

First Quarter 2015

Texas Business Today

Hope Andrade
Commissioner Representing Employers



Committed to Serving
Texas Employers

Texas Business Conferences: A Vital Employer Resource

Our Texas Business Conference (TBC) series is one of the services offered by my office that I am most proud of. These one-day seminars provide an opportunity for employers and small business owners to connect directly

Commissioner's Corner

with the state's preeminent employment law attorneys and learn about important legal updates regarding how to successfully manage their employees.

Each year, our goal is to host up to twenty conferences throughout the state, touching each region and providing opportunities for business owners, CPAs, HR professionals, and anyone who manages employees to receive updates and have their employment law questions answered. For a listing of upcoming conferences, turn to page 19.

"I want to thank all of the speakers and the material handouts. It was one of the best educational seminars I've attended in years. The information is priceless. I highly recommend this seminar. I will definitely attend again."

– Employer who attended
Brownsville TBC 2014

For the most part, the attorneys who answer your questions via our Employer Hotline (1-800-832-9394 or employerinfo@twc.state.tx.us) are the same experts who present at our TBCs. In fact, the topics covered at the conference are based on the most common phone call inquiries that our attorneys receive from employers. We also strive to host special guest speakers



TWC Commissioner Representing Employers Hope Andrade joins her staff in congratulating Senior Legal Counsel William T. Simmons on being awarded the Texas Star Award, which recognizes TWC employees who perform above and beyond at promoting agency systems and solutions and provide outstanding customer service and support. Pictured clockwise from left: Commissioner Andrade, Legal Counsel Mario R. Hernandez, Legal Counsel Elsa G. Ramos, Senior Legal Counsel William T. Simmons, Legal Counsel Velissa Chapa. Photo by Amy Kincheloe/TWC Staff

from each region we visit.

One thing that seems to always pleasantly surprise our conference attendees is how accessible our presenters are for questions and one-on-one discussions. Our attorneys are available for questions throughout the day, and host a Q&A session for the whole conference at the end of the day.

I am very proud of my attorney team that puts on these conferences. I often listen to them in the office when they are

on the phone with our Texas employers and their incredible customer service never ceases to amaze me. As a small business owner myself, I am reassured that I would feel very comfortable given their patience at explaining even the most complex legal issues and their earnest desire to help me and my business.

In fact, I regularly hear from employers on how impressed they are with our attorneys' expertise and

commitment to serving our Texas business community: To learn more about the attorneys who present at TBC and answer the Employer Hotline, turn to page 18.

"I was so impressed by the quality of the speakers, their breadth of knowledge, the availability of qualified staff and attorneys to answer specific questions and the sheer volume of information that was disseminated. Having attended my



share of read-the-PowerPoint-slide-to-you courses, I wasn't sure what to expect, but I can truly say that I was blown away at the quality of the experience."

– Employer who attended Grapevine TBC 2014

Last year, in order to make these conferences more accessible and convenient for our employers, we introduced a new online registration and payment system. To review the 2015 TBC schedule and register for the upcoming conference

nearest you, please go to www.texasworkforce.org/tbc. We look forward to seeing you at the next conference in your region! 🇺🇸

Sincerely,

Hope Andrade
Texas Workforce Commission
Commissioner Representing Employers



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Cover image: Texas Business Conferences offer a full-day conference where you will learn the relevant state and federal employment laws that are essential to efficiently managing your business and employees. *Composite image by Amy Kincheloe/TWC Staff*

Vicarious Liability: When Will An Employer Be Liable For An Employee's Actions?

Employers in Texas navigate through a countless number of employment issues on a daily basis. One matter of particular concern is the concept of vicarious liability. In short, vicarious liability means that employers will be held responsible for the actions of their employees. In addition, employers should be aware that vicarious liability can arise from actions both inside and outside of the workplace. While the focus of this topic will be to describe vicarious liability situations outside of the workplace, be sure to look for a similar article discussing vicarious liability occurrences inside the workplace in next quarter's issue.

To begin with, vicarious liability shares close ties with the tort (a wrongful act) theory of Respondeat Superior (Latin: "let the master answer.") This theory holds that in many instances an employer will be held responsible for the actions of its employees if those actions are performed within the scope of employment. Identifying the "scope of employment" is critical in vicarious liability cases because if it is determined that the employee was acting outside the bounds of his or her job, the employer will likely not be held liable for those actions. As it pertains to vicarious liability that occurs outside of the workplace, two key terms need to be considered by employers. Those terms are "frolic" and "detour."

These concepts, of "frolic" and "detour," are essential in establishing

whether employees were acting within their scope of employment when their actions took place. The term "frolic" means that the employee was engaged in an independent journey or task that was outside the bounds of his or her job duties as delegated by the employer. A common example given to illustrate a frolic is the truck driver that is responsible for delivering supplies to a buyer or customer, but instead chooses to deviate from this task and commit armed robbery at a local bank. In this latter example, it is clear that the employee is acting outside the scope of employment. As a result, the employer would likely not be held liable for the consequences of its employee's criminal behavior.

Unfortunately, not all cases of vicarious liability are as evident. For example, in the case of *Montez ex rel. Montez v. Department of Navy*, 265 F.Supp. 2nd 750 (N.D. Tex. 2003), a tort case was filed against the U.S. Navy by relatives of deceased family members who were killed when an off-duty naval clerk lost control of a passenger vehicle while trying to make a turn at a high rate of speed. Although the plaintiffs in this case argued that the naval clerk was acting within the scope of his employment when the accident occurred, the court disagreed. The court reasoned that the naval clerk was acting outside the bounds of his job duties because he was not given permission to use the vehicle for personal reasons and that the destination of he and his

passengers was a social gathering that was not part of his work responsibilities. Although the events of the case were tragic, the court illustrated that an employer cannot be held liable for the actions of its employees if those actions are unauthorized and constitute a personal trip or errand.

While the court in *Montez* found that engaging in a frolic severs the liability that an employer has for the actions of an employee, a "detour" presents a different set of circumstances. In relation to vicarious liability, a detour is defined as a mere departure from an assigned task while still acting inside the scope of employment. For instance, if a pizza delivery person receives a call order and opts to take a shortcut path instead of the normal route to reach the customer's residence, the employer will likely be liable for injuries that result from that employee's actions. Unlike a frolic situation, the employee in the pizza delivery example was engaging in activity that was in the furtherance of an employer objective.

In addition, instances of detours create concern among employers since they can be held responsible for money damages and attorney's fees associated with vicarious liability cases. Specifically, in *Garcia v. United States*, No. C-12-108 (S.D. Tex. 2012), a Chief Petty Officer had just completed a required training course that left him considerably fatigued. With his supervisor's permission to return to his duty station on base, the

officer got in his vehicle, drove away, and eventually drove to his off-base residence. Subsequently, while driving back to the naval base, the officer fell asleep at the wheel, drifted into oncoming traffic, and collided with the plaintiffs. The defendant, the U.S. Navy, attempted to have the case dismissed by arguing that the officer was not acting within the scope of his employment when the accident occurred. However, the court disagreed by referencing the permission that the officer had secured from his superior. Moreover, the court noted that the activities the officer had engaged in were in furtherance of the employer's objective: to return back to the base in time for a pinning ceremony. Although the court conceded that the officer had deviated from the employer's instructions by driving to his off-base residence, they indicated that his detour did not constitute a departure from his assigned tasks.

The rulings in *Montez* and *Garcia* comprise only a small portion of the voluminous decisions that courts have rendered regarding vicarious liability. However, both cases contained commentary that shed light on other situations where an employer would not be held vicariously liable for employee action. Particularly, the *Garcia* court indicated that an employee who goes out drinking while on a business trip is not acting within the scope of employment. The court also quoted a previous judicial decision that ruled an injury caused by an employee's personal animosity is not conduct in furtherance of an employer objective. Similarly, the *Montez* court described key principles that are applicable to vicarious liability. The court noted that "there is a presumption that an employee involved in an accident while driving the employer's vehicle is acting within the scope of employment."

The court added that the employer would need to show that the employee was on a personal errand or frolic at the time of the accident to rebut the presumption. More importantly, the court laid out the three-prong approach that Texas uses to determine when an employee is acting within the scope of employment. First, the employee has to be acting within the general authority given by the employer. Second, the activity has to be in furtherance of the employer's business. Lastly, the activity has to be in connection with the job duties for which the employee is employed.

In conclusion, vicarious liability that lurks outside of the workplace is a legitimate concern for employers. However, court rulings have

demonstrated that there are similar characteristics for determining whether an employer will be responsible for the actions of its subordinates. Employers would be well advised to remember that if an employee is engaging in activity that is sanctioned by the employer for the purposes of completing a business objective, the employer could potentially face an uphill battle avoiding liability if an injury occurs as a result of that activity. By keeping the principles of vicarious liability in mind, employers will be better situated to identify when they will be responsible for the actions of their employees. 🇹🇽

Mario R. Hernandez
Legal Counsel to Commissioner Andrade



As it pertains to vicarious liability that occurs outside of the workplace, two key terms need to be considered by employers. Those terms are "frolic" and "detour." Photo illustration by Amy Kincheloe/TWC Staff

An Employee's Pregnancy Rights in the Workplace

Employers are faced with many challenges when managing employees. Are the employees performing to the best of their abilities? Are they loyal and committed to the company? From employee performance to employee absences, employers have a lot of issues to consider. One of the most confusing issues for employers is that of employee pregnancy. On the one hand, the news that an employee is expecting a baby is usually met with much joy and anticipation by the pregnant employee,

her co-workers, and even the employer. On the other hand, employers running a business and looking at their business needs may dread the possibility that a pregnant employee will most undoubtedly be missing work at some point in the future. What should an employer do in these situations? Does the law require or prohibit employers from taking certain actions? The answer depends on the number of employees that an employer has: less than 15, 15 or more but less than 50, and 50 or

more. Let's address each one of these separately.

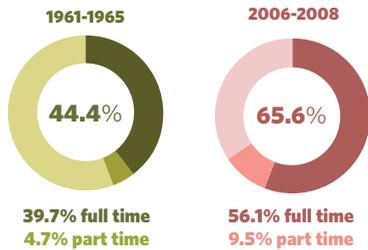
Less than 15 employees:

If an employer has fewer than 15 employees, then it is not covered by any anti-discrimination laws related to pregnancy or disability. That means that the employer faced with a pregnant employee is not legally required to hold a job, provide a certain amount of leave, modify the job duties, or change the employee's schedule because of

FIRST-TIME MOTHERS AT WORK

Now and Then: How first-time mothers have changed their employment and leave patterns

Percentage of First-Time Mothers Who Worked During Pregnancy



2 of 3

first-time mothers worked during pregnancy (2006-2008)



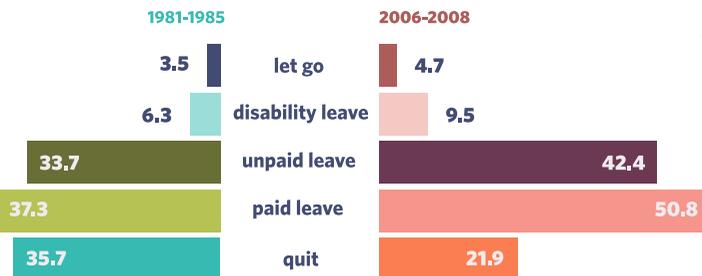
When Did First-Time Mothers* Stop Working During Pregnancy?

*excludes women who did not work during pregnancy
1961-1965 vs. 2006-2008

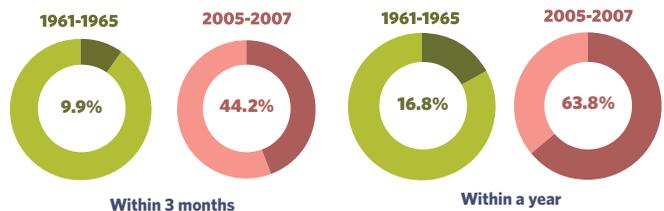


Leave Arrangements* Used By First-Time Mothers† Who Worked During Pregnancy

* Totals exceed 100 percent because women may use multiple types of leave.
† Before or up to 12 weeks after giving birth



More Women Are Working Sooner After First Birth



80% of mothers who returned to work within 12 months of giving birth returned to their same employer (2005 - 2007)

Source: U.S. Census Bureau, Income and Program Participation Survey

the pregnancy. The employer is free to handle the situation in any way the employer sees fit.

However, employers should be aware that if their employee policies contain provisions regarding sick leave or medical leave that would be applied to **any and all** employees, then an employer should abide by those policies and allow its pregnant employees the benefit of the policies. If, on the other hand, employers had no provisions for any sick or medical leave, employers should still treat pregnant employees consistently with non-pregnant employees.

Just because it is not illegal to do something, it does not mean that engaging in such behavior will yield no consequences. For example, if an employer with less than 15 employees chose to discharge a pregnant employee because the employer believed that the employee would not be able to carry out her assigned duties due to her pregnancy, and that keeping her employed would be too much of a hassle, the employer could legally terminate the employee without violating any discrimination statutes. However, the employer's dismissal of the employee could result in some undesirable results such as: employee complaints, issues with employee morale, an increase in employee turnover, negative feelings toward the employer, and damage to the employer's reputation in the community. After all, remember that employees are free to discuss their working conditions among themselves and will most likely discuss them with friends and families. So just because an employer can legally discriminate against pregnant employees, it does not mean that doing so would be the employer's best course of action or always in the employer's best interest.

15 to 49 employees: If an employer has at least 15 employees but less than 50, then it is covered by the Pregnancy Discrimination Act (PDA), which is

contained in Title VII of the Civil Rights Act of 1964. The complete text of the regulation can be found here: www.gpo.gov/fdsys/pkg/CFR-2006-title29-vol4/xml/CFR-2006-title29-vol4-sec1604-10.xml.

The PDA provides in part:

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, **for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions**, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, **shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.**

29 C.F.R. §1604.10 (1979) [44 FR 23805, Apr. 20, 1979]

The U.S. Equal Employment Opportunity Commission (EEOC) explains that, "The [PDA] forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment." Furthermore, it provides that, "If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same way as it treats any

other temporarily disabled employee. For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees." (For more information: www.eeoc.gov/laws/types/pregnancy.cfm).

Therefore, under the PDA, the employer is required to treat pregnant employees the same way that any other employee with a medical condition would be treated. Take, for example, an employee who was hospitalized for two weeks after a car accident and who, according to doctor's orders, was only able to work light duty for a month. If the employer was able to accommodate this injured employee under its written or unwritten policy, then the employer would be required to also accommodate a pregnant employee who needed medical leave or a modified job schedule or modified job duties. Although the employer is not required to treat pregnant employees any better than any other employees with medical conditions, they should not be treated any worse.

If a pregnant employee communicates to the employer that she is unable to perform some of her job functions due to the pregnancy, the employer is not required to simply take the employee's word on the matter. The employer has the right to require the employee to provide medical documentation from her healthcare provider outlining any medical restrictions on her ability to work. At that point, the employer can better assess if it can reasonably accommodate the employee's restrictions to enable the employee to continue working. Reasonable accommodation can include many things, such as: a change in job duties, a reduction in work hours, a change to meal or rest breaks, a change to the work schedule, as well as a reasonable amount of leave.

Continued on page 8

Continued from page 7

But what about maternity leave once the baby is born? The PDA does not set out any guidelines for employers to follow in determining an employee's maternity leave. Remember, if an employer already allows a temporarily disabled employee to take either paid or unpaid leave, as in the car accident example above, then the employer must allow an employee who is temporarily disabled due to pregnancy to do the same. The pregnant employee should be treated at least as favorably as other employees who suffer from medical conditions.

Employers should understand that pregnancy discrimination is discrimination on the basis of sex as opposed to discrimination on the basis of disability. Discrimination based on an employee's disability is prohibited under the Americans with Disabilities Act (ADA). A normal pregnancy is not considered a disability under the ADA. However, there are certain conditions or complications that may arise from pregnancy, such as gestational

diabetes or pre-eclampsia, which might be characterized as disabilities for purposes of the ADA. In that case, the ADA would apply and the employer should be aware of the requirements under this statute. Employers can learn more about their obligations under the ADA here: www.eeoc.gov/facts/ada17.html. In addition, the EEOC has a fact sheet for small business which explains employer requirements under the PDA and the ADA here: www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm.

50 or more employees:

Employers with at least 50 employees are covered by the Family Medical Leave Act (FMLA) in addition to the PDA and the ADA. Unlike the PDA, the FMLA provides guidance on the length of leave an employer is required to grant a pregnant employee who meets the FMLA initial eligibility requirements. An employer must provide up to 12 weeks of job-protected leave for absences due to pregnancy, other qualifying medical conditions, or for certain specified family reasons such as parent-baby bonding time after the birth of a baby. Employers can learn more

about the FMLA here: www.dol.gov/whd/regs/compliance/whdfs28.pdf.

While employers should be aware of the possible implications, many women have perfectly normal pregnancies with no serious complications. Fortunately, these employees are able to work and perform their normal job duties throughout the majority of their pregnancy and any disruption to their work is minimal. Ultimately, pregnancy can be a time of celebration for the pregnant employee, but it can also be a time filled with confusion and difficult issues for employers who must weigh a pregnant employee's needs and wants with the employer's best interest and business needs. By being aware of the relevant laws, employers will be better equipped to make the best decisions under the circumstances. Learn more about pregnancy rights in the workplace by reviewing this section in our employer handbook, *Especially for Texas Employers*, www.twc.state.tx.us/news/eft/pregnancy_rights.html. 🇹🇽

Elsa G. Ramos
Legal Counsel to Commissioner Andrade



Employers should be aware that if their employee policies contain provisions regarding sick leave or medical leave that would be applied to **any and all** employees, then an employer should abide by these policies and allow its pregnant employees the benefit of the policies. *Photo by iStock/Thinkstock*

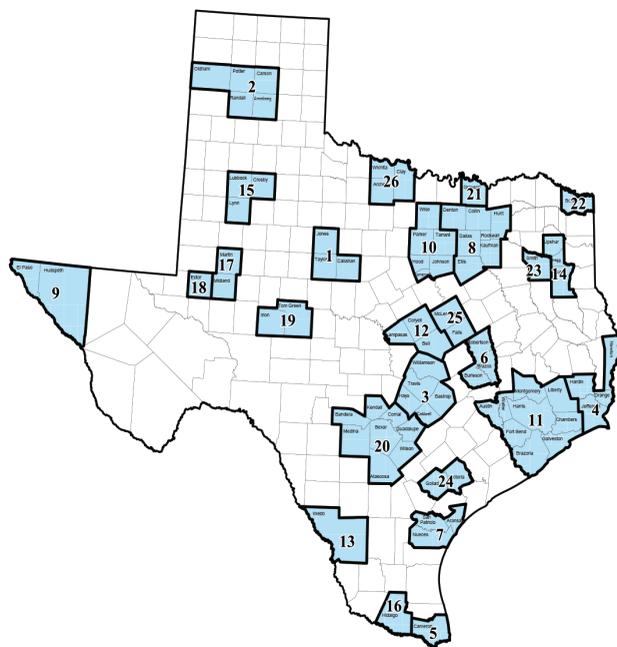
2000 Census vs. 2010 Census-based Metropolitan Statistical Areas (MSAs) and Metropolitan Divisions (MDs) in Texas

MSA Name - 2010 Census based	2000	2010
Abilene MSA	Callahan, Jones, Taylor	Callahan, Jones, Taylor
Amarillo MSA	Armstrong, Carson, Potter, Randall	Armstrong, Carson, <i>Oldham</i> , Potter, Randall
Austin-Round Rock MSA	Bastrop, Caldwell, Hays, Travis, Williamson	Bastrop, Caldwell, Hays, Travis, Williamson
Beaumont-Port Arthur MSA	Hardin, Jefferson, Orange	Hardin, Jefferson, <i>Newton</i> , Orange
Brownsville-Harlingen MSA	Cameron	Cameron
College Station-Bryan MSA	Brazos, Burleson, Robertson	Brazos, Burleson, Robertson
Corpus Christi MSA	Aransas, Nueces, San Patricio	Aransas, Nueces, San Patricio
Dallas-Plano-Irving MD	Collin, Dallas, <i>Delta</i> , Denton, Ellis, Hunt, Kaufman, Rockwall	Collin, Dallas, Denton, Ellis, Hunt, Kaufman, Rockwall
El Paso MSA	El Paso	El Paso, <i>Hudspeth</i>
Fort Worth-Arlington MD	Johnson, Parker, Tarrant, Wise	<i>Hood</i> , Johnson, Parker, <i>Somervell</i> , Tarrant, Wise
Houston-The Woodlands-Sugar Land MSA	Austin, Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, <i>San Jacinto</i> , Waller	Austin, Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, Waller
Killeen-Temple MSA	Bell, Coryell, Lampasas	Bell, Coryell, Lampasas
Laredo MSA	Webb	Webb
Longview MSA	Gregg, Rusk, Upshur	Gregg, Rusk, Upshur
Lubbock MSA	Crosby, Lubbock	Crosby, Lubbock, <i>Lynn</i>
McAllen-Edinburg-Mission MSA	Hidalgo	Hidalgo
Midland MSA	Midland	<i>Martin</i> , Midland
Odessa MSA	Ector	Ector
San Angelo MSA	Irion, Tom Green	Irion, Tom Green
San Antonio-New Braunfels MSA	Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina, Wilson	Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina, Wilson
Sherman-Denison MSA	Grayson	Grayson
Texarkana MSA	Bowie Co., TX & Miller Co., ARK	Bowie Co., TX; Miller Co. & <i>Little River Co.</i> , ARK
Tyler MSA	Smith	Smith
Victoria MSA	<i>Calhoun</i> , Goliad, Victoria	Goliad, Victoria
Waco MSA	McLennan	<i>Falls</i> , McLennan
Wichita Falls MSA	Archer, Clay, Wichita	Archer, Clay, Wichita

Texas Workforce Commission
Labor Market and Career Information
www.lmci.state.tx.us

Areas in red are losing counties.
Calhoun, Delta, and San Jacinto counties will no longer be in an MSA after the redefinition.

Areas in green are adding counties.
Counties in *italics* will be added or dropped to/from an MSA after redefinition.



- 1 Abilene MSA
- 2 Amarillo MSA
- 3 Austin - Round Rock MSA
- 4 Beaumont - Port Arthur MSA
- 5 Brownsville - Harlingen MSA
- 6 College Station - Bryan MSA
- 7 Corpus Christi MSA
- 8 Dallas - Plano - Irving MD
- 9 El Paso MSA
- 10 Fort Worth - Arlington MD
- 11 Houston - The Woodlands - Sugar Land MSA
- 12 Killeen - Temple MSA
- 13 Laredo MSA
- 14 Longview MSA
- 15 Lubbock MSA
- 16 McAllen - Edinburg - Mission MSA
- 17 Midland MSA
- 18 Odessa MSA
- 19 San Angelo MSA
- 20 San Antonio - New Braunfels MSA
- 21 Sherman - Denison MSA
- 22 Texarkana MSA
- 23 Tyler MSA
- 24 Victoria MSA
- 25 Waco MSA
- 26 Wichita Falls MSA

The following BLS Programs will reflect the new MSA definitions at different periods pertaining to their scheduled release dates. Below are summaries as to when these dates will occur:

Quarterly Census of Employment and Wage Data (QCEW) using the new MSA definitions is now on www.tracer2.com with third quarter 2014 data and is available back to the first quarter of 2010.

Current Employment Statistics Estimates (CES), also known as the Total Nonfarm estimates, using the new MSA definitions will occur with the January 2015 preliminary estimates scheduled for release on March 6, 2015. This data will be revised back to 1990.

Local Area Unemployment Statistics Estimates (LAUS), commonly known as the civilian labor force which includes the unemployment rate, reflecting the new MSA definitions will also occur with the January 2015 preliminary estimates scheduled for release on March 6, 2015 for state and sub-state estimates for 2015 and 2014. Benchmarked substate data for 2010-2013 will be available for the next release day scheduled March 27, 2015.

Occupational Employment Statistics Data (OES) will reflect the new MSA definitions with the March 2016 release of wage estimates.

Frequently-Asked Questions From Employers – Answered

The following questions were compiled from past Texas Business Conferences around the state and questions from Texas employers on our Employer Hotline.

Q: *A server has indirectly accused her manager of creating a hostile work environment. The interesting thing is the employee never reported it. Both the general manager and I approached the employee after being mentioned by other employees who were complaining about the general behavior of this manager. I do not know if this is significant, but it seems odd. When I approached this employee, she mentioned that her concern was for other employees that would be hired after she was gone. I have interviewed the manager in regards to all of the allegations against him. He has admitted to pulling apron strings and putting his hand on employee's backs to move them from one side to another. However, I have not yet discussed these specific allegations from this employee with the manager; at least, not all of them. I have suspended the manager pending the outcome of this investigation. I am thinking I should address these specific allegations with him one by one and give him a chance to respond before I make a final decision regarding his employment? Your thoughts?*

A: If your company's investigation of the allegations indicates that they are true, then the manager's conduct would appear to have been in violation of the company's written harassment policy. Depending upon the seriousness of what is proven to have occurred, the corrective action could range anywhere from a warning (usually written) all the way to termination of employment. However, the company should take

care to follow its policy as closely as possible in that regard. The employee's statements about the reactions of others should raise serious concern at the highest levels of the company. If a sexual harassment claim or lawsuit ends up being filed because management tolerated attitudes like those, and such attitudes contributed toward an environment that fosters future acts of harassment or retaliation, the owners of the company could end up literally losing their company to a successful plaintiff and her attorney. It is that serious – it could be a business-closing event. So, the company should consider investing in an outside HR consultant or law firm to get them to come and hold mandatory harassment training for all of the workers. In addition to the usual wording about what harassment is and why it is wrong, the employees need to get a clear and unequivocal message that treating others with respect, and refraining from committing unwelcome acts of harassing and even creepy behavior, is not an option, and that failing to follow the company policy can, in most cases, lead to immediate termination of employment. The training for managers would go beyond that and would let managers know that they must not only follow the policy themselves, but must also support it and remind employees of it whenever needed. Make compliance with and support of the company policies one of the criteria for raise reviews and performance evaluations. It would probably be a good idea to advise upper management to read some basic EEOC or law firm materials about sexual harassment and what employers are expected to do in such situations.

Q: *Can you please tell me what steps an employer must take to reduce an employee's hourly wage?*

A: Assuming that the employment relationship is at will, i.e., not governed by an express employment contract, reducing the employee's hourly wage could be as simple as giving the employee written notice that, effective on a certain date in the future, his new pay rate will be "xx.xx" per hour. The pay would have to be at least minimum wage (currently, \$7.25/hour). If the employee remains with the company after learning of the change, he is deemed to have agreed to the change and will be bound by the new wage agreement. As to the possible unemployment claim implications of a reduction in pay, please review the material in the following topic in our book *Especially for Texas Employers*:

http://www.twc.state.tx.us/news/eft/ui_law_the_claim_and_appeal_process.html#ui-20percentrule.

Q: *The City is creating two new employee positions for janitorial work at the City Hall and at the civic center. The City Council is considering paying a flat amount for each position. The janitorial work at City Hall will generate approximately 8 hours of work per week and hours worked at the civic center will only be needed as the center is utilized. So there may be weeks that there are no hours worked at the center. Will these two positions qualify for salaried non-exempt employees?*

A: There would be no legal obstacle to paying such employees a salary, as long as the salary, divided by the actual hours worked each week, amounts to at least \$7.25/hour. However, the city would have to keep exact, detailed records of all time actually worked by the employees, and they would be entitled to overtime pay for hours actually worked in excess of 40 in a

seven-day workweek. The city should keep in mind that if they miss work and do not have paid leave to cover the absence, the city would need written authorization from the employees to deduct the value of the time not worked from the salary (assuming that the city would not want to pay them for a full schedule when they worked only a portion of their regular schedule). With that in mind, what might be better is simply paying such employees an hourly rate. That way, the city would pay only for time actually worked, with no need to worry about getting written authorization for deductions for time not worked.

Q: *We are trying to decide about an overtime exemption for a salaried employee. She is paid a salary of \$32,500 for hours 7:45-5, M-F. The salary was meant to include any overtime, as the hours were indicated with the job offer. The position is office support and is a crucial position. She handles scheduling sales appointments for cities in our marketing area; schedules and assigns techs for projects in all cities; coordinates with project owners; orders supplies, calculates needs; assist with PR for techs; schedules CEU training for employees; handles warranties; invoices clients; makes collection calls; and processes credit card payments. She totally works independently and makes decisions on her own. I want to be certain if she is exempt from OT or not, but also want to be clear about what blocks of time she can be assessed towards PTO or not. She misses a lot of work with illness, child illness, early school release, school closings, and vacation. Does this all go towards her PTO? She is an asset and we enjoy working with her, but we want to be clear on how to handle it all and we don't want to short her or us.*

A: The employee does not sound like an exempt salaried employee as described. She simply does not operate at a high-enough level within the company. Her position involves a limited amount of decision-making on

her part, but the decisions she makes are limited to how best to apply established guidelines to assigned tasks, since her duties primarily revolve around following procedures and accomplishing tasks within parameters designed by others above her in the organization. Clerical support employees are never exempt. This person sounds like a senior-level support person, but her primary duty is not at the level at which she would be designing jobs for staff like herself. Her supervisor would presumably be exempt. Other exempt employees within the company would be the president / CEO, the general manager, employees operating at a vice-president level who have true discretion and independent judgment as to matters of significance for the company, and possibly the office administrator, if that person has true administrative authority as described in the regulations for administrative-exempt employees.

Since the office support employee has a fixed salary that is meant to compensate her for a standard workweek of 40 hours or so, depending upon her standard lunch breaks, any overtime she works would be compensated at time and a half based upon her "regular rate

of pay." As explained at http://www.twc.state.tx.us/news/eft/h_regular_rate_salaried_nx.html in Section H.1, the regular rate of pay for an employee like her is calculated by dividing her salary by the number of hours the salary is intended to compensate. Any absence, in any amount of time, may be deducted from the employee's available paid leave balance. What goes toward PTO usage depends upon your company's PTO policy. Absences not covered by available paid leave may be either ignored, or covered with a paid leave advance that would be offset by future leave accruals (depending upon what you have in your paid leave policy), or deducted from the employee's salary (however, any such deductions from pay must be authorized by the employee in writing – for an example of how to do that, see item 12 in the sample wage deduction authorization agreement at www.twc.state.tx.us/news/eft/wage_deduction_authorization_agreement.html). 

*William T. Simmons
Senior Legal Counsel to
Commissioner Andrade*



There would be no legal obstacle to paying such employees a salary, as long as the salary, divided by the actual hours worked each week, amounts to at least \$7.25/hour. Photo by iStock/Thinkstock

Employer Policies Regarding Wage and Workplace Discussions

While maintaining a positive work environment can be a difficult challenge for employers, many continue to fight the battle because it is believed to be a true business necessity. Negativity in the workplace can affect the working environment, including worker productivity as well as the overall reputation of the business itself. For this reason, many employers try to prevent issues by implementing policies that prohibit employees from discussing certain subjects, such as their pay or working conditions. Unfortunately, however, such a policy is illegal under the National Labor Relations Act (NLRA), and the employer may face serious penalties for a violation under this law.

The National Labor Relations Act is a federal law that provides employees with several rights with respect to their employment. Most of these rights are simple to understand. For example, employees have the right under the NLRA to organize, form, join, or assist a union, to engage in collective bargaining with respect to a hiring agreement, and to go on strike. However, this article is focusing on one of the more complicated employee rights afforded under the NLRA: the right to take part in “protected, concerted activity.”

Section 7 of the NLRA provides employees with the right to discuss the terms and conditions of their employment, including their wages and the overall work environment. Such activity, if concerted, falls under NLRA protection. This law prevents employers from banning such activity, regardless of whether or not it occurs in the workplace. An employer may not take any adverse action against an employee for participating in these activities. For

example, while many employers may feel that wage discussions can lead to a tense atmosphere in the workplace, the fact remains that having an employer policy banning such discussions would amount to an unfair labor practice in violation of the NLRA. Violating an employee’s rights under the NLRA can cause damage to an employer in many ways. Not only could it harm the employer’s reputation, but a violation could expose an employer to costly and time-consuming lawsuit in which the employer could be required to reinstate the worker and pay back pay.

Therefore, employers need to understand what “protected, concerted activity” includes to ensure that they are not impeding on employee rights. As a starting point, it is important to note who is covered under the NLRA and who is not. First, non-union members fall under NLRA coverage. In fact, most private sector employees are covered under this law. Some examples of employees who are not covered include government or union employees, independent contractors, agricultural workers, and supervisors. According to the NLRA, a supervisor is “any individual having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees . . . or effectively recommend such action” Because supervisors are usually held to a higher standard than their subordinates, they do not have the same freedoms to engage in these activities. The specific language of who is covered under the act can be found at the following link: <http://www.nlr.gov/resources/national-labor-relations-act>.

The next challenge involves determining what constitutes “protected, concerted activity” under

the law. The National Labor Relations Board (NLRB) – an independent agency – is in charge of investigating allegations of unfair labor practices. Past NLRB cases shed some light on what constitutes “protected, concerted activity.” Generally, employees are allowed to discuss the terms and conditions of their employment. In a broad sense, this includes discussions regarding pay (including pay cuts and pay raises), as well as working conditions and the working environment. Moreover, many employers mistakenly believe that the protected activity must involve two or more employees, but this is not true. Discussions involving a single individual may also be protected. Employees may also discuss filing grievances and have the right to wear union insignia.

Because discussions regarding working conditions are protected under the NLRA, employees can discuss how they are treated as well as the physical working conditions. For example, a California case explains that after an employee was discharged for raising safety concerns, the employer was required to reinstate the employee and pay back pay in the amount of \$20,000. In the same vein, employees may also be allowed walk off the job or sign a petition in order to protest the working conditions. These working conditions include but are not limited to complaints regarding harsh treatment from co-workers and upper management. Employers should also be especially careful not to bar employee discussions regarding harassment, as the employer has a duty to investigate such allegations when they become or should have become apparent to the employer. Employees can also discuss

an employer's failure to accommodate medical restrictions.

Employers should also be careful not to terminate an employee preemptively if it is discovered that the employee plans to discuss wages, hours, or working conditions. The NLRB has also made it clear that employers may not have an arbitration policy that prevents employees from filing joint claims.

These employee rights are not just limited to the workplace. Employee coverage extends out of the workplace, including the internet and media outlets. Several cases before the NLRB have made it clear that discussions on social media are equally protected, as are online videos, television interviews, and newspaper articles. The employees were protected in these cases because the public airing of their complaints involved accurate descriptions of their concerns. Therefore, employers should be careful to avoid having a blanket policy prohibiting work-related discussions via social media. Employers should also avoid any policies requiring

employees to obtain approval for adding connections on social media, as that would likely be considered unlawful under the NLRA.

Equally important to note is that there are certain limits as to these employee rights. If an employee discovers the information they are discussing through illegal means (such as accessing areas or files of which they do not have authorization to see), then that activity may not be protected. In addition, information protected by privacy laws, reckless or malicious behavior (including planned insubordination), credible threats, engaging in violence, and dishonesty are not protected. In one particular case, mere "gripping" was not found to be protected activity, as the employee was not seeking to initiate any group action and the comments were only for the individual's benefit. However, because the interpretation of the law is still developing, it would be dangerous for an employer to assume that the NLRB

would agree with them regarding what they consider to be mere complaining without intent to initiate change.

In conclusion, the employer should exercise caution when moving forward with any policy that may even potentially violate the NLRA. The NLRB takes a broad interpretation of what is covered under the law, and recent trends have appeared to expand the view on what constitutes "protected, concerted activity." Therefore, an employer should be careful to avoid blanket prohibition policies and should never leave a policy open to interpretation, as ambiguous language could weaken your case. Ultimately, if an employer plans to fashion a policy attempting to regulate workplace discussions, they should seek an employment attorney for assistance. 🇺🇸

Velissa R. Chapa
Legal Counsel to Commissioner Andrade



The NLRA provides employees with the right to discuss the terms and conditions of their employment, including their wages and the overall work environment. Therefore, employers should not adopt a policy banning such activity, regardless of whether or not it occurs in the workplace. *Photo by iStock/Thinkstock*

A Developing Trend in EEO Cases

There are certain fundamental principles at the heart of employment discrimination laws. First, they are grounded in the ideals of individual liberty and freedom enshrined in our country's founding documents, all standing for the proposition that people should be free to be who they are as long as they do not infringe on the rights of others. Second, they are based on the idea of respect for others. Finally, the main thrust of the various discrimination laws is that employment decisions should not be based upon so-called "immutable characteristics," i.e., things about a person that the person cannot change, or should not be expected to change, as a condition of getting or keeping a job.

The well-known "protected classes" of people that are expressly mentioned in current statutes are race, color, religion, age, gender, national origin, and disability. Certain groups of

employers, such as state or federal contractors or grantees, may also be subject to laws protecting a person's status as a veteran. However, despite an increasing number of cases from around the country, there is no mention in current statutes of discrimination protection on the basis of sexual orientation or gender identity. This article will discuss important trends in such cases, as well as moves on a federal level to address the issue via federal contracting and EEOC guidelines. In considering the cases and agency guidelines, it is important to remember that the most important decisions are the ones that come from the U.S. Supreme Court, followed by decisions of the federal circuit courts of appeal, then by decisions of federal district courts. Still important, but subject to review by federal courts, are regulations, guidelines, and decisions issued by government agencies, such

as the EEOC, the U.S. Department of Labor, and the U.S. Department of Justice.

The starting point in any discussion of this developing area of employment law is the U.S. Supreme Court decision in the *Price Waterhouse v. Hopkins* case in 1989 (490 U.S. 228). In that case, a female manager had been denied a partnership in her accounting firm. She was advised by a male partner that in the future, "in order to improve her chances for partnership, [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" The Court held that the manager had been illegally discriminated against due to her failure to conform to established gender stereotypes.

Other cases began following a similar path. In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the Supreme Court held that same-sex sexual harassment can be actionable under Title VII if the evidence shows that the acts of discrimination were done "because of sex," based in this case upon the victim being perceived as less masculine than his male coworkers thought he ought to be in the "hyper-masculine environment" in which they worked (an offshore oil drilling platform).

On the federal appeals court level, the case of *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) held that in the context of a claim under the Gender-Motivated Violence Act, a viable sex discrimination claim may exist where the evidence shows that the discrimination was based on the victim's failure "to conform to socially-constructed gender expectations."



Legislation has been filed on both a state and federal level to expressly provide protection to employees and applicants based on sexual orientation and gender identity or expression. Photo by iStock/Thinkstock

Similarly, in *Smith v. City of Salem*, Ohio, 378 F.3d 566 (6th Cir. 2004), a transgender employee was the victim of discrimination. That court ruled that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." In 2009, the Ninth Circuit ruled in *Kastl v. Maricopa County Community College District*, 325 Fed.Appx. 492, that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women . . . Thus, [plaintiff] states a prima facie case of gender discrimination." In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the court upheld a lower court's decision in favor of a transgender employee due to "ample clear evidence" showing that "the employer acted on the basis of the employee's gender non-conformity." Finally, our own Fifth Circuit ruled in *EEOC v. Boh Brothers Construction Co., L.L.C.*, 731 F.3d 444 (2013) that a male plaintiff had been illegally singled out for harassment because he did not act "manly enough."

Many federal district courts have weighed in on this issue as well. A court decision that has been cited in many other decisions around the country was *Schroer v. Billington*, 577 F.Supp. 2d 293 (D.D.C.2008), in which the court ruled that "[i]n refusing to hire [plaintiff] because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear ... [defendant] violated Title VII's prohibition on sex discrimination". In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653 (S.D.Tex. 2008), and in *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan.

5, 2009), the courts followed the same basic principle.

Not all of the cases have gone against employers in this area of the law. In the *Kastl* case noted above, the same court that in 2009 supported the principle of Title VII covering instances of discrimination based on non-conformity with gender stereotypes found that an employer is not prohibited from enforcing a rule requiring employees to use the restrooms associated with their biological genders (the law seems to be evolving in that area of workplace relations, though - more on that in a future issue of TBT). In the district court case of *Chavez v. Credit Nation Auto Sales, Inc.*, 2014 U.S. Dist. LEXIS 128762 (N.D. Ga., July 18, 2014), a male-to-female transgender employee did not prevail in her Title VII case due to evidence of acts of misconduct at the workplace (such as making unwelcome comments to coworkers about the medical procedures she would undergo, and sleeping in a customer's car while on the clock).

It would also be important to note that even though the EEOC and courts are likely to protect employees against discrimination based on failure to conform to gender stereotypes, there is no case or agency guideline suggesting that an employer's policy on workplace harassment should not be equally applied to all employees, regardless of their status of any type.

The EEOC's recent administrative decisions with regard to gender discrimination claims by transgender employees have followed the holding in the *Schroer v. Billington* case from 2008. Here is a representative list of some of those decisions:

Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 20, 2012)

Complainant v. U.S. Postal Service, EEOC Appeal No. 0120122376 (February 19, 2013)

Complainant v. Dep't of Energy, EEOC Appeal No. 0120131136 (August 13, 2013).

Complainant v. Dep't of the Interior,

EEOC Appeal No. 0120121354 (August 13, 2013)

Aside from those cases involving federal employees, recent executive orders by the President have led the EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) to issue guidance and regulations recognizing that illegal discrimination may occur in any case in which an employee or applicant is treated adversely based upon their failure to follow established gender-based norms.

Legislation has been filed on both a state and federal level to expressly provide protection to employees and applicants based on sexual orientation and gender identity or expression. In the previous session of Congress, House Bill 1755 and Senate Bill 815 were filed under the title "Employment Non-Discrimination Act of 2013;" neither bill passed. In the current session of the Texas Legislature, HB 412, HB 582, and HB 627 would all provide a measure of employment discrimination protection for employees based on sexual orientation and/or gender identity or expression.

Regardless of whether any such legislation is passed into law, employers would be well-advised to take note of the clear direction followed by the EEOC, the OFCCP, and by courts around the country. In any event, most employers already do their best to follow what is widely regarded as an HR best practice, which is to treat all employees fairly and consistently in accordance with known standards and rules, with no ill treatment based upon personal or individual characteristics that have nothing to do with their ability or willingness to do the work. Such employers would have no difficulty dealing with the rapid pace of change in this area of workplace relations. 

William T. (Tommy) Simmons
Senior Legal Counsel
to Commissioner Andrade

Latest Developments and Legal Updates

Take Care When Referring to "Legal" Workers

The NLRB issued a decision in the case of *Labriola Baking Company* (361 NLRB 041; apps.nlr.gov/link/document.aspx/09031d4581885375), holding that a union decertification election can be invalidated by an employer's comments to the effect that striking workers might have to be replaced by "legal workers." As noted by the Board, even though it could have been the result of a faulty translation, the phrase itself could have had a chilling effect on workers who might be uncertain. As with most matters involving unions and collective bargaining matters, it is best to work with an experienced labor law attorney in structuring a company's response to union situations.

Business & Legal Briefs

Why Companies Should Post Required Notices

Aside from the fact that various agencies may be able to impose administrative penalties for failing to post required notices in the workplace, a recent court decision (*Cruz v. Maypa*, 773 F.3d 138 (4th Cir. 2014)) illustrates another good reason to display every poster required by law. In that case, the court ruled that the employer's failure to post the required FLSA notice about minimum wage and overtime pay "equitably tolled" the three-year statute of limitations for filing an FLSA action in court. The effect of the ruling was to allow the former employee to maintain her FLSA suit despite its late filing.

EMPLOYEE RIGHTS

UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

\$7.25 PER HOUR

BEGINNING JULY 24, 2009

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Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:

No more than
 - 3 hours on a school day or 18 hours in a school week;
 - 8 hours on a non-school day or 40 hours in a non-school week.
Also, work may not begin before 7 a.m. or end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Different rules apply in agricultural employment.
- TIP CREDIT** Employers of "tipped employees" must pay a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.
- ENFORCEMENT** The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.

Employers may be assessed civil money penalties of up to \$1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to \$11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to \$50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to \$100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act.
- ADDITIONAL INFORMATION**
 - Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions.
 - Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands.
 - Some state laws provide greater employee protections; employers must comply with both.
 - The law requires employers to display this poster where employees can readily see it.
 - Employees under 20 years of age may be paid \$4.25 per hour during their first 90 consecutive calendar days of employment with an employer.
 - Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.



For additional information:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

WWW.WAGEHOUR.DOL.GOV



U.S. Department of Labor | Wage and Hour Division

WHD Publication 1088 (Revised July 2009)

Severe Consequences Possible for Violating Immigration Laws

A recent decision by the Second Circuit U.S. Court of Appeals highlighted the sometimes-extreme consequences of hiring and harboring undocumented workers. In *United States v. George*, No. 13-2762, 2015 WL 774576 (2d Cir., Feb. 25, 2015), the court held that forfeiture of the employer's home, valued at almost \$2 million, was not an excessive punishment in light of the employer's actions, consisting of illegally harboring and employing an undocumented worker for six years, failing to pay minimum wage and overtime for what were up to 17-hour days, six and seven days per week, failing to report wages and pay appropriate payroll taxes, forcing the worker to sleep in a closet in the home that was forfeited, and not allowing the worker to leave the home during the time she was employed.

New Rules from OFCCP

The U.S. Department of Labor's Office of Federal Contract Compliance Programs has adopted new rules for federal contractors that implement the President's recent executive order 13672. The rules basically prohibit employment discrimination against employees on the basis of sexual orientation or gender identity, and the effect is to protect lesbian, gay, bisexual, and transgender employees who work for companies with federal contracts. Employers may find more information on the OFCCP website at www.dol.gov/ofccp/LGBT/; compliance resources are at www.dol.gov/ofccp/LGBT/LGBT_resources.html.

U.S. Attorney General Clarifies Position in EEO Litigation

Attorney General Eric Holder announced on December 18, 2014 that he has instructed the Department of Justice, with regard to any future litigation in support of EEO cases involving public employers, to take the position that the Civil Rights

Act of 1964 "extends to claims of discrimination based on an individual's gender identity, including transgender status." The DOJ memorandum announcing Holder's position is online at www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf.

New NLRB Ruling on Use of Company E-Mail

In the case of *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014), a majority of the Board voted to overturn an earlier NLRB precedent case holding that employees have no right under the NLRA to use their employers' e-mail systems for purposes of exercising their rights to discuss their terms and conditions of employment and to engage in collective action, such as organizing a union. Under the new decision, employees indeed have the right to do that during non-working time. One member dissented, but unless the decision is reversed in a court, employers will need to exercise caution regarding e-mail use policies and should engage the assistance of experienced labor law counsel in designing and administering such a policy.

Update on DOL's Proposed Rules for Companions

The U.S. Department of Labor had earlier issued some proposed regulations restricting application of the "companionship" exemption under Section 213(a)(15) of the FLSA to companions hired directly by the elderly and disabled clients they served, thus excluding companions assigned to clients of third-party providers, and the definition of "companion" would have excluded direct-care providers of any service beyond companionship, fellowship, and protection. In addition, the proposed rules provided that third-party employers of care providers may not claim the overtime exemption under Section 213(b)(21) (the "live-in"

exemption). On January 14, 2015, the U.S. district court in the District of Columbia ruled in the case of *Home Care Association of America, Inc. v. David Weil, et al.*, that DOL had overstepped its authority, and the court issued an injunction preventing DOL from enforcing the new rules. The rules are now on hold pending an expected appeal by DOL. To see the decision, visit: ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv0967-32.

New Federal Resource Site for ADA Compliance

The Americans with Disabilities Act and related laws protecting individuals with disabilities can be challenging for employers to understand and comply with, and so the EEOC has partnered with other agencies charged with disability discrimination prevention to provide a resource guide titled "Recruiting, Hiring, Retaining, and Promoting People with Disabilities." The resource kit is available online at www.whitehouse.gov/sites/default/files/docs/employing_people_with_disabilities_toolkit_february_3_2015_v4.pdf.

Final Rule on FMLA Spousal Leave Rights Takes Effect

Effective March 27, 2015, the FMLA's provisions relating to taking job-protected leave in the event that a spouse has a qualifying condition will apply to all couples, including those who are in same-sex marriages entered into in states where such marriages are legal. That is a change from the former rule, which applied to same-sex spouses only if same-sex marriages were recognized in the state in which the employee works. For more information on the DOL regulations, visit www.dol.gov/whd/fmla/spouse/. 

William T. Simmons
Senior Legal Counsel to
Commissioner Andrade

Meet the Legal Staff for the Commissioner Representing Employers



William T. (Tommy) Simmons

serves as senior legal counsel for Commissioner Andrade, the Commissioner Representing

Employers at the Texas Workforce Commission, where he advises the Commissioner on final-level unemployment and wage claim appeals, assists business groups with employment-related legislation, and counsels employers on Texas and federal employment laws. Simmons has served as legal advisor to the Commissioner representing employers since 1987 and has given over 2000 talks before employer groups. He authored the TWC book *Especially for Texas Employers* and is the editor of the *Employment Law Handbook* of the Texas Association of Business. Recent awards from employer groups include the Texas Payroll Conference (Spirit of TPC - 2004, and Government Partner Award - 2008) and the Texas Association of Business (Lifetime Friend of Employers Award - 2012). Simmons has also published employment law software for desktop computers and mobile device apps for employers in three different formats: web app (any mobile device), Android, and iPhone/iPad.



Velissa Chapa

serves as legal counsel to the Commissioner Representing Employers of

the Texas Workforce Commission.

She was born and raised in McAllen, Texas, and received her undergraduate degree from Southwestern University in Georgetown, Texas. Velissa earned her law degree from Texas Tech University School of Law, and during her time there, she became active in several organizations, including the Hispanic Law Student Association, Intellectual Property Student Association, and the International Law Society. She also served as the Executive Student Writing Editor for Volume 14 of the Texas Tech Administrative Law Journal and was an active participant in the law school's advocacy program. In addition to her work, Velissa enjoys the outdoors and takes advantage of living in Austin whenever she can by attending events



supporting local music, art, and film.

Elsa G. Ramos

is legal counsel to Hope Andrade, the Commissioner

Representing Employers at the Texas Workforce Commission. She advises Commissioner Andrade on high-level unemployment appeal cases, policy initiatives and legislative changes. Ramos is a regular participant at the Texas Business Conferences. These seminars are hosted by TWC throughout the state and are designed to educate employers on various employment related topics. She also speaks at various events on the topic of Handling Unemployment Claims and Appeals. In addition, Ramos provides information and guidance to employers who contact the office hotline with questions about

employment law matters and employee management issues.

Ramos received both her undergraduate degree in architectural studies and her law degree from the University of Texas at Austin. She spent the first eight years of her career in private practice handling criminal defense cases and family law matters in Travis and surrounding counties. She joined the Commission Appeals department of the Texas Workforce Commission in 2010 and became a permanent staff attorney for the office of the Commissioner Representing Employers in January 2012.

Ramos shares her home with her husband of 17 years, her 10 year-old daughter, her 8 year-old son, two parakeets and one rabbit. When not at the office, she enjoys spending time with her family. She recently decided to take up rollerskating so she could keep



Mario Hernandez

completed his undergraduate studies in government at the University of Texas at Austin.

He went on to earn his doctorate in jurisprudence at St. Mary's University in San Antonio. While at St. Mary's, he participated in the clinic for legal and social justice and provided legal assistance to indigent and low-income individuals. Before joining Commissioner Hope Andrade's legal team in 2014, he spent four years as general counsel for a home health company in the Rio Grande Valley. In his spare time, he enjoys listening to music, running and fishing. 🇺🇸



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