First Quarter 2018

Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

Mandating Employee Flu Shots ■ The Family Medical Leave Act for Employers ■ Minimize Address Stress

New Year Brings Lower Tax Rate for Employers

Commissioner's Corner

Dear Texas Employer,

Happy New Year and welcome to our 1st quarter issue of *Texas Business Today*! This newsletter is designed to address employment law matters that come up most frequently for employers, as well as new issues that are emerging in employment law. We are constantly updating information that is beneficial to you.

Texas employers led the way over the year by creating more job opportunities that contributed to our state's economic growth. Texas added 294,600 private-sector jobs over the year, more than any other state. In fact, the seasonally adjusted unemployment rate in Texas fell to 3.8% in November, setting a new record for the lowest unemployment rate recorded in four decades.

In addition to these statistics, we are pleased to announce that due to our state's progress, the state unemployment tax rates for Texas employers have gone down across the board in 2018. The average rate in 2018 is 1.37%, down from 1.64% in 2017. Almost 65% of Texas employers will pay the minimum, which is 0.46%, down from 0.59% in 2017. The most dramatic drop is in the maximum tax rate, which went from 8.21% in 2017 to 6.46% in 2018. In addition to the strong economy, Texas retired the UI bonds, which resulted in the end of the obligation assessment tax. Finally, since the UI trust fund balance was above the statutory floor, no deficit tax is necessary for 2018. These lower tax rates in 2018 are a result of our outstanding business climate.

To stay current with these types of updates, we have announced our 2018 Texas Business Conferences schedule, with 16 locations available throughout the state. The conferences offer employers and human resources professionals the opportunity to learn about new employment law updates and talk one-on-one with employment attorneys. Attendees are eligible for Texas Society for Human Resource Management (SHRM) Professional Development Credits. Also, attorneys may receive up to six hours of Mandatory Continuing Legal Education (MCLE) credit. In addition, certified public accountants who attend can earn six hours of continuing education credit, and other conference participants may qualify for general professional credit.

Conference topics include: Texas employment law and the basics of hiring, federal and Texas wage and hour laws, the unemployment claim and appeal process, independent contractors, and employee policy handbooks. In addition, you will receive the book *Especially for Texas Employers,* a guidebook with valuable information on Texas and federal employment laws. For a list of upcoming conferences, see page 4 or go to: **http://www.twc.state.tx.us/texas-business-conferences**.

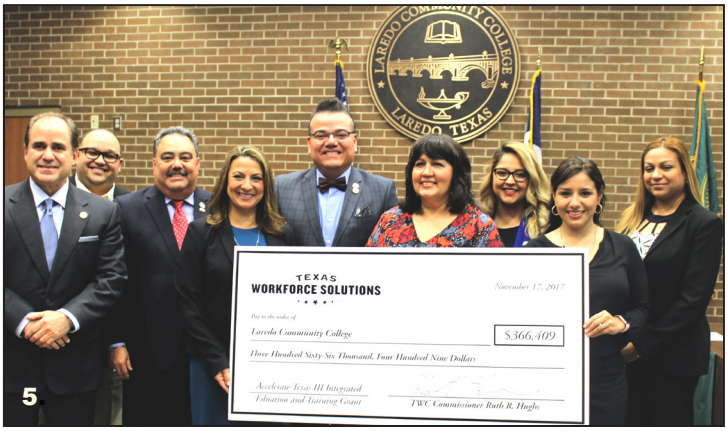
Also, remember that our Employer Hotline (1-800-832-9394) is available to all Texas employers. In fact, the topics covered at our Texas Business Conference are based on the most common phone call inquiries that we receive. The attorneys on my staff answer this hotline and provide guidance on employment law questions Monday-Friday, 8am-5pm. They answer anything from the simplest to the most complex questions. Please do not hesitate to contact us for assistance.

Lastly, the new year is an opportunity to say thank you for all your hard work and dedication. I look forward to meeting you in your communities and effectively serving as your Commissioner Represeting Employers. Each employer, large and small, contributes to Texas' success, and makes Texas the best state in the country in which to do business. May your successes reach new heights in 2018!

Sincerely,

Ruth R. Hughs
Texas Workforce Commission
Commissioner Representing Employers

Making Connections Across the State



1. Recognizing Southwest Airlines at their headquarters in Dallas during a "We Hire Vets" Employer Recognition Ceremony.
2. Ribbon cutting for the opening of the Hiring Red White & You! veteran job fair at Minute Maid Park in Houston.
3. Serving as the Emcee for the *Innovation & Entrepreneurship: Pushing the Boundaries for Success* panel at the Texas Conference for Women in Austin.
4. Roundtable discussions with employers and Workforce Solutions Northeast Texas in Texarkana.
5. Presenting an Adult Education and Literacy grant in partnership with Laredo Community College that will help adult students acquire skills and certificates in high-demand occupations.
6. Participating on a panel for Hiring America, a dedicated employment TV program for transitioning military veterans.
7. Supporting the Capital Region Texas Hireability Job Fair.

Texas Business Conferences
Employment Law Update

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

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

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as: Hiring Issues, Employment Law Updates, Personnel Policies and Handbooks, Workers' Compensation, Independent Contractors and Unemployment Tax Issues, the Unemployment Claims and Appeals Process, and Texas and Federal Wage and Hour Laws.

The non-refundable registration fee is $125 (one-day) and $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 6 hours of MCLE credit (no ethics hours) if they attend the entire full-day conference, or 12 hours for the two-day conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Business Conference, please visit the Texas SHRM website. Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

2018 CONFERENCE DATES

McAllen	February 9
San Antonio	March 9
Denison	April 6
The Woodlands	April 19-20
El Paso	May 4
San Angelo	May 11
Odessa	June 22
Arlington	July 19-20
Abilene	July 27
Laredo	August 10
Round Rock	August 24
Corpus Christi	September 6-7
Amarillo	September 21
College Station	September 28

To register for our 2018 conferences, visit www.texasworkforce.org/tbc or for more information, call 512-463-6389.

Mandating Employee Flu Shots

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

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Although it is not recommended that employers mandate employee flu shots, employers may encourage workers to do so.

Towards the end of every year, employers must face the possibility that their employees may fall victims to the flu. The flu season, which starts in October and concludes in March, can take quite a toll on a company's business. The concern is legitimate: a 32% increase in employee absences occurs during flu season compared to the rest of the year, causing a national economic impact of $87 billion (*see* **https://www.decodedscience.org/the-economic-costs-of-the-flu-in-the-united-states/25957/2**). For comparison, this impact is the same as if 48 hurricanes hit the United States in a year.

Both before and during flu season, employers try to find ways to protect their employees from illness to keep costs down and operations running. One consideration is to require employees to get flu shots at the risk of termination. While this may sound like an excellent idea in theory, having such a requirement can result in serious consequences for employers.

To put it simply, most employers should avoid mandating flu shots for employees. Although Texas employees are generally at-will, various applicable laws could easily turn a well-meaning policy into a violation of law. Here are the facts.

Unprotected Reasons for Refusal

There are several reasons why employees may refuse to get a flu shot. Some of these reasons are moral or philosophical in nature: people have a right to control what goes into their bodies, and nobody should have to accept medical intervention against his or her will. In addition, debates about the vaccination's lack of effectiveness suggest that the benefits of the flu vaccine are not what people think. Per the Center for Disease Control (CDC), the 2016-2017 flu vaccine was only 48% effective, and flu activity remains elevated overall (*see* **https://www.cdc.gov/mmwr/volumes/66/wr/mm6606a3.htm**).

In the workplace, however, these arguments are not legally-protected reasons for refusing a flu shot. According to the Equal Employment Opportunity Commission (EEOC), "social, political, or economic philosophies, as well as mere personal preferences, are not . . . protected" by law. This conclusion is supported by *Fallon v. Mercy Catholic Medical Ctr of Southern Pennsylvania, No. 16-3573 (3d Cir. Dec. 14, 2017)*, where it was determined that an employee's conscience alone did not qualify as a legally-protected religious belief.

Protected Reasons for Refusal

However, there are reasons for refusing a flu shot that are protected under Title VII of the Civil Rights Act of 1964 (Title VII), which applies to employers with 15 or more employees. In short, Title VII prohibits employment discrimination based on religion or a medical contraindication. Therefore, employees may refuse flu vaccinations if such a requirement conflicts with their sincerely-held religious beliefs. For more

information on sincerely-held religious beliefs and Title VII, visit the following link: **https://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html**.

Employees may also refuse flu shots for medical reasons, such as pregnancy, severe adverse effects, or a life-threatening allergy to the shot. In many cases, these medical concerns are also afforded protection under Title VII.

Because religion and medical contraindications as reasons for refusal are protected by law, the EEOC considers blanket vaccination requirements to violate Title VII. Therefore, if an employee refuses a flu shot for either of these reasons, employers should allow for an exemption from a mandatory vaccination requirement and provide a reasonable accommodation, unless doing so would pose an undue hardship.

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/facts/pandemic_flu.html**. Employers should note that reasonable accommodation under Title VII does not require employers to create new positions for employees who pose a direct threat to the workplace because they refused the flu vaccine (*see* **https://www.leagle.com/decision/infdco20160406a49**).

Less Than 15 Employees

Businesses with less than 15 employees are not covered under Title VII. Therefore, there is an argument that employers in this category might be able to impose a blanket requirement. However, this is not a best practice. Employers that offer Workers' Compensation could have issues if the employee is injured due to receiving the vaccine. In addition, if the employee is terminated for refusal and files for unemployment benefits, employers would risk losing the claim. Such a requirement could also result in negative press for the employer, and depending on the circumstances, employee discussions on this issue could be protected under the National Labor Relations Act. Further, all employers—regardless of size—that mandate flu shots 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 minorities (*see* **https://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap21-subchapI-sec1981.pdf**). Employers should also pay for the vaccination if there is a risk that not doing so would take the employee below minimum wage.

Employers in the Healthcare Industry

Hundreds of healthcare employers have mandated employee flu vaccinations, prioritizing patient safety over employee concerns. These employers believe that a special exception exists for having a blanket policy on flu shots because of the heightened responsibility of maintaining the health and well-being of their clients. However, there is no such exception, and healthcare employers fall under the same analysis as above.

In 2016, in the case *EEOC v. Saint Vincent Health 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/eeoc/newsroom/release/12-23-16.cfm**).

The ultimate lesson here is that being in the healthcare industry does not, by itself, relieve employers from their obligations under Title VII. If employers do have a mandate, they should make the exemptions clear in policy, create a process for opting out, and only apply the policy towards employees who regularly interact with patients. Reasonably accommodate if an exemption is requested (e.g.: surgical masks or temporary reassignment). Do not retaliate; the accommodations must be for legitimate reasons. Remember: each case stands alone.

Options

Although it is not recommended that employers mandate employee flu shots, employers can encourage workers to do so.

Employers could start with the educational component: train managers, remind employees that flu season is approaching, and start an early campaign to educate the workforce. The CDC provides printable information flyers for free, available here: **https://www.cdc.gov/flu/resource-center/freeresources/print/index.htm**. Employers may address prevention, good habits, and encourage workers to stay home if

they feel ill. Employers may also establish mandatory infection-control practices to reduce the chances that employees fall ill (e.g.: require regular hand washing and address proper coughing/sneezing etiquette).

Employers may also consider offering free flu shots or reimbursements for the cost of the shot (the average cost is $35). In fact, on-site vaccinations during work hours, or paid time off, is permitted. The CDC even offers a checklist for hosting a flu vaccination clinic: **https://www.cdc.gov/flu/pdf/business/toolkit_seasonal_flu_for_businesses_and_employers.pdf**. In addition, employers may provide protective equipment (such as masks or gloves), tissues, and free hand sanitizers in high-traffic areas. For prevention guidance, promotional tools, and resources for vaccination clinics, view this guidance from the CDC: **https://www.cdc.gov/flu/business/index.htm**.

Conclusion

Due to the risks involved, employers should avoid mandating flu shots for employees. Instead, they should simply encourage employees to do so. For those employers in the healthcare industry, a mandatory vaccination requirement should follow the above guidance and allow for religious and medical exemptions. Employers in this situation should seek a qualified attorney of their choosing to assist in the development and enforcement of such a mandate.

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Employers should allow for certain exemptions from a mandatory vaccination requirement to avoid issues with Title VII.

Minimize Address Stress

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

The Case Study

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 answered 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 or
cost quite a lot.

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Employers must decide what person, department, or third-party will handle the different matters that involve TWC, and must notify the agency of the mailing addresses for these entities.

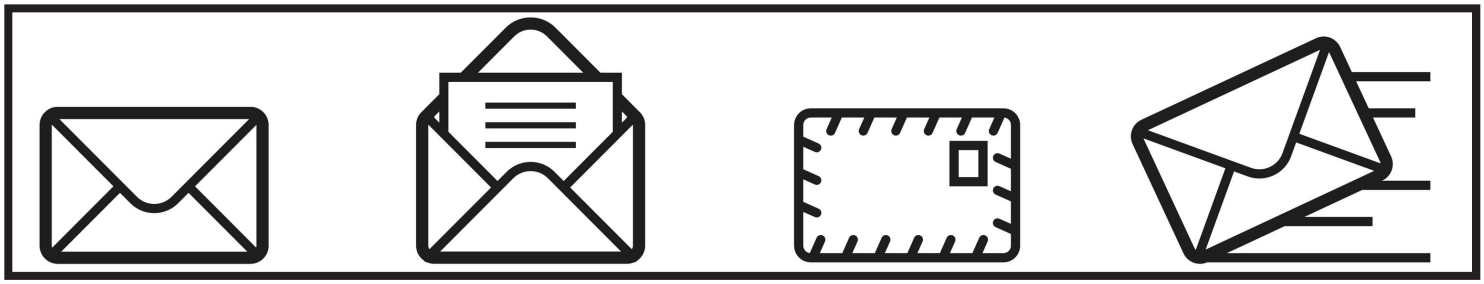
The Problem

Employers know that one of the easiest ways to lose a case with the Texas Workforce Commission (TWC) is failure to timely respond to, or timely appeal, a claim. Employers should therefore keep TWC updated with their most current information at all times. This is especially important if employers receive TWC documents via mail. TWC has many 14-day deadlines, which are measured from the date a document is mailed, and not from the date of receipt. As such, any delay in employers receiving relevant documents could dash their chances at prevailing on a claim.

In most cases, TWC sends claim documents to employers at the address the agency has on record. Despite this, employers often fail to receive documents in a timely manner. The two most common reasons for this are:

1) Documents are sent to the wrong address because the employer moved locations and did not notify TWC of its most current address.

2) Documents are sent to the address that corresponds to the entity handling tax matters for the employer, such as accountants, bookkeepers, payroll companies, or third-party representatives. If these entities do not handle claims for the employer, they may delay in passing on claim notices and documents to employers.



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Employers should ensure that TWC has the most accurate and current mailing information in its records.

The Legal Bits

The Texas Unemployment Compensation Act (the Act) specifies the following regarding addresses:

Section 208.002(b) of the Act provides that the commission shall mail a notice of the filing of an initial claim to the person for whom the claimant last worked before the effective date of the initial claim. If the person for whom the claimant last worked has more than one branch or division operating at different locations, the commission shall mail the notice to the branch or division at which the claimant last worked. Section 208.002(c) provides that mailing a notice under this section to the correct address of the person, branch, or division for which the claimant last worked constitutes notice of the claim to the person.

Section 208.003(a) of the Act provides that an employer may designate in writing to the commission an address for mail service. Section 208.003(b) provides that if an employer designates a mailing address under Subsection (a), mailing of notice of claims, determinations, or other decisions to that address constitutes notice to the employer.

TWC rules further require employers that have or had individuals "in employment" to notify the agency of their correct address and of any change in the correct address. Employers are also required to promptly notify TWC of any change in address.

In addition to their requirements, these laws and rules allow employers to provide TWC with different addresses for different purposes, such as for tax-related matters and unemployment claims.

The Solution

Employers should ensure that TWC has the most accurate and current mailing information in its records.

Employers provide an address of record when they register and set up a tax account number with TWC. This address is often the physical location of the employer's operation, but may also be a mailing address only.

If an employer has a third party handling its quarterly taxes and reports and/or claims, the employer can choose to authorize this other party to act on the employer's behalf as the employer's representative for these different matters. For the protection of the employer, written authorization must be provided to TWC to designate a third-party representative.

In addition, as Section 208.003(a) provides, an employer can designate a different address from the tax address to be used for unemployment and chargeback claim notices.

In order to authorize a third-party representative, or to designate a claims address for the receipt of unemployment and chargeback notices, review the information and follow the instructions here: **http://www.twc.state.tx.us/businesses/designate-employer-mailing-address.**

Employers must decide what person, department, or third-party will handle the different matters that involve TWC, and must notify the agency of the mailing addresses for these entities. If an employer has moved and is unsure of whether TWC has the correct address on record, or if there is any doubt as to whether TWC's records are the most current, employers should contact TWC to double check. Businesses and employers can call 1-800-832-9394 and choose option 1, or call 512-463-2699, to contact the Tax Department. They can also email with questions at **tax@twc.state.tx.us**.

The Bottom Line

It is an employer's responsibility to keep TWC updated with the most current and correct information. Doing so gives employers the best chance of receiving time-sensitive documents in a timely manner, and helps avoid unwanted and needless stress and financial liability. For more information, call our Employer Hotline at 1-800-832-9394.

So, update your data
with TWC,
And ward off a needless
claim emergency.
The more information
The less your frustration,
And a less-stressed
employer you'll be.

Workplace Sexual Harassment in the #MeToo Era

By Sheila Gladstone *(Chair of the Employment Law Practice Group (ELPG) at Lloyd Gosselink Rochelle and Townsend, P.C., Austin, Texas)* **and Ashley Thomas** *(Associate)*

Unless you were hiding under a rock in 2017, you must be aware of the tidal wave of allegations of sexual harassment by celebrities and other high-powered public figures that have resulted in firings, resignations, and public outcry to change attitudes as to what is considered acceptable behavior in the workplace. The #metoo internet phenomenon emerged in its wake, serving as a call-out to victims of sexual harassment to raise awareness by sharing their stories on social media using the viral hashtag.

Given the renewed focus on workplace harassment, employers should be ready to prevent and respond to complaints in a swift and thorough manner, not only because it is the right thing to do, but also because all employers with 15 or more employees have a legal responsibility under Title VII of the Civil Rights Act to provide their employees with a workplace free of harassment and retaliation. Workplace sexual harassment has high monetary costs through charges and litigation (the Equal Employment Opportunity Commission collected over $40 million from employers in 2016 just on sexual harassment claims!), as well as significant indirect costs to the health and productivity of your employees, your turnover rate, and reputation of your organization. The following is brief guidance on how to prevent workplace sexual harassment and how to respond when you receive a complaint:

1. Review your anti-harassment policy to ensure it has a strong statement against workplace harassment and clear reporting procedures.

Your organization should have an anti-harassment policy that includes a clear statement that sexual harassment is prohibited and that such conduct is unlawful. The statement should inform employees that if they engage in harassment, whether a manager, supervisor, or employee, they will be subject to disciplinary action, up to and including termination.

The policy should define sexual harassment as (i) unwelcome sexual advances; (ii) requests for sexual favors; and/or (iii) other verbal or physical conduct of a sexual nature when submission to the conduct is a term or condition of employment, is used as a basis for employment decisions, interferes with the employee's work performance, or creates an intimidating, hostile, or offensive work environment. The policy should provide examples of verbal, physical, and visual conduct that constitutes sexual harassment, while cautioning employees that the examples are not all inclusive. The policy must inform employees that they will not be retaliated against for complaining of harassment, reporting harassing behavior, or for participating in an investigation regarding a harassment claim.

In addition, the policy must include a procedure for employees to report harassment, including multiple avenues to report if reporting to a direct supervisor or manager is insufficient or the offender is the individual's direct supervisor or manager. The procedure should assure employees that reports will be investigated promptly and thoroughly, will be kept as confidential as possible, and that the organization will take swift action if it is determined that harassment occurred. A benefit of a reporting procedure is that an employer can assert a defense against liability if they can show they had a policy against harassment with a reporting procedure, but that the employee unreasonably failed to use the reporting procedure.

2. Remind employees of the anti-harassment policy and reporting procedures to reinforce that your workplace is one where employees should feel comfortable speaking out, and so any current issues can be addressed as soon as possible.

Whether you think your organization has a current issue or not, now is a good time to remind employees of your anti-harassment policy and reporting procedures. You can send out an email with a copy of the policy and procedure and let employees know where the policy can be found in your handbook. Assure employees that their complaints will be kept as confidential as possible and that your organization has an open-door

policy, takes complaints seriously, and will address reports promptly and thoroughly. Learning about harassment complaints early, or while they are still minor, can allow resolution before things get out of control.

3. Train all employees, including supervisors and management, on your organization's anti-harassment policies and reporting procedures.

Training is a valuable tool for preventing harassment from occurring in the workplace, and to increase the likelihood that any harassing behavior will be reported so it can be addressed before the situation escalates. The training should provide management and employees with a clear and uniform understanding of what type of behavior is prohibited, how to report harassing conduct, how the organization will investigate complaints, and that retaliation is forbidden. Managers and supervisors should also be trained on how to respond to complaints from employees, no matter how minor, to foster a workplace environment that is professional and respectful, and guidelines for discipline of harassers. Managers should also be reminded that any romantic or sexual advances toward subordinate employees violate the anti-harassment policy and place them and the organization at legal and reputational risk.

4. Respond to complaints by investigating seriously, thoroughly, and promptly.

Upon receipt of a complaint, respond immediately to address the situation not only to reduce your legal liability, but also to show

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Your organization should have an anti-harassment policy that includes a clear statement that sexual harassment is prohibited and that such conduct is unlawful.

employees that your organization does not just pay lip service to its anti-harassment policy and reporting procedures, and that it takes harassment complaints seriously. Investigations should be conducted by a neutral party, whether that is HR, management, or outside consultants and/or legal counsel. The complainant should be interviewed and the discussion documented with details as to who engaged in the conduct, how the accuser has been affected, what the conduct consisted of, when the conduct occurred, and where it occurred. It should be determined whether anyone else has information that can assist in the investigation, and if so, those individuals should be interviewed as well. The person accused should be interviewed with a full opportunity to respond to the charges and provide other witnesses. Any written evidence, such as phone records, texts, and posts, should be gathered and preserved. Based on the information gathered, each party's credibility should be weighed along with the facts presented to determine whether the conduct complained of occurred. The standard is not so high that it must be determined beyond a reasonable doubt that the conduct occurred, only that the employer has a reasonable belief, based on the information presented, that the harassing conduct occurred. If the results are inconclusive, the complainant should be informed of the results and the situation should continue to be monitored.

Texas Employer Traffic Safety Training

By Lisa Robinson
Our Driving Concern Senior Program Manager

Employers absorb the brunt of costs associated with crashes, whether they occur on or off the job. In fact, off-the-job crashes account for 80% of employer crash-related health benefits costs, and half of crash-related injuries cause employees to miss work.

Our Driving Concern Senior Program Manager Lisa Robinson tackles traffic safety issues that regularly confront Texas employers on her *Live with Lisa* video blog.

In these short video clips, you will see Lisa yawn. You will hear her reference "Bubba" and point to the 10% who still do not buckle up and play traffic safety roulette. You will learn the next time you hear, "my time," it is a good idea to think, "your bottom line."

Robinson works with Texas employers to promote safe driving practices among their employees, both on and off the job. Nationally, crashes cost employers more than $47 billion and 1.6 million workdays each year, according to the Network of Employers for Traffic Safety.

In Texas, one person is injured in a crash every 2 minutes. One person is killed every 2 hours and 20 minutes. The average workplace motor vehicle crash costs more than $24,000, and if an employee is injured, the cost is more than $125,000.

More than 90% of crashes are the result of human error and, therefore, preventable. Texas employers regularly share with Robinson some of the most common driving errors their employees and covered family members make:

- missing road hazards or detecting them too slowly;
- choosing the incorrect defensive driving action;
- driving in a distracted or altered state, such as having inadequate sleep, being distracted by a phone, or driving under the influence of drugs or alcohol;
- striking fixed objects; and
- driving complacency.

The 4 "Ds" of impairment–drunk, drugged, distracted, and drowsy–continue to be prevalent factors in crash investigations across Texas. Employers are positioned to drive behavior change through consistent and ongoing messaging around traffic safety. Traffic safety belongs in your regular workplace safety culture. How can you afford not to protect your employees as well as your bottom line?

Much has changed since the *Our Driving Concern* program first launched. While free workplace traffic safety training sessions remain a staple, the curriculum has been updated. *Live with Lisa* videos address everything from distracted driving to the impact of off-the-clock incidents on your organization's bottom line. These videos have been created as tools to reach employees and win over executive management.

Other new offerings include:

- Drug Impairment Training for Texas Employers (DITTE): Managers and supervisors learn how to educate employees in an effort to help reduce the number of alcohol and drug-related injuries and fatalities on Texas roads;
- Alive at 25: Teen drivers are nearly three times more likely than drivers over the age of 20 to be in a fatal crash; this pilot program is designed to teach young adults how to make safe, respectful, and legal driving decisions (training offered at employer locations for teens of employees);
- E-Learning: You asked for traffic safety lessons you could take anywhere, anytime, and we responded by developing interactive lessons that are fully compatible with your mobile device; and
- Safety Huddle talking points, Safety Coach cards, and Toilet Tabloids.

We hope *Our Driving Concern* is your driving concern. Everything we do is provided free to Texas employers by the National Safety Council and through grant funding from the Texas Department of Transportation. To access free resources, visit **www.txdrivingconcern.org.**

If you have questions or need more information, contact *Our Driving Concern* Senior Program Manager Lisa Robinson. Email: **Lisa.Robinson@nsc.org**. Phone: 512-466-7383.

The Family Medical Leave Act for Employers, Part 1

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

There are many employment laws that regulate workplace behavior and activity in our great state. Some of these laws are passed at the state level, and others at the federal level. One such federal law that certain Texas employers must abide by is called the Family Medical Leave Act (FMLA). The FMLA provides employees with job-protected leave if certain conditions are met. FMLA regulations can be complex, but it is important for employers to know the basics to minimize potential legal liability. In next quarter's edition of *Texas Business Today,* more advanced FMLA concepts will be covered.

Which Employers are Covered by the FMLA?

The FMLA provisions are mandatory for employers who are covered by the law. Not all Texas employers are covered by the FMLA. In fact, FMLA coverage depends largely on how many employees work for the employer. The threshold number of employees is also different depending on whether the employer is in the private-sector or a public agency (cities, municipalities, political subdivisions, etc.). A private-sector employer is covered by FMLA rules if it employs 50 or more employees in 20 or more workweeks in the current or previous calendar year. A public agency is covered by FMLA rules regardless of how many employees it employs. In addition, schools, such as public school boards, and private or public elementary and secondary schools, are covered by the FMLA regardless of how many employees they employ.

FMLA Eligibility Requirements

There are two big questions to ask when approaching any FMLA situation. First, is the employer covered by FMLA rules? Second, is the employee eligible for FMLA protected leave? The basic rules

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The Family Medical Leave Act provides employees with job-protected leave if certain conditions are met.

surrounding FMLA coverage were discussed previously, but the eligibility requirements also play a critical role in diagnosing FMLA issues because some employees may be ineligible for FMLA leave – even if they work for an FMLA-covered employer.

There are four basic factors to consider in determining whether someone is an eligible employee for FMLA protections. First, the employee must work for a covered employer. Second, the employee must have worked for the employer for 12 months as of the date the FMLA leave is supposed to start. Third, the employee must have worked 1,250 hours during the 12-month period immediately before the FMLA leave is to start. Fourth, the employee must work at a location where the employer has 50 or more employees within a 75-mile radius.

FMLA Qualifying Events

In addition to being eligible for FMLA leave and working for an FMLA-covered employer, an employee needs to experience an FMLA qualifying event for the leave to be protected. There are multiple FMLA qualifying events, and many of them allow an eligible employee to take up to 12 workweeks of FMLA leave in a 12-month period. First, the birth of a child and bonding time within 1-year of the birth is an FMLA qualifying event. Second, bonding time with a newly-placed adopted or foster care child is also a qualifying event. The third and fourth ways that FMLA protection can be triggered deal with the serious health condition of the eligible employee, or the serious health condition of the eligible employee's immediate family member (spouse, parent, son, or daughter). Fifth, any qualifying exigency resulting from the eligible employee's immediate family member being a military member on, or called to, covered active duty status is also qualifying.

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Proper application of the FMLA can be useful in minimizing potential employment law-related lawsuits.

Furthermore, there is an exception to note concerning the general rule of 12 weeks of job-protected leave for FMLA qualifying events. An eligible employee may take up to 26 workweeks of leave in a single 12-month period for military caregiver leave.

Things You Might Not Know About The FMLA

Since FMLA regulations cover a lot of ground, it is understandable that some of the law's lesser-known provisions might fly under the radar. For example, joint employment is a concept where two or more businesses exercise control over aspects of an employee's work. Thus, employees that are jointly employed by two employers must be counted by both employers for purposes of FMLA coverage, even if the employee is only found on the payroll of one employer.

Next, the FMLA qualifying events of the birth of a child or the placement for adoption or foster care of a child, and the subsequent bonding time, apply to both mothers and fathers. It is important to remember this point, as the proper application of the FMLA can be useful in minimizing potential employment law related lawsuits.

Moreover, not every FMLA qualifying event allows an employer to obtain certification for leave from a medical provider. For instance, an employer is not allowed to request a certification for leave if the eligible employee is requesting FMLA leave for bonding time with a newborn baby, or a child who has been adopted or placed with the eligible employee for foster care.

Conclusion

FMLA law can be intricate. However, a good grasp of its fundamental principles is vital for covered employers. In sum, keeping in compliance with FMLA regulations is good for business. For more information about the FMLA, please visit The Employer's Guide to The Family Medical Leave Act at **https://www.dol.gov/whd/fmla/employerguide.pdf** or call our Employer Hotline at 800-832-9394.

Frequently Asked Questions

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

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

Q: ***Is it reasonable for a salaried employee to be expected to work 10-hour days, 5 days per week, when they were hired on the understanding that their salary was based on a 40-hour workweek? Can a company reasonably change this mid-tenure?***

A: As noted in the topic "Work Schedules" in the book *Especially for Texas Employers* (see **http://www.twc.state.tx.us/news/efte/work_schedules.html**), an employer has a basic legal right to schedule an adult employee for any number of hours per day and days per week that the business needs. As long as the employer is not contractually prohibited from changing an employee's work schedule, a company can make such a change at any time during an employment relationship.

Whether a particular increase in work hours is reasonable is more of a management question than a legal one. That having been said, a 25% increase in work hours per week is fairly drastic and uncommon, and it is likely that a business owner would not make a substantial change like that unless there were a clear and demonstrated need for a certain employee to work more hours. If that need results from an upswing in business, that is a good thing, and if business increases, so does the revenue from business operations, and with an increase in revenue, there is usually an increase in the company's ability to award pay raises. Most people in business would agree that an employee's willingness to work more hours should be rewarded in every way possible, depending upon the company's ability to do so.

Bottom line: your company would have the authority to require an employee to work more hours, but it would be well-advised to try to reward the employee's extra efforts with additional pay, commensurate with the additional effort the employee contributes. As noted management consultant Brigette Hyacinth has said, "Take care of your employees, or your competitors will."

Q: ***Should I have employees sign a permission form when our company puts on a photo shoot to publish or post how-to videos online? In case they are no longer employed with us, would we be able to continue to use the photos and videos?***

A: It would definitely be advisable to have employees sign a photo release if the company plans to publish pictures or videos depicting them in any way in any kind of company publication. Employees who refuse to sign such a release should not be depicted on company websites or in printed materials from the company. This is the kind of form for which you could probably find many examples online. It would be best to use something that has been put online by a Texas law firm or photography company, and you would want to ensure that it has language covering post-employment use of the images or videos. It would be best to be sensitive to employees' and former employees' requests regarding privacy, especially if someone expresses concern over being stalked or harassed following a change in personal circumstances. Special care should be taken with images of minors – both parents should sign the release, and any request to take images offline should be honored immediately.

Q: ***We currently have our non-exempt employees set up for being paid a salary, with time and a half for over 40 hours. To do this, we need to have them track their hours. We do not reduce their pay if they fall below 40; however, if they record 36 and have a day that they worked late, by 2 hours, we still only pay them for 40. I have a couple of employees who will repeatedly put down 8am to 5pm everyday – even if they leave at 4pm. They feel since they are paid a salary, they don't really need to record it correctly. However, they will also put down 8am to 6pm if they work late - we do always pay for the overtime. My question is, is it OK to hold them accountable for recording their time correctly?***

A: Thank you for your inquiry regarding timekeeping policies with regard to non-exempt salaried employees who seem reluctant to keep good time records. An employer has the legal right to require employees to keep any kind of time and work records that the employer deems necessary. That right applies no matter what type of employee is involved and no matter what pay method is used. Particularly with regard to non-exempt employees, it is essential to maintain complete and

accurate records of all time that they work. The primary responsibility for doing that falls on the employer, but the employer may legally require that the employees cooperate with the employer in obtaining and maintaining those records. Employees who fail to follow the employer's timekeeping policy may be dealt with accordingly.

It is important to note that the employer should not attempt to enforce rules like this half-heartedly. The old adage "in for a penny, in for a pound" definitely applies. Some employers make the mistake of believing that employees have them over a barrel, and they dare not force the issue for fear of not being liked. The toughest prisons are the ones of a person's own making. For every employee who does not want to cooperate with a simple concept such as keeping accurate time records, there are literally dozens, sometimes hundreds, of eager potential employees with not only job experience, but more importantly a proper attitude, who would love to have a chance to be under those same timekeeping requirements when working for your company. An example of a work schedule and timekeeping policy is available in our book *Especially for Texas Employers* at **http://www.twc.state.tx.us/news/efte/work_schedule_policy.html**, and basic information on progressive disciplinary systems, including a sample final written warning, is online at **http://www.twc.state.tx.us/news/efte/discipline.html**. Strategies for designing time records appear at **http://www.twc.state.tx.us/news/efte/e_timecard_policies_and_strategies.html**.

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

Q: ***We had an employee who resigned on Thursday, June 15, 2017. The employee's final four days of work from June 12th through June 15th fall in the pay period that is scheduled to be paid on June 30, 2017. Since this employee resigned, can we wait to issue a final paycheck on June 30th, or are we required to issue the check today on Friday, June 16, 2017? The law says "if the employee quits, retires, resigns, or otherwise leaves employment voluntarily, the final pay is due on the next regularly-scheduled payday following the effective date of resignation." We are wondering, since he resigned June 15th and our next regularly scheduled payroll is on June 16th, whether we be issuing his final paycheck on June 16th or June 30th?***

A: Under the Texas Payday Law, the final pay for an employee who resigns, i.e., leaves voluntarily, is due no later than the next regularly-scheduled payday following the effective date of resignation. TWC interprets that requirement as meaning that the final pay for the final day or days of work is due when the paycheck for such day or days would normally be given. Accordingly, if the regular payday for June 12 – 15, 2017 would be June 30, 2017, the employee's final paycheck for the very last days of work would be due on June 30, 2017, the date on which the paycheck for those days would normally be given.

Q: ***If a job candidate is required to list references on a job application, or voluntarily lists some on a resume, is it permissible to call references who are not on the lists provided, but the reference previously worked with the candidate? If an application asks for a supervisor's name and contact information, plus asks whether we may contact this person, the candidate provides the information but lists no under permission, are we obligated to not contact this person or this person's assistant?***

A: As a general matter, it is permissible to call anyone with relevant information about a job candidate and ask for the kind of information that would be legally relevant in a hiring decision. While a candidate's denial of permission to contact a particular supervisor is not by itself legally binding on a prospective new employer, i.e., there is no Texas or federal statute that expressly prohibits a contact under such circumstances, it is probably best not to do so if the reason for the denial is that the candidate currently works for the supervisor, and contacting the supervisor might somehow cause the premature termination of the applicant's employment. In such a case, the candidate could potentially try to sue the prospective new employer for interference with an employment relationship, or something similar, and even though such a lawsuit would be difficult to win in court, the prospective new employer would incur significant legal costs in making the lawsuit go away. It might be better to first ask the candidate to explain why he or she does not want such a contact to be made, and the candidate's answer to that question could supply some insight into whether the candidate would be a suitable employee if hired. Finally, in general, it is legal for an employer to give a hiring preference to those candidates about whom more relevant hiring information is known than others.

Business and Legal Briefs

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New Hire Reporting

More questions have come in recently concerning the new hire reporting law, as more employers become aware of a recent statutory change requiring them to report independent contractors as well as newly-hired employees. This change in the law came from a 2015 bill (SB 1727) that amended Section 234.101(1) of the Family Code. Interestingly, "compensation received as an independent contractor" was already covered under the definition of "earnings" in Section 101.011(1) of that law. Page 2 of the Office of the Attorney General's (AG's) publication *Texas Employer New Hire Reporting* (online at **https://www.texasattorneygeneral.gov/files/cs/newhire.pdf**) notes the following: "The definition of 'independent contractor' is clarified in the Texas Administrative Code to include independent contractors 'whose income is required to be reported on Form 1099-MISC.' 1 TAC § 55.302(4)." Thus, any independent contractor whose compensation would, under the rules of the IRS, be reportable on a Form 1099-MISC would have to be included in an employer's new hire report. For more information, see the AG's employer portal at **https://portal.cs.oag.state.tx.us/wps/portal/employer**.

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"No Cameras Allowed" Policies Can Be Permissible, NLRB Says

The National Labor Relations Board (NLRB) has issued an important ruling in a case involving the right of an employer (in this case, a contractor in the defense industry) to enforce a no-camera rule in its workplace. Overturning a previous Board ruling from 2004 (*Lutheran Heritage, 343 NLRB 646*), the Board held in *Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, 365 NLRB No. 154 (Dec. 14, 2017*), that a no-camera policy can comply with the National Labor Relations Act (NLRA) if the employer has sufficient justification for it that outweighs the potential impact on an employee's rights under the NLRA. In *Boeing*, the employer's security concerns were found to justify the policy. The ruling was particularly interesting due to the additional commentary the majority had regarding employer policies in general: "… The 'reasonably construe' standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases. The *Lutheran Heritage* standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most

important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. … In many cases, *Lutheran Heritage* has been applied to invalidate facially neutral work rules solely because they were ambiguous in some respect. . . . It has rendered unlawful every policy, rule and handbook provision an employee might 'reasonably construe' to prohibit any type of Section 7 activity. . . . Over the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain. We do not believe that when Congress adopted the NLRA in 1935, it envisioned that an employer would violate federal law whenever employees were advised to 'work harmoniously' or conduct themselves in a 'positive and professional manner.' Nevertheless, in *William Beaumont Hospital*, the Board majority found that it violated federal law for a hospital to state that nurses and doctors should foster 'harmonious interactions and relationships,' and Chairman (then-Member) Miscimarra stated in dissent: 'Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. Nobody can be surprised that a hospital, of all workplaces, would place a high value on "harmonious interactions and relationships." There is no evidence that the requirement of "harmonious" relationships actually discouraged or interfered with NLRA-protected activity in this case. Yet, in the world created by *Lutheran Heritage*, it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.'" The *Boeing* ruling will likely enable employers to have more flexibility when designing workplace policies and to take legitimate factors into account to a greater extent than previously allowed.

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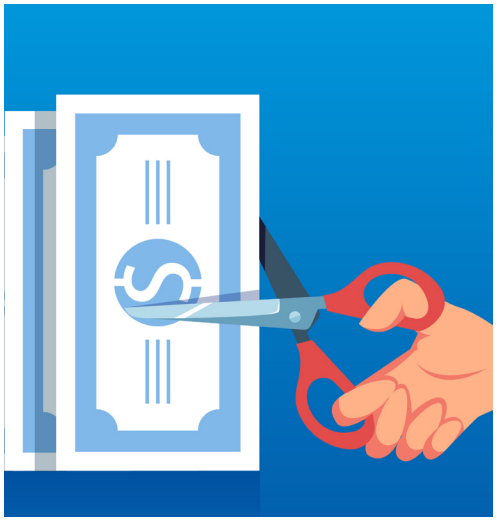
Significant NLRB Developments

Memorandum GC 17-01 (Jan. 31, 2017) provided for scrutiny of the religious status of a school and its employees; inclusion of non-management professors in the ranks of NLRA-protected employees; that student assistants are employees under the NLRA; and that medical interns, residents, and fellows (or "house staff") in post-medical school residency programs are employees covered by the NLRA. That memo has been rescinded effective December 1, 2017 by the new General Counsel (GC) Peter G. Robb.

In addition, the new GC's memorandum GC 18-02 outlines a very significant and substantial array of recent NLRB holdings and interpretations that will presumably come under increased analysis / reanalysis by the agency. That memo also lists several recent controversial memos that have been rescinded by the new GC. Space limitations restrict a detailed listing of those changes, but the memo is easily accessible online at **https://apps.nlrb.gov/link/document.aspx/09031d458262a31c**.

Quick Items

- In December, 2017, a large class action suit was filed in San



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Francisco federal court alleging that many high-tech companies practice age discrimination by restricting their Facebook advertisements in such a way that they primarily ask only for younger potential applicants. The lawsuit is a reminder of the general proposition that job ads should be targeted to the broadest possible applicant pool in order to comply with Equal Employment Opportunity (EEO) best practices.

- Under Texas Labor Code Sections 402.082 - 402.092, information relating to workers' compensation claims is confidential and may be released only under very restricted circumstances, and unauthorized disclosure of such information may result in criminal penalties, as provided in Section 402.091.
- Severance pay disqualifies a claimant from unemployment benefits for the period covered thereby (see Section 207.049(2) of the Texas Labor Code), unless it is an incentive paid to obtain a release or waiver of liability from the departing employee with regard to the Civil Rights Act of 1991, or to settle a claim or lawsuit that has already been filed, or in connection with a written contract that was negotiated between the employer and employee prior to the date of the work separation.
- Unemployment claim responses and appeals can be filed online at **http://www.twc.state.tx.us/businesses/employer-response-notice-application-unemployment-benefits** (claim responses) and **http://www.twc.state.tx.us/businesses/employer-benefits-services** (appeals - see "Appeal Online").
- Generally speaking, if a person is helping you do the work of your company, he or she will be considered your employee, instead of an independent contractor. Since the Texas Workforce Commission, the Internal Revenue Service, the U.S. Department of Labor, and other agencies are paying more attention to worker classification issues than ever before, it would be a good idea to review the standards applicable to the workers in your company. For detailed information, see **http://www.twc.state.tx.us/news/efte/ics_contract_labor.html** in our book online.

Texas Business Today

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