included opening Texas businesses 100%. My office will be hosting a town hall to discuss this new Order and what it means for our Texas employers on March 10th from 11:30am-12:45pm. To register, click [HERE](#).

Equally as important, the pandemic, and the unusual week of weather in Texas, has been front and center for Texas Employers. The historic number of claims our Texas Workforce Commission (TWC) staff handled this past year has been staggering. Since March of 2020, more than 7 million claims have been filed for unemployment and more than \$42 billion has been paid out to Texans.

To put this in better perspective, TWC took about 1 years' worth of claims in a one-month timeframe.

We addressed this monumental task by immediately taking action and called for an all hands-on deck approach. This included increasing the number of call centers available and extending the hours and days open, to ensure no Texan would be left behind.

The team in my office proactively held over 60 virtual town hall meetings with various Chamber of Commerce organizations, elected officials, and industry associations to assist our Texas employers with relevant answers to their pressing questions. We also handled thousands of calls and emails and continue to do so. Our Texas Employer Hotline (1-800-832-9394) is available to all Texas employers. Or if they prefer, Texas employers can email our office at: employerinfo@twc.state.tx.us.

In addition, we created *Lunchtime Live!*, a 90-minute virtual employment law session featuring our employment law attorneys. These events, which served as a temporary replacement for our standard *Texas Conference for Employers*, drew over 6000 Texas employers and covered many topics.

Even through these unprecedented times, Texas continued to lead the way and

remain at the top of many lists. For the 16th year in a row, Texas was voted by CEOs across the nation as the best state for business.

Also, for a record-shattering 9th year in a row, Texas was awarded the Site Selection Governor's Cup for job performance and capital investment, and the list goes on. The Governor has issued his priorities for the session and the interest of Texas Employers remains at the top of his list.

Regarding the 2021 Unemployment Tax Rate, please see the article on page 12 for the latest information. Our goal is to ensure we keep the UI tax rates as low as possible for our Texas employers.

As the 87th Texas Legislature has begun, we will follow all bills related to employment law and continue to provide updates throughout the session.

As we continue through the year, our office remains committed to ensuring you have the best and most updated information to assist you with successfully operating your business. Thank you for ALL you do. Let's Continue to Make Progress!

Sincerely,

Aaron S. Demerson
Texas Workforce Commission
Commissioner Representing Employers



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 may resume in the summer of 2021. We will continue to monitor the matter of in-person meetings and will confirm through our website and mailed invitations per location.

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 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 (one hour of ethics available). Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

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Mandating Employee Vaccines

By **Velissa Chapa** | Legal Counsel to Commissioner Aaron S. Demerson



Employees may refuse a vaccine due to sincerely held religious beliefs, or for legitimate medical reasons, such as pregnancy, severe adverse effects, or a life-threatening allergy to the vaccine.

Mandating vaccines is tricky business, even during a pandemic. There are various legal issues employers should be aware of before moving forward with any kind of mandatory vaccination policy. In fact, it is because of these issues that many employers choose to encourage employee vaccinations instead of mandating them.

Before COVID-19, various federal agencies provided guidance on mandating other types of vaccinations (such as the flu shot). There is a belief that this guidance has shifted significantly in light of the recent pandemic. However, a pandemic does not nullify certain legal protections for employees. The following is an explanation of what those legal protections are, what employers must do to balance them, and best practices.

Protected Reasons for Refusal: Medical and Religious

Some reasons for refusing a vaccine are protected under federal law. Title VII of the Civil Rights Act of 1964 (Title VII)—which applies to employers with 15 or more employees—prohibits employment discrimination based on religion or a medical contraindication.

Employees may refuse a vaccine due to sincerely held religious beliefs, or for legitimate medical

reasons, such as pregnancy, severe adverse effects, or a life-threatening allergy to the vaccine. Whether the reason for refusal is religious or medical in nature, the result is the same: the employer would need to take steps to reasonably accommodate that employee, unless doing so would pose an undue hardship. Reasonable accommodation could mean exempting that employee from the vaccination requirement.

Employers may believe that reasonable accommodation is not possible during a time of a pandemic. They should keep in mind that the Centers for Disease Control (CDC) and the Occupational Safety and Health Administration (OSHA) have provided guidance on infection-control practices, such as social distancing, the use of PPE such as gloves, masks, and face shields, and sanitization of the workplace. Continued use of these practices could constitute reasonable forms of accommodation, arguably making it more difficult to prove undue hardship. Of course, each case must be addressed on a case-by-case basis. For more information, see questions K.6 and K.7 in the following guidance from the Equal Employment Opportunity Commission (EEOC): <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

Therefore, employers who choose to mandate vaccines for employees would do well to have a written policy, and the policy should provide for religious

and medical exemptions, as well as include a procedure for how such issues should be addressed.

For further guidance on appropriate medical inquiries, whether the employee's lack of vaccination would pose a "direct threat" to the workplace, reasonable accommodation, undue hardship, and practices for preparedness, see the EEOC's guidance on pandemic preparedness: https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf (see page 10 for information on mandating vaccines).

Unprotected Reasons for Refusal

An employee may refuse a vaccine for moral, social, or political reasons, or as a matter of personal preference. However, according to the EEOC, none of these arguments constitute legally-protected reasons for refusing a vaccine.

Additional Legal Concerns

Businesses with less than 15 employees are not covered under Title VII, but the guidance for employers in this category remains the same, just for different, additional reasons.

First, employers should remember that employees who are injured from taking a mandatory vaccine could have a Workers' Compensation claim against the employer. For employers who do not have Work-

ers' Compensation, legal liability could still result from employee harm.

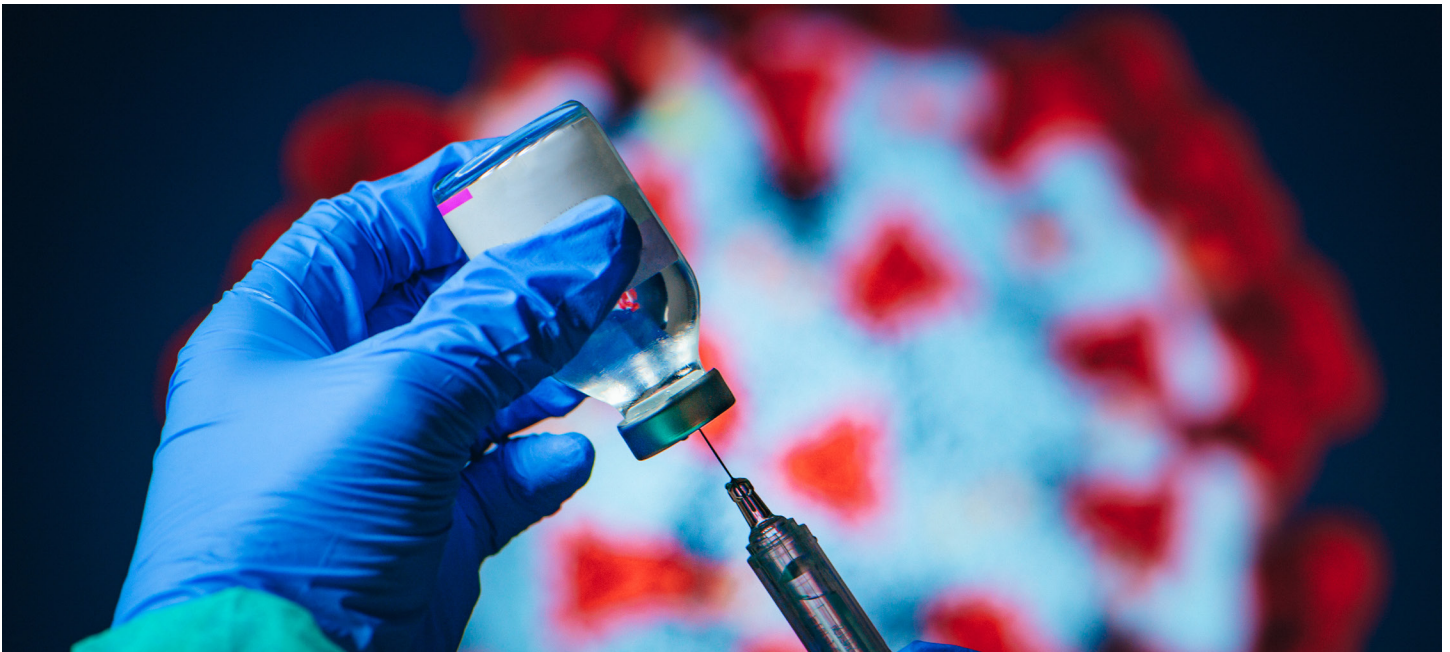
In addition, mandatory vaccines could lead to employee discussions about the policy. Such discussions may be protected under the National Labor Relations Act (NLRA). Under this federal law, employees have the right to discuss their working conditions with one another, and disciplining or preventing employees from having such discussions could result in a violation of the NLRA: <https://www.nlr.gov/about-nlr/rb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1>.

Employees who are terminated for refusing to receive the vaccine may file for unemployment benefits. Depending on the facts of the case, an employee may be eligible to receive unemployment benefits, and the employer could be charged.

Finally, all employers—regardless of size—that mandate vaccines and do not pay for the associated costs may risk a racial discrimination lawsuit under 42 U.S.C. §1981, as such a practice may have a disparate impact on minority populations: <https://www.govinfo.gov/content/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap21-subchapI-sec1981.pdf>. Employers should also pay for the vaccine if there is a risk that not doing so would take the employee below minimum wage.



Mandatory vaccines could lead to employee discussions about the policy. Such discussions may be protected under the National Labor Relations Act (NLRA).



In general, mandatory vaccination requirements are not recommended for employers outside of the healthcare industry, due to the complicated issues that can arise from such a mandate.

Employers in the Healthcare Industry

Many employers in healthcare believe that there is a special exception that applies to employers in the healthcare industry. The belief is that mandating vaccines without exception is crucial because of the heightened responsibility of maintaining the health and well-being of patients. However, there is no specific exception for the healthcare industry, and healthcare employers fall under the same analysis as above.

As an example, the case of *EEOC v. Saint Vincent Health Care Center*, Civil Action No. 1:16-cv-234 (Sept. 22, 2016), the employer paid \$300,000 in back pay and compensatory damages to six employees whose religious exemption requests were denied. The primary lessons from this case include that:

1. Employers must notify employees of their right to request an exemption and establish appropriate procedures;
2. Employers cannot reject a religious accommodation simply because they do not agree with the religion; and
3. Employers cannot require exemption requests to be certified by clergy members (see <https://www.eeoc.gov/newsroom/saint-vincent-health-center-pay-300000-settle-eeoc-religious-accommodation-lawsuit>).

Being in the healthcare industry does not, by itself, relieve employers from the obligations to reasonably accommodate employees under Title VII, nor does it completely shield the employer from the other legal concerns listed.

Best Practices

In general, mandatory vaccination requirements are not recommended for employers outside of the healthcare industry due to the complicated issues that can arise from such a mandate. For those employers who do choose to mandate employee vaccines, they should make the exemptions for medical or religious reasons clear in policy, create a process for opting out, and consider only applying the policy towards employees who regularly interact with patients. Do not forget to train managers on how to handle refusals and accommodation requests, and remind employees of OSHA and CDC guidelines and make resources easily accessible to employees (the Department of Labor has compiled a list of COVID-19 resources for employers: <https://www.dol.gov/agencies/odep/topics/coronavirus>).

Employers may also need to pay for the vaccine and reasonably accommodate if an exemption is requested. Consider providing paid time-off for employees who elect to take the vaccine. Do not retaliate, and remember: each case stands alone, so keep excellent documentation of the accommodation process. Finally, employers should continue to implement mandatory infection-control practices, such as social distancing, sanitizing, and the use of PPE.

Conclusion

Although it is not generally recommended that employers mandate employee vaccinations, employers can certainly encourage employees to do so. Of course, employers who are interested in imposing a mandatory vaccination requirement should seek a qualified attorney of their choosing to assist in the development and enforcement of such a mandate.

Best Practices for Maintaining a Safe Workplace

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



It is now more important than ever for employers to know about some of the best practices for maintaining a safe workplace in the time of the coronavirus.

Employers have traditionally been aware of their responsibility to maintain a safe workplace. While undoubtedly the main basis for such efforts has been to ensure the well-being and best interests of their employees, employers have also implemented safety measures to limit liability associated with workplace accidents and to avoid penalties from local, state, and federal regulators. With COVID-19 infiltrating virtually all aspects of our lives, including the workplace, it is now more important than ever for employers to know about some of the best practices for maintaining a safe workplace in the time of the coronavirus.

Knowing Your Resources

As mentioned, employers implement safety measures at the workplace for a variety of reasons. At a fundamental level, each safety measure that is implemented starts with a plan. With that in mind, a good plan draws from reliable and knowledgeable resources. As far as COVID-19 safety protocols are concerned, three of the biggest resources that Texas employers should know about are the Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and the Texas Department of State Health Services (DSHS).

Centers for Disease Control and Prevention (CDC)

The CDC has plenty of guidance for employers wanting to maintain a safe workplace. The CDC recommends that employers “implement and update as necessary a plan that: is specific to your workplace, identifies all areas and job tasks with potential exposures to SARS-CoV-2 [the virus that causes COVID-19], and includes control measures to eliminate or reduce such exposures.”

Moreover, the CDC recommends that employers take action at limiting the spread of the virus by engaging in activities to “prevent and reduce transmission among employees, maintain healthy business operations, and maintain a healthy work environment.” More details about these activities can be found below.

Prevent and Reduce Transmission Among Employees

The CDC has guidance for employers seeking to prevent and reduce transmission among employees. This guidance includes actively encouraging sick employees to stay home, identifying where and how workers might be exposed to individuals with COVID-19 at work, taking action if an employee is

suspected or confirmed to have COVID-19, and educating employees about steps they can take to protect themselves at work and at home.

Maintain Healthy Business Operations

The CDC also has guidance for employers seeking to maintain healthy business operations. CDC's guidance on this topic includes implementing flexible sick leave and supportive policies and practices, communicating supportive workplace policies clearly, frequently, and via multiple methods, and establishing policies and practices for social distancing.

Maintain a Healthy Work Environment

Another big component of the CDC's guidance is to maintain a healthy work environment. Some of the CDC's guidance on this topic includes giving employees, customers, and visitors what they need to clean their hands and cover their coughs and sneezes, performing routine cleaning and disinfection, and minimizing risks to employees when planning meetings and gatherings.

The information in this portion of the article relating to CDC guidance and more details can be found at the following link: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

Occupational Safety and Health Administration (OSHA)

OSHA also offers resource materials for employers wishing to maintain a safe workplace. OSHA has resource information for best practices including guidance for specific industries, information on hazard recognition, and guidance for returning to work.

In addition, OSHA has helpful FAQs, PDF downloads, and information about workers' rights and employer responsibilities. You can find this information and more by visiting the following website: <https://www.osha.gov/coronavirus>.

Texas Department of State Health Services (DSHS)

DSHS is another source of good information for employers desiring to maintain a safe workplace. DSHS offers a wide array of resource material for employers including communication tools, instructional videos, and information on minimum standard health protocols. For this information and more, please visit <https://dshs.texas.gov/coronavirus/business.aspx>.



When implementing a plan to maintain a safe workplace, employers should draw from relevant, knowledgeable, and accurate resources.

In addition to those mentioned above, here are some other resources to assist employers in maintaining a safe workplace.

Office of the Texas Governor

The Office of the Texas Governor has useful information for employers, including COVID-19 resources. This information and more can be found at the following link: <https://gov.texas.gov/>.

Additionally, information on the Governor's Strike Force to Open Texas can be found at the following link: <https://open.texas.gov/>. Per that website: "The Governor's Strike Force to Open Texas will safely and strategically restart and revitalize all aspects of the Lone Star State—work, school, entertainment, and culture." Information on the website also includes "Open Texas Checklists," which describe minimum standard health protocols for all employers and event organizers, and other specific industries. For this information and more, please visit <https://open.texas.gov/>.

Occupational Safety and Health Consultation Program (OSHCON)

OSHCON also has resources for maintaining a safe workplace for employers. Per the OSHCON website: "The Occupational Safety and Health Consultation (OSHCON) program (www.txoshcon.com) is a free and confidential service available to private Texas employers through the Texas Department of Insurance, Division of Workers' Compensation. Our

professional safety and health consultants across the state are available to help you identify and eliminate occupational hazards in your workplace, whether or not your company carries workers' compensation insurance." You can find this information and more at the OSHCON website at the following link: <https://www.tdi.texas.gov/oshcon/index.html>.

Local Guidance

Depending on location, local authorities may have different rules and regulations for that particular location. County and city officials are good sources of information on rules and regulations for their respective jurisdictions.

Conclusion

Maintaining a safe workplace is a necessity for employers. It should also be noted that the above-mentioned resources are not exhaustive and there are surely other resources available to employers when crafting a plan to maintain a safe workplace. When implementing a plan to maintain a safe workplace, employers should draw from relevant, knowledgeable, and accurate resources. Doing so will aid employers in establishing safe working environments for both their companies and their employees.



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Quarantine Queries: Employer-Mandated Quarantine for Employee Travel or Off-Duty Behavior

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

Q: Can an employer require employees to disclose past or future travel plans?

A: There is currently no law that prohibits employers from requiring employees to disclose travel plans. The employer may choose to inquire about all travel out of town, or limit the inquiry to travel outside a large radius, for example, asking employees to inform the employer if they plan to travel out of the state or the country. The employer will want any inquiry to be job-related and consistent with business necessity.

Q: Can an employer require employees to self-quarantine (not come into the office or worksite) if they have traveled out of town/city/state/country or have engaged in risky behavior on their own time, such as attending large gatherings or parties?

A: No law prohibits employers from requiring employees who have engaged in such activities to stay away from the office or worksite for a certain period of time. Since the purpose of this precaution is to minimize employee exposure to Covid-19, the length of the stay-away period should comply with guidance from the Centers for Disease Control (CDC) or other reliable authority. CDC recommendations regarding travel: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

Please note, if employees being asked to self-quarantine can work remotely during the quarantine period, employers are encouraged to keep employees working.

Q: If employees are not able to work remotely during the quarantine period, does the employer have to pay employees for that time?

A: The answer depends on the type of employees at issue. For hourly employees, employers are required to pay for all hours worked. If an hourly employee is not working remotely while away from work, then the employer is not required to pay for the time off.

For salaried exempt employees, employers are required to pay the full salary if the employee works part of any week. If a salaried exempt employee does not work a full week, the employer is not required to pay for the full week not worked. See: https://twc.texas.gov/news/efte/legal_issues_for_military_leave.html#salarydeductions

For all employees, employers can look to their policies to see if there is some form of paid-time-off available, such as vacation hours, to cover some or all of the employees' leave.

Q: Can an employee who is neither working nor getting paid during the self-quarantine file an unemployment claim for that period?

A: Yes. If an employee is no longer performing services for pay, the employee can file an unemployment claim.

Q: Can an employer require employees who were on employer-mandated quarantine to submit a negative Covid-19 test before returning to work?

A: There is no law that prohibits this request. However, since this type of self-quarantine is requested by the employer, without manifestation of any symptoms or illness, employers should consider how useful it is to request a negative Covid-19 test. In addition, some authorities, such as the CDC, recommend that employers not require sick employees to provide a Covid-19 test result or medical note due to various reasons. See: <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>

Q: If the employer requires employees in employer-mandated quarantine to take a Covid-19 test before returning to work, does the employer have to pay for the test?

A: If the employer requires an employee who is not ill and who has no symptoms to provide a negative Covid-19 test before returning to work, the employer is responsible for paying for the employer-mandated test.



The employer may choose to inquire about all travel out of town, or limit the inquiry to travel outside a large radius, for example, asking employees to inform the employer if they plan to travel out of the state or the country.

Unemployment Tax Rates for 2021

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



An important component is the benefit ratio, which is the three-year chargeback total divided by the three-year taxable wage total.

Late last year, the Texas Workforce Commission announced that employers' state unemployment insurance (UI) tax rates for 2021 would be published and mailed to employers later than the usual target date of the second week of December. That was primarily due to TWC wanting to consider all possibilities, including adjustments of certain tax rate components, legislative action, potential federal funds, and extensions of deadlines, in an effort to keep UI tax rates as low as possible.

The rates will be set as soon as possible (at the latest by the end of June, 2021), but for purposes of setting up payroll systems and budgeting, employers may want to choose from the current published 2020 rates which are: minimum tax rate .31%; average tax rate = 1.14%; maximum tax rate = 6.31% and the entry level tax rate for new employers = 2.7% and make adjustments once the actual 2021 rates are published.

New employers pay at 2.70% for the first six calendar quarters of operation and are eligible for an experience rating subsequently and thereafter based on their companies' individual history of employment separations. Employers with no chargebacks during the past three years may receive the minimum tax rate. Employers with chargebacks during the past three years will have a calculated tax rate above the minimum.

The following is a breakdown of the General Tax Rate, which is the central component:

- Benefit Ratio: Unique to each employer account. It is the three-year history of total chargebacks divided by three-year history of total taxable wages.
- Replenishment Ratio: Computed according to state law is one of the primary mechanisms for dealing with half of the shortfall in the UI Trust Fund. This ratio is the same for each employer account.
- General Tax Rate: Benefit Ratio x Replenishment Ratio

It is important for employers to respond to any notice of Maximum Potential Chargeback as soon as possible. Any increases to the total amount of chargebacks used in the Benefit Ratio may result in a higher General Tax Rate component.

Once the General Tax Rate is computed, it can statutorily increase to a maximum of 6.00%. Other rate components are then added to produce a total Annual Effective Tax Rate:

- Replenishment Tax Rate: The other mechanism for dealing with half of the shortfall in UI Trust Fund. This rate is the same for each employer account.
- Interest Tax: Used if Texas owes interest on a federal UI loan.
- Obligation Assessment Tax: Established if Texas needs to repay bonds issued to repay federal UI loans.
- Deficit Tax: Created according to state law if there is a deficit in the floor of the UI Trust Fund.

Individual tax rate calculations can become quite complex based on individual company circumstances. A detailed illustration of the formula appears at <https://twc.texas.gov/businesses/unemployment-insurance-tax-rates>.

The latest news on UI tax rates is online at <https://twc.texas.gov/businesses/tax-department-tip-month#-january01> and updates will also be posted periodically on this same link.

New and Extended Unemployment Insurance Programs

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

The federal government extended the CARES Act legislation of March 27, 2020 by enacting the Continued Assistance Act (CAA) on December 27, 2020. The CAA provides extensions of existing federal benefits and creates new categories of benefits, as outlined below.

Pandemic Emergency Unemployment Compensation (PEUC) benefits have been extended for 11 weeks, beginning with the week ending January 2, 2021 and ending with the week ending March 13, 2021. If a claimant has not yet drawn the 11 additional weeks of PEUC benefits by that time, they can continue receiving such benefits through a phase-out period that ends on April 10, 2021. The amount of the weekly PEUC benefit will be the same as the previous PEUC benefit.

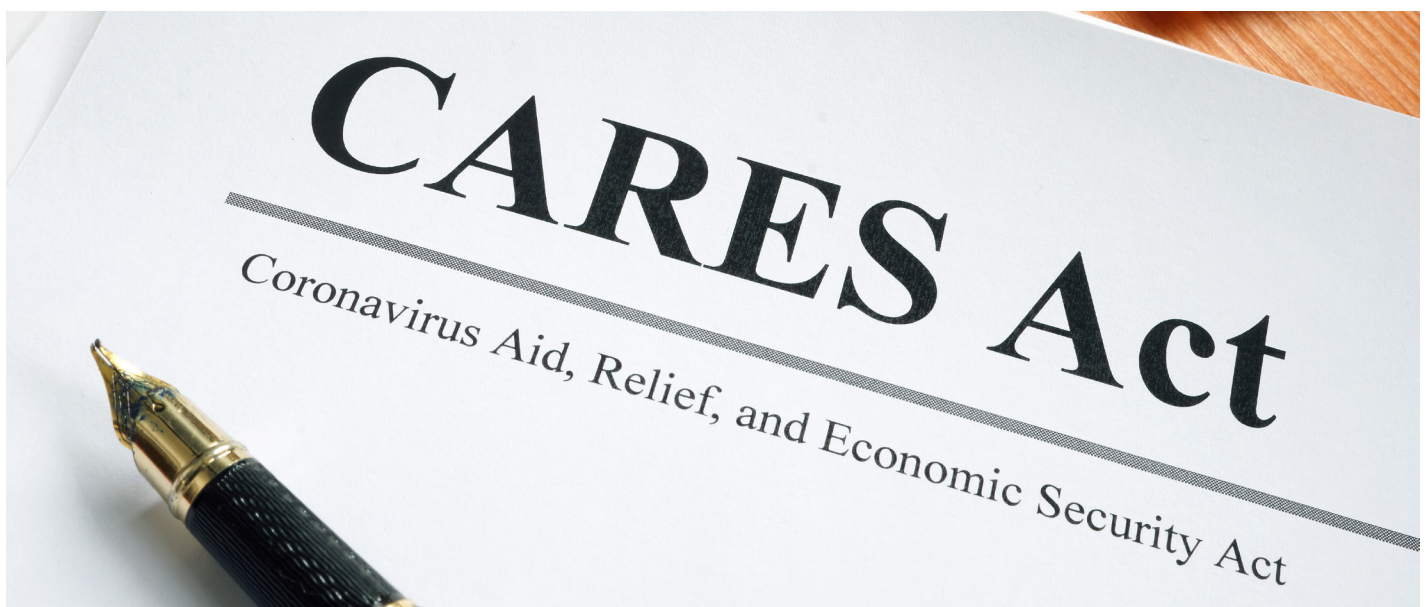
Pandemic Unemployment Assistance (PUA) benefits have also been extended by the CAA for an additional 11 weeks, with the same beginning, ending, and phase-out period dates noted above for PEUC benefits. The amount of the PUA benefit during the extension period will be the same as it was in 2020.

Additionally, Federal Pandemic Unemployment Compensation (FPUC) benefits, which originally expired in Texas on July 25, 2020, have been renewed for the same beginning and ending dates that apply to the additional PEUC and PUA benefits, but without the phase-out period that applies to those benefits. Instead of the \$600 amount that applied to FPUC benefits in 2020, the amount for the CAA-extended

FPUC benefits is \$300 per week. As it was in 2020, the FPUC benefit is added to the amount a claimant receives in regular, PEUC, PUA, disaster, or other unemployment benefits.

The CAA created a new unemployment benefit program called the Mixed Earner Unemployment Compensation (MEUC) program, which is subject to TWC formalizing the arrangements for such payment with the U.S. Department of Labor. MEUC benefits will be available for claimants who received at least \$5,000 of self-employment income in the most recent taxable year ending prior to their application for regular unemployment insurance. Unlike FPUC benefits, MEUC benefits are unavailable for PUA recipients. Similar to FPUC benefits, the MEUC program dates have the same beginning and ending dates that apply to the additional PEUC and PUA benefits, but without the phase-out period that applies to those benefits. The benefit amount is \$100 per week, which is added to the amount of benefits the claimant receives from any other unemployment benefit program except for PUA.

For the latest official guidance from TWC concerning unemployment benefit programs, see the TWC website at <https://twc.texas.gov/news/covid-19-resources-job-seekers#typesOfRegularAndPandemicUnemploymentBenefitsClaims>.



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Texas Business Today

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