

Second Quarter 2015

Texas Business Today

Hope Andrade
Commissioner Representing Employers

Innovative
Partnerships
Power Texas to
New Business
Solutions



Innovative Collaborations Set Texas Apart

We are fortunate to live in the Lone Star State. Our state has long been recognized as the leader in development, discovery and economic success. And as a top leader, we must stay vigilant in our determination to remain the greatest state in the nation.

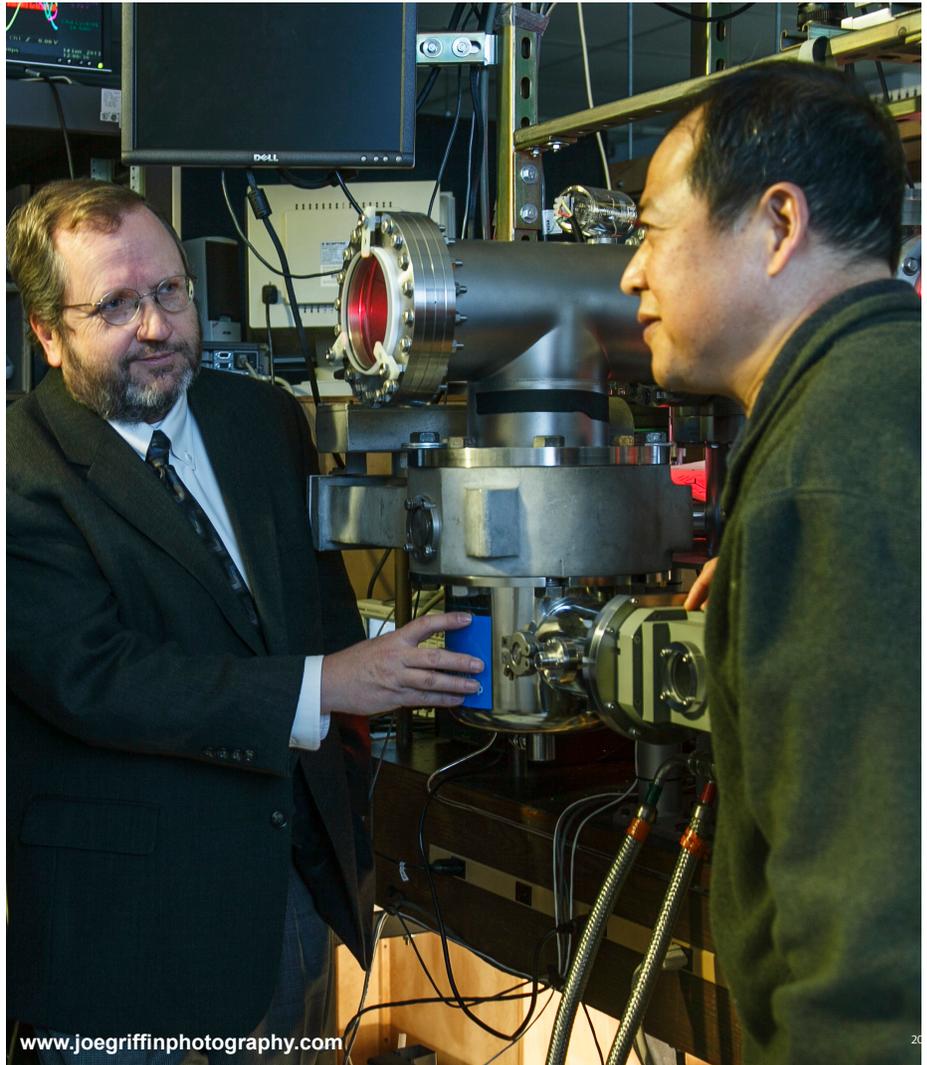
The Texas Workforce Commission works hard to remain

Commissioner's Corner

creative, responsive, and flexible to new demands and changes in our economy over time. But workforce development and maintaining a business friendly environment are important jobs that we must all tackle together.

If Texas simply continues doing what we have always done, our competitors will soon pass us in the race towards workforce and economic development. When it comes to growing existing business and competing for new business, other states – like Louisiana, Florida, and Tennessee – are quickly catching up to the high standard that has been set by Texas. I believe that it is time for us to raise the bar even higher.

There are many ways we can do this, but the backbone of this endeavor is innovative partnerships. We must collaborate more robustly than ever before and we must make sure we continue to work together, forming sustainable partnerships that will overcome challenges using the combined strengths of the stakeholders. Through the power of partnerships we will be able to respond more rapidly to



Dr. Trueell Hyde, Vice Provost for Research at Baylor University, and Dr. Jay Kong, assistant research professor of Baylor's Center for Astrophysics, Space Physics and Engineering Research (CASPER). CASPER is a part of the Baylor Research and Innovation Collaborative (BRIC), an initiative that brings together industry, researchers, and educators all under one roof in order to foster innovations that will be taken from concept all the way to the marketplace. Photo courtesy of Joe Griffin/www.joegriffinphotography.com

employers' needs.

I applaud the many communities across Texas who are coming together, trying something new, and forming strong, reliable partnerships that engage educators and trainers, economic

developers, business and industry, and community leaders. It will be these partnerships that keep Texas on top for many years to come.

During my travel throughout the state, I have visited many communities

that continue to rise to the task of keeping up with the accelerated pace of technological and economic advancement.

One example that certainly stands out is the Baylor Research and Innovation Collaborative (BRIC) in Waco.

The BRIC is an initiative that brings together industry, researchers, and educators all under one roof in order to foster innovations that will be taken from concept all the way to marketplace. Most notably, the BRIC has allocated space for an on-site technology training and workforce development center to be run by Texas State Technical College (TSTC) Waco. Bringing this training partner into the shared space allows TSTC

Waco faculty to work synchronously with the engineers and scientists who are developing new technology as well as with the businesses partners who will be employing workers now and in the future as they utilize these advancements. The goal is to provide workforce training in a setting co-located with industry, engineering research and design, and business accelerator support.

This is an impressive example of how industry and educators in Texas are working hand-in-hand to make sure our students are getting the appropriate skills training to excel in the workplace. This type of model is beneficial for both workers and employers as it assures that skillsets and certifications are aligned

with business demand.

I encourage you to start a conversation with your community partners about new workforce development ideas that help support your business and economic growth. It's simply the Texas way. 

Sincerely,



Hope Andrade
Texas Workforce Commission
Commissioner Representing
Employers



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Cover image: Innovative business partnerships power Texas to new business solutions. One example that certainly stands out is the Baylor Research and Innovation Collaborative (BRIC) in Waco. Composite image by www.polleidesign.com

Vicarious Liability: When Will An Employer Be Liable For An Employee's Actions? Pt. 2

Editor's Note: For Part 1 of this article, please visit page 4 of the First Quarter 2015 issue found at: texasworkforce.org/texasbusinesstoday.

Employers in Texas are rightfully concerned with situations in which they can be liable for the actions of their employees. As described in last quarter's edition, liability that attaches to the employer can be found in numerous places outside of the workplace. The focus of this article will shift gears in order to explore some of the types of liability that can arise inside of the employer's place of business.

The Basics

As you may recall, the term 'vicarious liability' means that an employer will be responsible for the actions of its employee. In addition, that employee's action has to be within the scope of his or her employment. Generally speaking, an employee is acting within their scope of employment if their action is in the furtherance of an employer objective and within the authority given by the employer. In other words, an employer can be better situated to avoid vicarious liability if it can show that the employee was acting outside the bounds of his or her job. Usually, vicarious liability inside the workplace arises when a supervisor or manager acts inappropriately to a subordinate. In response, the subordinate files a

lawsuit claiming that the employer should be vicariously liable for the supervisor's actions.

Harassment

Harassment is the subject of many lawsuits filed by former employees against their previous employers. Most harassment lawsuits are filed under Title VII of the Civil Rights Act (race, color, religion, national origin, and gender discrimination, including pregnancy and sexual harassment). Because supervisors are the most prevalent targets for harassment litigation, it is critical for an employer to identify how the law defines the term 'supervisor.'

As recently as 2013, the Supreme Court of the United States has provided guidance on who qualifies as a supervisor for purposes of vicarious liability. In *Vance v. Ball State University* (133 S. Ct. 2434 – 2013) the Court held that a supervisor is someone who has been empowered by the employer to take 'tangible employment actions' against an employee. As per the Court, 'tangible employment actions' means that the supervisor has the authority to hire, fire, demote, promote, transfer, or discipline the employee. The Court further added that if a supervisor's harassment ultimately leads to a tangible employment action against an employee, liability will immediately attach to the employer. On the other hand, the

Court noted that if the harasser is not a supervisor, the employer may be able to avoid responsibility for the non-supervisor employee's actions if it can demonstrate two things. First, the employer must show that it took measures to prevent and to correct the harassing behavior. Second, the employer should demonstrate that the victim employee failed to take advantage of the measures that the employer provided.

Defamation

As with harassment, defamation is another type of inappropriate action for which employers can find themselves liable. Employers should advise their supervisors to use caution when accusing other employees of engaging in theft, being under the influence, or any other activity that would expose them to be looked at unfavorably in the eye of the public. Absent evidentiary proof of the listed activities, accusations that turn out to be baseless could result in defamation lawsuits against the employer if the supervisor was acting within the scope of his or her employment.

For instance, in *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573 (Tex., 2002), the plaintiff brought a lawsuit against the employer for defamation when one of her fellow employees accused her of having an affair with a store manager. The court ultimately ruled against the plaintiff by reasoning that the statements at

question were not made within the scope of employment because they were not in the furtherance of an employer objective. Contrastingly, in *Hooper v. Pitney Bowes, Inc.* 895 S.W.2d 773 (Tex. App.-Texarkana, 1995), a sales manager sued her employer due to statements made by her supervisors. The statements characterized the sales manager as a ‘sorceress’, ‘satanistic’, and a ‘witch.’ As a result, the court found that the statements were made by the supervisors “in an effort to investigate her conduct as their subordinate” and within the scope of their employment. In sum, unless the employer is confident that it can prove up one of the defenses against defamation (the statement made was true or substantially true, qualified privilege, etc.), it should refrain from

communicating false information about an employee.

Violations of Federal or State Statutes

In addition to harassment and defamation, violations of state or federal law result in administrative fines, fees, and potential criminal penalties for willful offenders.

Specifically, the Fair Labor Standards Act (FLSA) is the federal law that outlines minimum wage and overtime regulations. Additionally, the FLSA broadly defines the term ‘employer’ to include any person acting for the employer in relation to an employee (a link to this definition can be found here: www.gpo.gov/fdsys/pkg/USCODE-2011-title29/html/USCODE-2011-title29-chap8-sec203.htm). In other words, liability could attach both to the individual employee

who committed the FLSA violation and the employer if the commission of that violation was within the scope of employment. It should be noted that in addition to repaying the victim employee their back pay and overtime, the employer could also be saddled with a fine of up to \$10,000 and potential imprisonment for egregious or repeated violations.

Next, the state law that most mirrors the FLSA is the Texas Payday Law. The law states that an employer must pay its employees on time and on regularly scheduled paydays. Like the FLSA, the Texas Payday Law broadly defines the term ‘employer.’ While the penalties of the Texas Payday Law are not as severe as the FLSA, violations still command fines of up to \$1,000 and could potentially result in a third degree felony.

Conclusion

Harassment, defamation, and violations of statutes are just a handful of the many ways that employers can be found vicariously liable for the actions of their employees. Because vicarious liability inside the workplace often starts with supervisors, employers would be well advised to train these types of employees to be aware of their position in the company and to conduct their job duties in a way that comports with the law. While an exhaustive list of all the things that an employer could be liable for is too much for one article, the most important concept to remember is that the scope of employment will likely be the determining factor as to whether employers will be liable for the actions of their employees for situations both inside and outside the workplace. 🇹🇽

Mario R. Hernandez

Legal Counsel to Commissioner Andrade



Harassment is the subject of many lawsuits filed by former employees against their previous employers. Because supervisors are the most prevalent targets for harassment litigation, it is critical for an employer to identify how the law defines the term ‘supervisor.’ Photo by iStock/Thinkstock

Helpful Tips for Appeal Tribunal Hearing

If a party to an unemployment claim disagrees with the initial determination issued at the beginning of a claim, that party may appeal the determination to the Appeal Tribunal (AT). An appeal results in the scheduling of an AT hearing. This hearing is basically the parties' day in court. At the hearing, the parties are able to provide testimony, witnesses, documentary evidence, and any other type of evidence they have. While still a legal proceeding, the hearing is less formal than an actual court hearing.

When a hearing is scheduled, the AT sends the parties a hearing notice packet with information about the hearing, including the date and time of the hearing, contact information for the parties and the hearing office, any statements the parties made during the initial investigation, and any appeals and other documents the parties earlier submitted to TWC. In addition, the hearing packet contains the issues that are to be covered in the hearing and instructions for the hearing. It's important for employers participating in a hearing to carefully read all of the instructions. Employers can avoid many pitfalls by reading and following the instructions provided. The following are some tips to an appeal hearing that may help employers be better prepared if they find themselves defending an unemployment claim.

Hearing Officers

The hearing will be presided over by a hearing officer who will act as the neutral trier of fact in the hearing.

Although not officially a "judge" in the usual sense of the word, the vast majority of hearing officers are attorneys. The job of the hearing officer is to consider the evidence presented, apply the applicable law, and render a decision in the case. Hearing Officers are trained to ask questions of the parties and witnesses, to review and consider different types of evidence, and to develop the relevant facts of the case. In many cases, hearing officers also find themselves having to keep order when the parties are not able to control their emotions and behavior during hearings.

Resets

If an employer receives notice of a hearing and realizes that a conflict exists for a very good reason, such as a preplanned vacation, or realizes that due to an emergency (something not within the employer's power to control) the employer will be unable to participate in the hearing, the employer can request a reset from the hearing officer. However, hearing officers have very little discretion when granting resets. TWC rules state that any postponement of a hearing "shall not be for the purpose of delaying the proceeding." Resets may be granted for different reasons, including, but not limited to, the illness of the appellant, death in the immediate family of the appellant, or a pending criminal prosecution of the appellant. Regardless of the reason, if an employer needs to request a reset because of circumstances beyond the employer's control, it's a

good idea to make the request to the hearing officer in writing. Although it may not be granted, if the employer ends up missing the hearing and requesting another one, the prior request may help establish the employer's good cause for its non-appearance.

Hearing Schedules/Continued Hearings

Hearing officers are very busy and are usually scheduled for about seven hearings per day. Hearings are usually scheduled to last one hour if they cover a single issue, such as a job separation. The hearings may be scheduled for longer periods if more issues are to be covered or if a non-English language interpreter is needed. Employers can see how many issues will be covered in the hearing by looking at page 2 of the hearing notice packet. If a one-issue hearing takes longer than an hour, the parties should be prepared for the hearing to be continued, i.e., postponed, for a later date. This may happen because of the complexity of the facts surrounding a job separation or because a party has multiple witnesses. If the case is continued, the parties will again receive notice of the hearing by mail and will need to make arrangements for participation; including making sure all the witnesses are available and ready.

Witnesses

The notice of hearing packet instructs the parties to provide firsthand witnesses. These are

witnesses who saw what happened with their own eyes or who heard what happened with their own ears. You can read more about firsthand witnesses in this prior article: texasworkforce.org/files/news/texas-business-today-2nd-quarter-2013-twc.pdf.

If an employer intends to present witnesses to help prove its case, it's important for the employer to prepare the witnesses to receive the call at the designated time. The hearing officer should not be cold-calling the witnesses. This only wastes time and benefits no one. The witnesses should also be told that the number on their caller ID will be a number they don't recognize or may indicate a private number. When witnesses are ready to participate when called the hearing goes more smoothly.

When a hearing officer is notified

that a party will be calling witnesses, the hearing officer usually asks the party whether s/he would like witnesses to be on the line for the whole hearing, or only when they need to provide testimony. When asked this question, many employers respond to the hearing officer with something similar to this, "Well, whatever you think is fine." It is up to the employer to decide whether the witnesses should be on the line listening to the testimony during the whole hearing, or be called only when it's their turn to testify. This decision should not be left to the hearing officer; it's not the hearing officer's case. This is one of those details that the employer should have discussed with the witnesses in advance. In addition, because hearings with witnesses may go long and may have to be continued, i.e.,

postponed to a different date, make sure your witnesses are also prepared for this eventuality.

A quick note about "the rule": When parties have witnesses who they wish to have testify at a hearing, either party or the hearing officer can invoke "the rule." This is an evidentiary rule which requires that the witnesses, not the parties, leave the hearing and not be allowed to listen to anyone else's testimony. This is supposed to ensure that witnesses will not be influenced by what they hear others testify. If no one invokes the rule, the witnesses are allowed to remain in the hearing and to listen to everyone else's testimony.

Burden of Proof

One of the first questions asked of the parties during the first part of the hearing, is whether the claimant



The job of the hearing officer is to consider the evidence presented, apply the applicable law, and render a decision in the case. Hearing Officers are trained to ask questions of the parties and witnesses, to review and consider different types of evidence, and to develop the relevant facts of the case. Photo by iStock/Thinkstock

was fired or quit. This question is important because, depending on who initiated the job separation, it establishes which party has the burden of proof and which party gets to present its case first. If a claimant was discharged, then the employer initiated the job separation, and the employer will provide testimony and evidence first. If the claimant quit, then the claimant initiated the job separation, and the claimant will provide testimony and evidence first. After the hearing officer finishes questioning a witness, then the opposing party can cross examine the witness. Once all the witnesses for one party have finished their testimony, then the hearing officer shifts to the witnesses for the other party and asks them questions one at a time until all those witnesses have gone through direct testimony and cross examination.

Documents

Hearing officers are supposed to review the case file, including all documents submitted as possible evidence, prior to the hearing. However, if a party submits documents that are **not** in the hearing packet shortly before a hearing, for example, the morning of the hearing, it's unlikely that the hearing officer will have an opportunity to review and become familiar with the new documents. If a party realizes that certain documents or other types of evidence are relevant shortly before a hearing, that party should absolutely submit the documents to the hearing officer as well as the opposing party. However, parties should understand that it will be up to them to bring these documents to the attention of the hearing officer and to explain the relevance of this new evidence.

Another point about documents, many parties believe that once they submit their documents for the hearing, that the documents automatically become part of the record and will be considered as relevant evidence. However, that is not the case. In order for any documentary, photographic, or other type of evidence to be considered by the hearing officer in making his or her decision, the evidence must become part of the record. And in order for that to happen, a party must request that the evidence be "admitted as an exhibit" by the hearing officer. Only *after* evidence has been admitted as an exhibit, and assigned an exhibit number, are the parties able to discuss the specific evidence and ask questions about it. In addition, and more importantly, only then will the hearing officer be able to consider that evidence in making the final decision about a case. Evidence that is not officially made part of the record cannot be taken into account in rendering a final decision. For this reason, it's important that the parties understand this procedure and are able to fully develop the record.

One final reminder regarding documents: the hearing packet instructs parties that if they want to use documents that are not included in the hearing packet, they should send copies to the hearing officer as well as the opposing party. A failure to send documents to the opposing party could result in 1) the documents not being admitted as evidence, or 2) the hearing officer scheduling an additional hearing – a continuance - to ensure that all parties receive a copy of the relevant documents before they can be discussed.

Primary Representative

Once at the hearing, the hearing officer will ask the parties to designate a "primary representative." The primary representative does not need to be an attorney. The appeal tribunal hearing system is designed so that parties can represent themselves. However, the primary representative would be the one person who has the opportunity to cross-examine witnesses and to ask questions of witnesses that the hearing officer may have neglected to ask. The primary representative can be whomever the party designates and does not need to be a firsthand witness. However, the primary representative should understand the responsibilities that such a role carries.

Conclusion

The appeal tribunal hearing is a great opportunity for an employer to present its most complete, most credible, and most persuasive case. By reading the instructions included in the hearing packet, and by taking into account the information included herein, an employer can avoid unnecessary mistakes and ensure that most, if not all, of the relevant evidence has been presented and will be considered. 🇹🇽

Elsa G. Ramos
Legal Counsel to Commissioner Andrade

How TWC's OES Wage Data Can Help You

Wage payment data prepared by the Texas Workforce Commission (TWC) can give you the crucial information you need to move your business forward.

TWC's Labor Market and Career Information department recently released the latest wage data for over 800 different occupations in Texas.

These Occupational Employment Statistics (OES wage data) can help employers looking to hire and retain staff. Business owners can compare the wages they offer with the reported wages in their area for the same job, which can help employers looking for entry-level and experienced hires alike.

You can view OES data for the occupations that interest you either online at TexasWages.com, or by downloading an Excel spreadsheet

from tracer2.com. Either location will provide useful data for specific occupations by specific geographic areas. The report includes occupational titles, the number of jobs for each occupation, and wage breakouts. All the data are calculated using responses to the OES report from employers like you.

Here's a quick explanation of the column headers in the spreadsheet below, to help you better understand the information. "Estimated Employment" shows how many different jobs employers have reported in a particular area (in this case, Texas). "Mean Wage" is the average of all wages reported for a particular occupation. "Entry Wage" is the average of the lower one-third of the reported wage categories.

"Experienced Wage" is the average of the upper two-thirds of the reported wage categories. The "PCT" numbers show different wage ranges. For example, 25 percent of workers earn wages at or below the 25th percentile; 50 percent of workers earn wages at or below the Median Wage (50th percentile), and so on.

If you receive an OES survey, you have an opportunity to strengthen this data by filling it out and returning it to TWC. The survey does NOT include confidential employee or business information. If you need help completing the survey, contact OES staff at 800-252-3616 or OESInfo@twc.state.tx.us. 

Vivian Cantu
Occupational Employment Statistics
Program Manager

TWC Occupational Employment Statistics Wage Data

Texas Statewide Wages, Occupational Employment Statistics Program, Data benchmarked to 2014												
Source: Labor Market & Career Information Department, Texas Workforce Commission												
Rate type: Hourly - Only occupations reporting hourly wages are shown Annual - Only occupations reporting annual wages are shown												
Rate Type	Occup. Code	Summary	Occupational Title	Estimated Employment	Mean Wage	Entry Wage	Experienced Wage	PCT10 Wage	PCT25 Wage	PCT50 Median Wage	PCT75 Wage	PCT90 Wage
Hourly	00-0000	Major	Total, All Occupations	11,228,940	21.79	9.14	28.12	8.45	10.36	16.18	26.53	41.42
Hourly	11-0000	Major	Management Occupations	475,640	55.04	26.48	69.32	22.87	32.75	46.69	69.22	93.70
Hourly	11-1011	Detail	Chief Executives	7,960	91.33	44.19	114.91	36.53	57.24	90.45	94.35	100.04
Hourly	11-1021	Detail	General and Operations Managers	175,410	59.16	26.04	75.72	21.86	33.08	48.74	76.33	94.15
Hourly	11-2011	Detail	Advertising and Promotions Managers	1,180	48.10	23.06	60.62	19.65	26.96	42.11	63.67	85.95
Hourly	11-2021	Detail	Marketing Managers	9,560	67.63	40.52	81.19	35.37	48.95	64.79	82.02	93.71
Hourly	11-2022	Detail	Sales Managers	22,470	65.91	33.97	81.88	29.61	41.33	59.72	83.67	94.19
Hourly	11-2031	Detail	Public Relations and Fundraising Managers	3,160	58.33	32.65	71.17	28.46	38.99	53.24	73.25	93.11
Hourly	11-3011	Detail	Administrative Services Managers	23,940	47.07	26.97	57.12	23.35	32.20	42.91	56.09	74.67
Hourly	11-3021	Detail	Computer and Information Systems Managers	19,570	66.69	43.97	78.05	40.15	50.04	63.61	78.35	93.46
Hourly	11-3031	Detail	Financial Managers	27,690	64.71	36.29	78.91	32.64	42.69	57.95	78.54	93.99
Hourly	11-3051	Detail	Industrial Production Managers	11,730	54.39	29.87	66.65	26.76	35.01	47.94	66.24	91.81
Hourly	11-3061	Detail	Purchasing Managers	4,230	60.68	33.42	74.31	28.97	40.91	56.33	73.18	93.26
Hourly	11-3071	Detail	Trans., Storage, and Distribution Managers	9,500	46.10	27.31	55.49	24.29	31.12	41.46	56.18	72.74
Hourly	11-3111	Detail	Compensation and Benefits Managers	790	68.19	41.38	81.60	39.04	47.89	63.74	82.21	94.08
Hourly	11-3121	Detail	Human Resources Managers	6,640	58.45	36.09	69.63	32.88	41.70	53.27	69.61	91.35
Hourly	11-3131	Detail	Training and Development Managers	1,450	56.78	35.28	67.53	31.35	41.39	52.54	66.28	88.77
Hourly	11-9013	Detail	Farmers, Ranchers & Other Ag. Managers	280	32.30	13.30	41.79	12.69	14.02	22.29	47.07	62.57
Hourly	11-9021	Detail	Construction Managers	29,680	41.44	24.74	49.79	22.22	29.26	36.63	47.45	66.44
Hourly	11-9031	Detail	Education Admin., Preschool & Childcare Center	2,070	24.27	13.38	29.72	11.96	14.91	20.35	29.22	40.82
Hourly	11-9032	Detail	Education Admin., Elementary & Secondary	23,110	-	-	-	-	-	-	-	-
Hourly	11-9033	Detail	Education Administrators, Postsecondary	5,290	51.02	28.37	62.35	25.44	33.47	44.81	60.52	86.54
Hourly	11-9039	Detail	Education Administrators, All Other	970	39.63	24.84	47.02	22.26	29.20	37.42	46.42	60.50
Hourly	11-9041	Detail	Architectural and Engineering Managers	13,510	75.22	45.97	89.84	42.33	53.30	69.10	89.86	95.26
Hourly	11-9051	Detail	Food Service Managers	14,330	27.04	17.64	31.75	15.98	19.63	23.88	30.86	41.86
Hourly	11-9061	Detail	Funeral Service Managers	620	31.21	17.11	38.25	15.35	20.17	30.97	36.60	51.66
Hourly	11-9071	Detail	Gaming Managers	24.20	16.92	16.92	27.84	16.22	18.07	21.81	29.45	36.64
Hourly	11-9081	Detail	Lodging Managers	2,420	24.98	14.82	30.06	13.33	17.20	21.30	28.71	41.05

Texas Statewide Data 2014
Labor Market & Career Information Department
Texas Workforce Commission
www.lmci.state.tx.us

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: *We called an applicant in for a working interview and paid him \$25 as contract labor, but ended up selecting another person for the job. Our CFO told us that we might have to worry about the unsuccessful applicant filing an unemployment claim. Is that correct?*

A: Yes, an unemployment claim can be filed after a working interview, if any productive work is performed by the applicant/employee for which pay must be given. You would not want to let anyone perform such work until and unless you have completed the I-9 process for them and obtained full W-4 information from them. Be sure to report their wages from the working interview to TWC and IRS and pay any applicable payroll taxes on the wages. A better alternative might be to not conduct working interviews at all, but rather do simple, non-working interviews during which the applicants demonstrate their knowledge and abilities in skills tests that are directly related to the jobs for which they are applying, without performing any productive work that will or can be resold to customers of your business, or to your business itself. In other words, invent things for them to do during the interview that do not result in anything useful for your

company - remember, you just want to see if they can do what they say they can do, and for that, you do not need them to do any actual work for the company that could or would be done by an actual employee.

Q: *We have a management-level employee in our professional firm who has been exhibiting a very poor attitude ever since she failed to obtain a desired promotion. No "nit" is too minor for her to pick, other employees dread having to deal with her, and she has been increasing her criticism of the mistakes she thinks her fellow managers have been making. She is reported to have told others that she wants to make the company sorry that it denied her the promotion, and that she would like to be fired and file an unemployment claim, and she is said to have started looking for another job. What if we fire her for her poor attitude?*

A: Poor attitude cases can be very difficult to deal with, since so often, they come across as personality disputes, and TWC rarely finds misconduct in such cases in the absence of tangible problems. Your company would have to focus on proof of how the employee's poor attitude was having a bad effect on others, and how the company had placed her on reasonable notice that how she was dealing with others was putting her job on the line. Short of discharge, the employer could try to help her by having a

respected peer-level staff member counsel her on the effect that her conduct is having on other people and on others' perceptions of her professionalism. Such counseling could help her consider whether she really wants others to dread seeing her approach each day with more negativism, secretly wish for her to leave them alone, roll their eyes when she finishes and leaves, and wonder how a professional-level person like her could be reduced to that kind of conduct. If she is really looking for another job, that may be a reasonable way out. If someone she respects could help her understand that turning her attitude around could let her complete her job there with some dignity, the situation might be salvageable. Perhaps the best revenge, if that is what she thinks she wants, would be to go with dignity to a new position and be a real success in it.

Q: *Does my company need to report wages we pay to our independent contract employees?*

A: Amounts paid to an independent contractor are not considered "wages" for unemployment tax purposes, are neither reported to nor taxed by TWC, and do not influence the potential cost of an unemployment claim. Of course, if the worker is later deemed to have been an employee during that time, the employer could end up owing back taxes, interest, and penalties, and if one of those

workers later files an unemployment claim, chargeback liability could extend to unemployment benefits paid to the claimant that were based upon the amounts that should have been reported as wages. As a general matter, a term such as “independent contractor employee” is meaningless and sounds like a contradiction in terms. A worker is either an employee, or is something else, such as an independent contractor. The same would apply to terms such as “contract labor” or “1099 employee”

money or in the relationship with a customer). I think by common sense this is wrong, but I'm not sure. Is this something that we as a company can legally stop?

A: The company definitely has the legal right to try to stop that kind of conduct, but the problem would be in detecting it in time to make a difference. More importantly, the company needs a long-term solution. There is much more to that story than three employees with attitude problems. Somewhere, somehow,

new company policy, or raises that were promised and then pulled back, or something similar. It is important to find out whether their underlying problem is something that the company can deal with. It is also important to make it clear to the employees how important it is that they not carry out their plan to remain silent about problems. Remind them of a few things: 1) the company's ability to pay them depends upon the company doing well, so everyone needs to pitch in to ensure that the company does well; 2) future performance evaluations and raise reviews will depend in large part on how each employee is seen to have contributed to the company doing well; and 3) folding one's arms and pouting and withholding important information is not typical of a mature adult in a modern work environment and will not earn respect from anyone whose respect is worth having. The company could adopt a policy requiring any employee with knowledge of a serious problem at work to notify a designated supervisor of the problem, and advising employees that if an employee is discovered to have had knowledge of a serious problem and to have failed to give such notice, he or she will be subject to termination of employment, depending upon the severity of the offense. Of course, to avoid the potential problem of everyone becoming tattletales and nitpickers, the policy would have to find a way to clearly define "serious problem" and exclude the reporting of things like coworkers leaving toilet lids up, burping excessively, engaging in other types of annoying personal behavior that nevertheless does no harm to the company, taking



Poor attitude cases can be very difficult to deal with and TWC rarely finds misconduct in such cases in the absence of tangible problems. Photo by iStock/Thinkstock

- when a TWC person hears that, the first thought is that the worker is probably misclassified and is likely an employee, since that is where the legal presumption lies. It would be best to find out sooner rather than later whether the worker is really an employee, so contact the Tax Department to request a ruling on the status of those workers.

Q: *I have two or three employees who have been talking, and they decided that if they see an error in the daily operation, they're not going to say anything to their superiors, no matter whether that error will affect the company (in*

there had to have been a cause that led them to get together to agree that they were so demotivated, so burned-out, or so mad that they would let harm come to the company that pays their wages. The first thing to do is have someone they respect, or at least are not suspicious of, meet with them and find out what is really bothering them. It could be that they are all responding to a rogue supervisor whose bad actions are alienating employees – if that is the case, the problem goes far beyond the three demotivated employees you know about. Or, it could have something to do with disappointment over a blocked promotion, or a

excessive breaks, and the like. Minor problems could still be reported, of course, but there would be no duty to report them.

Q: *Can PRN employees file unemployment claims? We have several such employees, but would prefer to avoid chargebacks that would increase our unemployment taxes.*

A: Yes, PRN employees can file unemployment claims if they meet the standard requirements. Status as a PRN employee would not have anything to do with unemployment claim eligibility, since on-call, as-needed employees are regarded as having been laid off, i.e., involuntarily separated from employment, upon the completion of each assignment if no further work is available the next workday. For unemployment claim purposes, a PRN employee's work separation date would be the last day of an assignment, if no further work was available on the next workday immediately following that day. For employees who are idle for significant periods between assignments, it might be advisable to adopt a policy regarding their status between assignments. The policy would be useful for providing some kind of clear end date for things like an employee's eligibility for certain company benefits, or a date beyond which any further work would be conditioned upon the employee's submission of a new job application. If your company gets a chargeback, it would probably occur because the claimant's last assignment for your company came to an end, and no further work was available thereafter, in which case the work separation would have been

considered chargeable as a form of layoff. That can happen anytime your company has wages in the base period of an unemployment claim - the chargeback decision depends upon the reason why the last period of work during the base period came to an end. It does not matter if your company leaves a PRN employee on the active payroll system for a particular length of time. What matters is that they stopped working for pay at some point - under the law of unemployment compensation, that is the relevant work separation that the agency takes into account. No termination on your system is necessary except for your own internal HR purposes, since the work separation for unemployment claim purposes has already taken place, back when the claimant stopped working for pay.

Q: *I have a salaried exempt manager who has missed several days due to various medical problems. She is so new that she has not yet accrued enough sick leave pay to cover the time missed. It has gotten to the point where the company needs to dock her pay, but our CFO said that would violate the law. What are we allowed to do?*

A: The salary definition regulation, 29 C.F.R. § 541.602(b) (2), expressly allows such deductions from the salary in increments of a full day at a time. Here is the relevant text from that section:

Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance

plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits.

The regulation is quoted in full in Especially for Texas Employers at the following link:

texasworkforce.org/news/eft/salary_definition.html. TWC's Labor Law Department has signaled in the past that no written authorization is necessary for such deductions, since they are expressly authorized in the DOL regulation. If you wish, you could include such an item in a standard written wage deduction authorization agreement, as illustrated by item 12 in the sample agreement at the following link: texasworkforce.org/news/eft/wage_deduction_authorization_agreement.html. In the absence of such written authorization, an alternative could be to grant a paid leave advance and deduct it later from future accruals, as long as the company's written paid leave policy provides for such offsets. If the current policy does not address such a thing, the employer can certainly revise the policy and distribute it appropriately to let everyone know of the change.

Q: *My company offers paid leave benefits. From what I have read, I suspect I need to clarify certain things, such as accrual and carryover limits. I would like to limit accruals to 240 hours. Is that legal under Texas law?*

A: Yes. Paid leave is an optional benefit in Texas, and optional benefits can have conditions attached. Under the Texas Payday Law, paid leave promised in a written policy is an enforceable part of the wage agreement, and the policy is enforced according to how it is written. The plain language controls the interpretation of the policy, so make any paid leave policy as clear as possible. If you want to limit accrual and carryover of paid leave to 240 hours, you could consider having a provision like the following in your policy: "Employees may accrue paid leave up to a limit of 240 hours. No employee may have more than 240 hours of paid leave in his or her paid leave bank at a particular time. Once an employee reaches an accrued total of 240 hours, no further accruals will occur until the employee uses a portion of the available paid leave. Accordingly, the maximum amount of available paid leave at any given time will be 240 hours."

Q: *My employees seem to have a real problem with turning their timesheets in on time. Still, I need their skills, so I cannot fire them even though others have advised me that failure to submit timesheets is good cause to let an employee go. Is there something short of discharging an employee that I can do to encourage them to submit time records when I need them? A friend who owns another business told me I can just tell them they won't be paid for overtime if they turn in late timesheets, but something tells me that would not work. Advice?*

A: To start with, you are correct that simply refusing to pay overtime pay would not work. However, your company could adopt a pay agreement to encourage timely completion of timesheets. How you do that would definitely matter. Here are a couple of examples, one of which would be a legal problem, and the other of which could be a possible solution:

Illegal: Your pay is \$15.00 per hour. Your overtime pay is \$22.50 per hour. If you violate our timesheet policy, you will not be paid overtime for overtime hours, but rather only straight time.

Legal: Your pay is \$10.00 per hour, plus a compliance bonus of \$5.00 per hour for each hour that is reported to the payroll department in a correct and timely manner. If you report all hours in a correct and timely manner, the hourly rate plus the bonus will equal \$15.00 per hour for all hours worked. If you report some, but not all, of the hours as instructed, the hours reported in a correct and timely manner will earn the bonus, and the hours reported incorrectly or late will not earn the bonus. If you report all of your work hours incorrectly or late, you will not earn the bonus for any of your work hours during the pay period involved. Following are the conditions for earning the bonus:

- Report your work hours on the official company timesheet designated for that purpose, unless your supervisor has given you permission in advance to use a different method for reporting the hours.
- Enter all hours accurately and legibly for each day. No bonus is earned for time entries that cannot be deciphered or are factually incorrect.

- Do not omit any time worked. You must report all time that you work - no exceptions are allowed under any circumstances.

- Submit your timesheet no later than _____ p.m. on [day of week] to [designated payroll person].
- [Any other conditions would go here.]

We expect that you should easily be able to earn the bonus for each hour worked. However, you should understand that the bonus is entirely dependent upon your fulfillment of the above conditions. Persistent violations of the timesheet policy will result in disciplinary action, up to and potentially including discharge from employment, depending upon the severity and repeat nature of the offense.

Q: *One of my newer employees is a habitual no-show. He is always offering bogus reasons for not coming to work, such as "My car is in the shop and I can't come to work." Help!*

A: It sounds like some straight talk about the facts of work life would help. For instance, your response to the car shop excuse could be something like: "I can understand why your car can't make it to the workplace, but that is no reason for you to be absent. Get a ride to work - do whatever it takes to get here, because you are on the schedule, and you do not have permission to miss work." If the problem persists, consider following the steps suggested in the topic "Discipline" in our book online at texasworkforce.org/news/eft/discipline.html. Note that item 12 includes a sample final written warning. 

*William T. Simmons
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Latest Developments and Legal Updates

Release Agreements and Unemployment Claims

With recent layoffs in certain industries, more employers are calling the employer Commissioner's office asking about the effect of release-of-claims agreements on unemployment claims. In order to minimize the risk of a court refusing to enforce a release agreement, the

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following would be important to keep in mind not only with respect to unemployment claims, but also with respect to release agreements in general:

- Certain claims cannot be waived, such as claims for minimum wage or overtime pay (the U.S. Supreme Court held back in 1945 that such claims are unwaivable under the FLSA), or for unemployment compensation (see Sections 207.071, 207.072, and 207.074 of the Labor

Code - it is actually a criminal offense to ask for or even accept such a waiver, and any release like that is void and unenforceable).

- In a similar vein, a release should not attempt to prevent the employee from filing a "charge" with an administrative agency (which would include, at the very least, an EEOC or CRD charge of discrimination), or from participating in an investigation or proceeding of a governmental agency.



The EEOC has issued a notice of proposed rulemaking on the Americans with Disabilities Act and Employee Wellness Programs. Photo by iStock/Thinkstock

- A valid release generally does not attempt to cover claims that may arise after the date on which the release agreement is executed.

- It should be written in plain and clear language that does not require a lawyer to read and understand.

- Money paid to an employee as an incentive to sign a release agreement is not treated as severance pay for purposes of an unemployment claim and will have no effect on unemployment benefits.

More details are available in the “Release and Waiver Agreements” topic in the outline of employment law issues in Part III of our book *Especially for Texas Employers*: texasworkforce.org/news/eftw/release_waiver_agreements.html.

EEOC Guidance on Wellness Programs

The EEOC has issued its long-promised draft regulations on how wellness programs can be compatible with the Americans with Disabilities Act. The agency’s guidance for small businesses regarding the notice of proposed rulemaking is online at eoc.gov/laws/regulations/facts_nprm_wellness.cfm. The full text of the draft regulations is at federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act.

New Developments in Transgender Rights

As covered in the first quarter 2015 issue, the law on LGBT issues in general has been developing rapidly, and with particular respect to transsexual/transgender employees, the best advice for a company is to look to what the federal agencies

are doing now. The EEOC and other federal agencies are moving towards allowing transgender employees to use the restrooms associated with the gender with which they identify. One of the first cases of this type involved a U.S. Office of Special Counsel investigation into gender discrimination claims brought by a male-to-female transitioning transgender employee – the OSC ruled that the Army had violated EEO guidelines with respect to gender discrimination by not allowing her to use the women’s restroom and by repeatedly referring to her by her birth name and with male pronouns. Prior to the OSC ruling, the Army accommodated her by allowing her to use the women’s restroom, and following the OSC’s resolution of the matter, the Army also agreed to have everyone at her workplace undergo additional EEO training. Here is the link to the actual OSC report online: osc.gov/Resources/2014-08-28_Lusardi_PPP_Report.pdf. The EEOC also ruled in Ms. Lusardi’s favor on the same case - that ruling is available online at eoc.gov/decisions/0120133395.txt. Detailed guidance on the evolving federal standards, jointly issued by the Office of Personnel Management, the EEOC, the Office of Special Counsel, and the Merit Systems Protection Board is online at opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf. OSHA has issued guidance on restroom use in the workplace to the effect that “all employees, including transgender employees, should have access to restrooms that correspond to their gender identity”

- OSHA’s “Guide to Restroom Access for Transgender Workers” is online at osha.gov/Publications/OSHA3795.pdf. Finally, the U.S. Department of Labor’s guidance page for employers regarding OFCCP, FMLA, and other laws affected by LGBT issues is at www.dol.gov/asp/policy-development/lgbt-workers.htm. Clearly, both public and private employers need to be aware of the issues in this area of employment law. Employers with questions about specific policy and implementation issues would be well-advised to consult with an experienced management-side employment law attorney. 🇺🇸

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Unemployment Claim Myths

There are many myths surrounding unemployment claims and benefits. Adopting these misconceptions as truth can cause added and unnecessary stress for employers. It can also lead to false security, damaging an employer's ability to prevail on a claim. This article will highlight 10 of the most common misconceptions surrounding unemployment claims, in an effort to clear the air as to these issues.

Myth #1: Unemployment benefits are for people who need it.

While this is a common misconception, the reality is that *unemployment benefits are for those who lose their job through no fault of their own*. The system is based on fault. People who may need it would not qualify for benefits if they were

discharged for misconduct connected with the work. Conversely, people who do not necessarily need benefits (perhaps because they have plenty in savings) may qualify because they were laid off.

Myth #2: An employee who is discharged under the at-will doctrine cannot collect unemployment.

While it is true that Texas is an at-will state, the focus for unemployment claim purposes is on the reason for the job separation, regardless of the claimant's at-will status with the employer.

Myth #3: Employees cannot collect unemployment benefits if they quit.

Claimants can receive unemployment benefits if they resign for good cause connected with

the work. Some examples of good cause to resign include but are not limited to: 1) a substantial change in the hiring agreement (including a reduction in pay of 20 percent or more or a relocation to another store that is more than 20 miles away); 2) reported harassment or hostile work environment where the employer fails to remedy the issue after a reasonable period of time; 3) improper withholding or delaying of payment; 4) being reprimanded in public in a humiliating and accusatory manner; and 5) being asked to violate the law.

Many personal reasons, on the other hand, do not provide a person with good cause to resign. Examples include lack of transportation, leaving to take another job, and quitting without affording the employer an adequate opportunity to address a specific grievance.



Claimants can receive unemployment benefits if they resign for good cause connected with the work. Photo by iStock/Thinkstock

Myth #4: Employees cannot collect unemployment if they only worked for you for a few hours or a day.

Generally, an employee who no longer performs services for pay may file an unemployment claim. If the employer is found to be in the base period, it may be on the hook for chargeback, regardless of how long the claimant worked for the employer. The good news is that if the employer were in the base period, liability would be limited because the employee only worked for a short period. For an explanation on how to calculate the base period, click here: texasworkforce.org/news/efte/how_ui_claims_affect_employers.html#dateofinitialclaim.

Myth #5: Employees cannot collect unemployment if they knew the job was seasonal or temporary in nature when they were hired.

This type of job separation is treated as a layoff, which is in the discharge category (as opposed to the resignation category). Because unemployment benefits revolve around a fault-based system, it does not matter whether or not the employee knew the job was temporary when they accepted it. In the end, the main question is whether the discharge was due to misconduct, and layoffs do not qualify as misconduct.

In order to avoid potential chargeback to their accounts, employers often hire employees through temporary help firms. The employer would be treated as a client of that temporary help firm for unemployment claim purposes, placing chargeback liability on the temporary help firm instead.

If you wish to estimate your potential chargeback liability and tax rate, you can use our online tool,

available here: texasworkforce.org/news/efte/estimate_cbs_and_tax_rates.html.

Myth #6: As needed or PRN employees cannot collect unemployment.

The truth is, as needed or PRN employees are separated from the job in the form of a layoff at the end of every shift. The reasoning behind this is that the employee should be able to collect unemployment because he or she does not know when they will work next. To avoid this problem, employers also hire these types of workers through temporary help firms.

Myth #7: Employees can waive their right to unemployment benefits.

This is simply not true. Employees cannot waive their right to unemployment benefits, and the Texas Labor Code both prohibits and criminalizes such agreements. Such an agreement is invalid and an employer could be exposed to fines and imprisonment for violating this law. For a review of the specific language of the statute, click here: www.statutes.legis.state.tx.us/Docs/LA/htm/LA.207.htm.

Myth #8: An employee cannot collect unemployment if I discharge them during the probationary period.

Probationary periods provide no protection when dealing with an unemployment claim. Discharging an employee during that period does not bar the employee from collecting benefits. The analysis would still focus on the reason for the job separation. The purpose of a probationary period is to let the employee know what fringe benefits they will not receive until the probationary period ends (for example, vacation and sick leave). For

more information on probationary periods, you may wish to review a prior Texas Business Today article on the subject, available here: texasworkforce.org/files/news/texas-business-today-3rd-quarter-2012-twc.pdf.

Myth #9: If an employer is involved in the unemployment claim, their account is subject to chargeback.

Not necessarily. The last employer before the claimant filed for benefits will be involved in the unemployment claim, but that does not mean that their account would be affected. The employer's account is subject to chargeback only if the employer is in the base period. For an explanation of the base period, see the link under #4.

Myth #10: If I am not the last employer, my account is safe from chargeback.

Employers who are not the last employer can be liable for chargeback, if they are in the base period. Look out for a Notice of Maximum Potential Chargeback in the mail if you are not the last employer, because you may be in the base period.

As you can see, there are many myths out there that can easily deceive employers and damage their chances of approaching unemployment claims properly. However, taking note of these 10 common myths can most certainly set an employer on the right path to better understanding how unemployment benefits work. For additional information on Texas and federal labor laws, you can visit our online handbook at the following link: texasworkforce.org/news/efte/indexmain.html, or you can contact our office via the employer hotline at 1-800-832-9394. 

Velissa R. Chapa
Legal Counsel to Commissioner Andrade



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