

Texas Business Today

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**Tom Pauken, Chairman
Commissioner Representing Employers**

TEXAS
WORKFORCE SOLUTIONS



Probationary Status: Myths and Realities
• New Notice Requirements for Earned Income Tax Credit •
Pregnancy Rights in the Workplace

Texas will lead the way for rest of country's recovery

While private sector job creation on the national level has experienced unprecedented stagnation and decline over the past decade, Texas has created more private sector jobs than any other state during that same period. Of the 10 largest states by labor population, Texas leads with both the lowest jobless rate and the highest rate of private sector job creation. Florida is the only other large state to experience positive growth in the private sector.

Much of this success can be attributed to policies put in place by Governor Rick Perry and our State Legislature to encourage economic development and job creation, while at the same time keeping our fiscal house in order. Consequently, Texas has been largely spared from many of the

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severe adverse economic consequences experienced in other large states which are running large budget deficits and have higher rates of unemployment.

Nonetheless, during the course of the worst national recession our nation has experienced since the Great Depression, Texans have had to face the stark reality that we are not immune to the negative trends experienced at the national level. In recent years much of our nation's financial and economic practices have evolved into a system based upon faulty incentives, unbridled greed, and a focus upon short-term profits rather than long-term investment for future growth and prosperity, all of which contributed to the creation of a "bubble economy" fueled by credit excess. Our nation is paying a very expensive price for these economic policy mistakes and errors in judgment. Despite these challenging economic conditions, Texas is poised to be one of the first states to lead our nation out of this economic recession and get us back on the road to recovery.

Just recently, we are seeing some encouraging signs of this happening.

The health of our manufacturing sector is an important gauge for measuring the condition of our economic recovery. Although one of the most heavily impacted sectors during the recession, in recent months manufacturing in Texas has shown signs of stabilization and improvement.

This January, the Production Index from the Federal Reserve Bank of Dallas' Texas Manufacturing Outlook Survey increased from 0.1 to 7.4, a number which reflected the highest level of expansion since March 2008. This increase represented the third consecutive month of positive expansion after 14 straight months of contraction. This, along with recent positive reports from several of our global economic partners, bode well for a Texas manufacturing base that has led all states in exports for the last eight years.

While these statistics are encouraging, the real economic



Texas Workforce Commission (TWC) Chairman Tom Pauken speaks at a recent TWC forum to launch a new TWC initiative to help put Texans back to work. Pauken says Texas may be one of the first states to lead the rest of the country toward economic recovery. *Texas Workforce Commission photo*

recovery will take place when our unemployment rates come down and we put more Texans back to work. This goal is best accomplished through promoting policies that encourage capital investment in our state's small businesses and new startup companies, which have historically been the first and most significant employers to hire coming out of an economic downturn.

In a recent article for Forbes Magazine, Thomas F. Cooley wrote that young firms "have higher employment growth than established firms" while "very young firms (one year old) have a net employment growth rate of about 15 percent, conditional on survival." Compare that to the 4 percent rate of growth for firms 29 years or older and it becomes abundantly clear just how much of the recovery rests upon the shoulders of small businesses.

Businesses continue to relocate to the Lone Star State because of a dedicated labor force and a tax and regulatory environment conducive to industry. A great many of these businesses are smaller startups with fewer than 500 employees. The Texas Workforce Commission (TWC) and its 28 local workforce boards work very closely with these businesses to provide them with the tools and knowledge needed to thrive and successfully compete on both the national and global levels.

Recently, our State Legislature allocated \$15 million in subsidized wages and other incentives to employers hiring qualified, out-of-work Texans. This, along with other programs administered through the Texas Workforce Board system, help give our state a competitive advantage.

In this issue, our labor experts at TWC aim to help Texas employers “get back to the basics” in understanding the specifics of the law, and how to best apply that knowledge for the advantage of both the businesses and their employees. 



Sincerely,
Tom Pauken, Chairman
Commissioner Representing Employers

The health of our manufacturing sector is an important gauge for measuring the condition of our economic recovery. Although one of the most heavily impacted sectors during the recession, in recent months manufacturing in Texas has shown signs of stabilization and improvement.



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An employer guide to wages in kind, deductions for other costs to employer, and unreimbursed expenses

Under the Texas Payday Law (TPL), an employer must make timely payment of wages in full on regularly scheduled paydays. Wages must be paid in accordance with the wage agreement that was in effect when the work was actually performed. Minimum wage and overtime pay owed under the Fair Labor Standards Act (FLSA) can become an issue if the employer pays wages in a form other than money, if deductions are made from the pay for

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expenses normally borne by a business,

or if certain types of job-related expenses are not reimbursed by the company. This article explains the basic legal principles associated with such issues.

Wages in Kind

An employee whose wages are paid in part with meals furnished in connection with the job, by being able to live in housing provided by the employer, or with “other facilities” is considered to be paid “in kind.” Special considerations apply when wages are paid in kind. Section 61.016(a) of the TPL states that wages shall be paid either in cash, by a check that is negotiable for cash at the full face value, or by electronic funds transfer. Section 61.016(b) states that payment of wages “in kind or in another form” is acceptable if the employee has agreed in writing to take the wages in such a manner. TPL thus takes a stricter position than that of the prevailing federal court decisions, e.g., under the state law, written acceptance of lodging as part of wages is required, whereas under the federal law, the employee’s signed acceptance is not required.



Even if a deduction or credit for lodging costs that would reduce an employee’s pay below minimum wage or cut into an employee’s overtime pay might be legal under the FLSA, the employer would still have to have the employee’s written consent to receive part of the wages in the form of meals or lodging in order to comply with the state wage payment law. *Allan Danahar/Digital Vision/Getty Images*

Thus, even if a deduction or credit for lodging costs that would reduce an employee’s pay below minimum wage or cut into an employee’s overtime pay might be legal under FLSA, the employer would still have to have the employee’s written

consent to receive part of the wages in the form of meals or lodging in order to comply with the state wage payment law. The Texas Workforce Commission, which enforces TPL, also takes the position that to be valid, the lodging deduction

must also comply with the federal recordkeeping standards found in Part 516 of the federal wage and hour rules, most specifically, 29 C.F.R. § 516.27.

The written authorization for wages paid in kind may appear as part of a standard wage deduction authorization form that lists all the various wage deductions that will be made. The authorization must be as specific as possible with regard to the purpose and amount of such deductions.

Deductions for Other Costs to the Employer and Unreimbursed Expenses

In general, almost all costs that an employer might incur in providing a workplace for and meeting various needs of its employees in complying with workplace regulations that impose a duty on the employer (such as supplying employees with safety equipment required under OSHA regulations), and in paying for the expenses of an ongoing business operation, will be regarded as part of the normal cost of doing business that may not be deducted from an employee's wages to the extent that it would take the employee's pay below minimum wage, or result in payment of less than one and one-half times the regular rate of pay for any overtime hours. The general rule is found in U.S. Department of Labor (DOL) wage and hour regulation 29 C.F.R. 531.32(c). That provision notes that expenses for things that are primarily for the benefit and convenience of the employer are not considered "other facilities" and thus may not be credited toward payment of the minimum wage. Regarding overtime pay, 29 C.F.R. 531.37(b) states "[w] here deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made." Subsection (a) of the same regulation provides that the deduction for expenses may "not exceed the amount which could be deducted if the employee had only worked

the maximum number of straight-time hours during the workweek." Together, those two provisions mean that even if the employee is paid more than minimum wage, deductions for expenses incurred for the employer's benefit and convenience may be made down to minimum wage only for the non-overtime hours; overtime hours must be compensated at one and one-half times the full regular rate of pay. The general rule is outlined in several provisions of DOL's Field Operations Handbook (FOH) excerpted in the following section:

DOL Field Operations Handbook (excerpts)

30c03. Primarily for the benefit of the employee.

(a) The crediting by an employer of facilities furnished to employees as wages will depend upon whether such facilities are furnished primarily for the benefit or convenience of the employee, as determined by Wage/Hour Division. Where the primary benefit of such facilities is to the employer's business interest, credit will be denied. The following are commonly viewed as furnished primarily for the benefit or convenience of employees:

(3) Transportation

a. ... transportation which is an incident of or necessary to the employment is not an "other facility".

30c04. Primarily for the benefit of the employer.

The following are examples of items not considered bona fide "other facilities" under Section 203(m) and Part 531 [of the regulations], because they are provided primarily for the benefit or convenience of the employer:

- Electric power used for commercial production in the interest of the employer.
- Telephones used for business purposes.
- Taxes and insurance on the employer's building which is not used as lodging furnished to the employees.
- Medical services and hospitalization which the

employer is obligated to furnish under workers' compensation law or similar Federal, State, or local laws.

- Rental of uniforms where the wearing of a uniform is required by law, the employer, or by the nature of the work.
- Business-related travel expenses. (See 29 C.F.R. 778.217.)
- Necessary tools or uniforms used in the employee's work.

30c13. Deductions from wages of migrant and seasonal agricultural workers.

(d) - In *Marshall v. Glassboro Service Association, Inc.*, the Third Circuit affirmed the district court's judgment that money advanced to farm workers for transportation costs from Puerto Rico to the mainland was primarily for the benefit of the employer and therefore could not be deducted from the workers' wages to the extent it reduced the wages below the statutory minimum. ... The U.S. Supreme Court denied review. The Court of Appeals also ruled that, regardless of the manner or method by which the employer sought to pass on to its employees certain transportation costs, where the effect was to bring the wage rate below the statutory minimum, such practice was unlawful.

[Note: several other provisions of Section 30c13 emphasize the same principle; even though the section is nominally titled as having to do with seasonal and migrant workers, it is clear that the same principle would apply to any worker covered by the FLSA minimum wage provision.]

The only exceptions to this general rule are found in DOL's FOH Sections 30c05 and 30c06 and have mainly to do with things like depreciation and operational costs attributable directly to meals, lodging, and other facilities. DOL wrote in an opinion letter dated January 21, 1997, that "it is our longstanding position that the cost of uniforms and safety equipment required by the employer is a business expense of the employer.

Thus, even if the employees purchase these items, this cost may not reduce their wages below the minimum wage, nor decrease their overtime compensation.” See also the discussion focusing on uniform costs below. The same rule would apply to drug and alcohol testing costs; since such costs are usually borne by the employer, wage deductions for such expenses may not take the employees below minimum wage. A DOL opinion letter of September 10, 1998 noted that an employer does not have to pay mileage expenses incurred during work, “so long as at least the full minimum wage is paid free and clear for all hours worked.” That position coincides with the rule cited in DOL opinion letters WH-92 of November 10, 1970 and WH-531 of June 27, 1990 that expenses relating to transporting employees during a workday may not be counted toward minimum wage, i.e., the employer must both pay the full minimum wage and reimburse any out-of-pocket transportation expenses that would effectively reduce the employees’ pay below minimum wage if left unreimbursed. Such reimbursements are not counted as part of wages. In general, any employer contemplating such deductions should definitely consult with legal counsel before proceeding.

To the extent that a deduction for a miscellaneous cost to the employer does not violate the minimum wage laws, an employer is allowed to make such a deduction as long as the employee has authorized it in writing in accordance with the Texas Payday Law.

Uniforms and Uniform Cleaning Costs

Under severely restricted circumstances, the reasonable cost of uniforms and associated cleaning costs may be deducted from wages, or the employee may be expected to purchase clothes that are consistent with a dress code, even if the deduction or cost takes the employee below minimum wage. If supplied



Under severely restricted circumstances, the reasonable cost of uniforms and associated cleaning costs may be deducted from wages, or the employee may be expected to purchase clothes that are consistent with a dress code, even if the deduction or cost takes the employee below minimum wage.
Ryan McVay/Photodisc/Getty Images

by the employer, it must be clear that such clothes are furnished as a convenience to the employee (generic clothing suitable for off-duty use), and that those particular outfits are not a condition of employment or otherwise required for the job (see 29 C.F.R. 531.3(d)(2)(iii), 531.32(c), and 531.35; also FOH, Section 30c12 (1988)). The cost of specially branded company clothes may not take an employee below minimum wage. Below are relevant portions of FOH § 30c12:

30c12. Cost of furnishing and maintaining uniforms.

(a) If the wearing of clean uniforms is required by law, by the employer, or by the nature of the work, the financial burden of furnishing or maintaining these clean uniforms may not be imposed upon the employees if to do so would reduce their wages below the

minimum wage (see 531.3(d)(2), 531.32(c), and 531.35).

(f) Definition of “uniforms”

(1) Although there are no hard and fast rules ..., the following principles are applicable:

- a. If an employer merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered to be uniforms.
- b. On the other hand, where the employer does prescribe a specific type and style of clothing to be worn at work, e.g., where a restaurant or hotel requires a tuxedo or a skirt and blouse or jacket of a specific or distinctive style, color, or quality, such clothing would be considered uniforms.
- c. Other examples would include uniforms required to be worn by guards, cleaning and culinary personnel, and hospital and nursing home personnel.

(g) Employee elects to buy additional uniforms, in excess of number required

Where an employer supplies, free of charge, or reimburses the employees for a sufficient number of uniforms required to be worn, and all or some employees elect to purchase additional uniforms in excess of the number required, the employer will not be required to reimburse the employees for costs incurred in purchasing uniforms in excess of the required number.

This type of deduction must be authorized in writing by the employee to be valid under TPL. In general, any deduction authorization signed by employees should be as specific as possible, both as to the purpose and the amount of the deductions. 

*William T. Simmons
 Legal Counsel to
 Chairman Tom Pauken*

Employer federal tax savings program expanded

Two new groups added to Work Opportunity Tax Credit program

Texas employers are leaving millions in federal tax credits unclaimed and the opportunity for tax savings is now greater for those who choose to participate in the Work Opportunity Tax Credit (WOTC) program. Employers who hire unemployed veterans or eligible 16- to 24-year-olds are now entitled to receive up to \$2,400 in tax savings for each member of those groups added to their payrolls in 2009 and 2010. As part of the American Recovery and Reinvestment Act of 2009, these groups are now included with the existing 10 targeted populations eligible for WOTC.

Administered by the U.S. Department of Labor and the Texas Workforce Commission (TWC), WOTC is a federal income tax benefit for private employers who hire from certain groups. Tax credits range from \$1,200 to \$9,000. WOTC reduces a business' tax liability, serving as an incentive to select job candidates who face barriers in their efforts to find employment.

"We want Texas employers to earn valuable tax credits while benefitting from the skills of these often untapped groups of qualified workers," said TWC Chairman Tom Pauken. "It's particularly encouraging to me that unemployed veterans now are included in this program."

TWC certifies which newly-hired employees make an employer eligible for the tax credit based on applications received from the new employer. Although TWC was able to identify more than \$200 million in tax credits for Texas employers in FY 2009, there were many more credits available that went unclaimed

Eligible WOTC Groups	
<p>Groups eligible for a WOTC of up to \$2,400:</p> <ul style="list-style-type: none"> • SNAP benefit recipients (formally known as food stamps) • unemployed veterans* • eligible disconnected youth* • veterans receiving food stamps • ex-felons • residents living within empowerment zones, renewal communities or rural renewal counties • vocational rehabilitation referrals • Supplemental Security Income (SSI) recipients • Temporary Assistance for Needy Family (TANF) benefit recipients 	<p>Group eligible for a WOTC of up to \$1,200:</p> <ul style="list-style-type: none"> • youth who live in empowerment zones or renewal communities and are hired for temporary summer work <p>Group eligible for a WOTC of up to \$4,800:</p> <ul style="list-style-type: none"> • disabled veterans <p>Group eligible for a WOTC of up to \$9,000 over two years:</p> <ul style="list-style-type: none"> • long-term TANF benefit recipients <p>*New group added as part of the American Recovery and Reinvestment Act of 2009</p>

through the underutilized program because applications were not submitted. WOTC offers employers a way to address workforce shortages while reducing hiring costs and gives job seekers a way to overcome some employment barriers.

For the newly added groups to qualify their employers for WOTC, new hires who are unemployed veterans must have been receiving unemployment benefits for at least four weeks and youth must not have been regularly employed or regularly attending school for six months prior to being hired.

"Our company saved \$114,000 on our federal income taxes last year by hiring 85 qualifying employees to work in our restaurants," said Joseph Hicks, Certified Public Accountant for Wright Foods, which owns several restaurant franchises in the McAllen area.

Within each employee group, specific eligibility requirements apply. All forms and WOTC information are available online at: www.twc.state.tx.us/svcs/wotc/wotc.html, or by calling the TWC WOTC unit at 1-800-695-6879. 

Probationary status: Myths and realities

There is no Texas or federal law that either prescribes or prohibits employers from treating employees as probationary, initial, trial, introductory, or provisional employees. No matter what name a company assigns to new employees, that is up to a company to determine through its policies. That issue primarily has relevance with respect to whether new employees have seniority of any kind for purposes of a benefit plan. The only type of benefit to which those incoming employees would potentially have to be granted immediate access would be the company's health insurance, due to the federal law known as HIPAA (Health Insurance Portability and Availability Act). To determine whether HIPAA would apply in a company's case, ask the company's health insurance carrier for guidance. No other types of benefits would have to be immediately granted. For instance, it is common to restrict accrual or use of paid leave to those who have worked at least some kind of minimum period for the company.

The other major reason for classifying employees as new, probationary, initial, trial, introductory, or provisional is to let them know that during that time, they will be subject to special scrutiny and must turn in successful performance in order to continue with the company and become "regular" employees. As noted above, there is no obstacle to the company classifying the incoming employees in such a manner. There is also no particular legal significance to such a classification, since Texas is an employment-at-will state, and an employer can subject any at-will employee at any time to special scrutiny, consistent with express employment agreements and specific statutes such as employment discrimination laws.

Most employment law attorneys in Texas these days advise against calling the initial period of employment a "probationary period," simply because it is so often misunderstood by employees, and for that reason can lead to unnecessary, and expensive, lawsuits. Rather, many attorneys advise calling the initial period an "initial," "trial," "introductory," or "provisional" period because those terms have not resulted in the same level of misunderstanding by employees.

Change in Ownership of the Company

Sometimes a company changes ownership, in which case the predecessor's employees may be hired by the successor company. In such a case, the new owner of the company would have the legal right to consider the predecessor's employees as new employees of the new company. Of course, the new owner would have to ensure that the predecessor entity fully pays the employees through their ending date with that company, or else be prepared to assume such obligations itself. If a company acquires the organization, trade, and business of the other company, it also acquires whatever obligations the predecessor entity owes to its employees and to the Texas Workforce Commission (TWC) (under Section 204.086 of the Texas Unemployment Compensation Act, the successor company is liable for any state unemployment tax debt the predecessor owes to TWC). The division of such liabilities is usually accomplished via the contract of acquisition.

A Problem of Terminology

The problem with using a term such as "probationary period" or "probationary employee" is that over time, such terms have acquired a certain amount of semantic baggage that tends to mislead some employees into thinking that once they have "passed" the probationary period, their jobs are "safe," "permanent," or even guaranteed, and they cannot be fired except for cause. In other words, some people think, however erroneously, that during a probationary period, their employment is at-will, and they can be fired at any time for any reason that doesn't violate a specific law, and that passing a probationary period actually modifies the at-will employment relationship to where their employer can no longer fire them at-will, but rather must have some sort of good cause before it can fire them. Such employees, if they are fired after completing the initial period of employment, often think they have a good case for bringing a lawsuit against the company. As a general rule, such lawsuits are extremely difficult to

sustain and are usually dismissed.

Under general Texas employment law, the presumption is that all employment is at-will, unless the employer has done or said something tangible that would modify the relationship. Usually, that kind of thing is something like a formal written employment contract, wherein certain procedures are laid out that must be followed before someone can be terminated from employment, such as a prescribed series of warnings and a notice period, or else specified offenses that can lead to immediate termination. Most employment relationships are not on the basis of a formal contract, and employment at-will is the rule followed. Under that rule, absent a statute or an express agreement (such as an employment contract) to the contrary, either party in an employment relationship may modify any of the terms or conditions of employment, or terminate the relationship altogether, for any reason, or no particular reason at all, with or without advance notice.

With the above issues in mind, most employment law attorneys in Texas these days advise against calling the initial period of employment a “probationary period,” simply because it is so often misunderstood by employees, and for that reason can lead to unnecessary, and expensive, lawsuits. Rather, many attorneys advise calling the initial period an “initial,” “trial,” “introductory,” or “provisional” period, not because those are magic words or are required by law, but because those terms have not resulted in the same level of misunderstanding by employees. No matter what the initial period of employment is called, though, it is a good idea to make it clear in the section of the policy handbook defining such a period that completion of the period does not change the employment at-will relationship and that either party may terminate the employment relationship at any time, with or without notice. That would be in addition to the standard employment at-will disclaimer that should be in any good employee handbook, restating the employment



Sometimes a company changes ownership, in which case the predecessor's employees may be hired by the successor company. In such a case, the new owner of the company would have the legal right to consider the predecessor's employees as new employees of the new company. *Stockbyte/Getty Images*

at-will rule and noting that the policies do not constitute any kind of contractual relationship or obligation for either the company or the employees, but rather are only guidelines, and that no one except the president or CEO of the company has the authority to change anything in the policies, and even then only in writing. Specific wording may be obtained from an employment law attorney of your choice.

Significance of Probationary Periods in Unemployment Claims

Put simply, probationary periods, by themselves, have no significance in unemployment claims. The unemployment insurance law does not care how long someone worked for a particular employer prior to filing a Unemployment Insurance

(UI) claim. Anyone who is no longer working for pay can file a basic UI claim, but must satisfy several different wage, work separation, and eligibility criteria in order to actually draw any benefits.

Where probationary, initial, trial, introductory, or provisional periods can come in handy with respect to UI claims is in the area of chargeback liability. The key is in whether the employer is a base period employer. That, in turn, depends upon the timing of the initial claim with respect to whatever period of employment the claimant had with the employer. Basically, if the claimant worked a relatively short period of time with the company, and filed the initial claim fairly soon after losing that short period of employment, the employer might not be a base period employer at all, meaning that it will have no potential chargeback or reimbursement liability

if the claimant draws benefits. This subject is fully explained in the article “How Do Unemployment Claims Affect an Employer?” in the Fall 2008 issue of Texas Business Today (online at <http://www.twc.state.tx.us/news/tbt/tbt1208.pdf>).

Due to the way the base period works, and the fact that non-base period employers have no financial involvement in an unemployment claim, a probationary period can actually have some value if the employer handles it correctly. Properly seen, the probationary period really should be a time of close scrutiny of a new employee. The employer should closely monitor the new employee’s work performance and general “fit” within the organization. If it becomes clear during a trial period that the employee is not going to work out on a long-term basis, then there is no reason to continue the employment relationship past the point where the employer determines that fact. There is no better time to act. The longer an employer waits to terminate a clearly unsuitable employee, the greater the chance is that the employer will end up in the base period of an unemployment claim. In addition, the longer the employee is employed, the higher the wage level will be, and since the level of chargeback liability is directly proportional to the amount of wages paid, the employer’s potential financial involvement can only increase with the passage of time (again, see the article “How Do Unemployment Claims Affect an Employer?”). Thus, an employer should watch carefully and act without delay when it comes to handling new employees who do not perform well. Below is a chart showing what the base period of a UI claim looks like:



Probationary periods, by themselves, have no significance in unemployment claims. The unemployment insurance law does not care how long someone worked for a particular employer prior to filing a UI claim. Anyone who is no longer working for pay can file a basic UI claim, but must satisfy several different wage, work separation, and eligibility criteria in order to actually draw any benefits. *Stockbyte/Getty Images*

As an example, if an employer hires an employee in February, and lets the employee go after 30 days, and the claimant files an initial claim prior to April 1, then the base period would not include the first quarter of that year (the quarter in progress), nor the fourth quarter of the preceding year (the lag quarter), but would consist of the fourth quarter of the year before the previous year, and the first three quarters of the previous year. Since the employer did not report wages during that base period, it will have no financial involvement in the claim. The same would apply if the claimant waited until April, May, or June to file the initial claim - in that case, the base period would omit the second quarter of the current year, the first quarter of the current year, and consist of the four quarters of the preceding year. If the ex-employee files an initial claim

after June 30 of the current year, then the employer could be a base period employer, but its chargeback liability would be limited due to having paid only 30 days’ worth of wages.

No matter whether a company uses something called a probationary period or something else, there is always a potential that a new hire, however short the period of employment is, may file an unemployment claim involving the company. The trick is to control the potential chargeback liability by using your best instincts when hiring, monitoring the new employees as closely as possible, and not delaying effective action when it is time to take it. 🇹🇽

*William T. Simmons
Legal Counsel to
Chairman Tom Pauken*

Determination of Base Period Wages					
Calendar Quarter 1	Calendar Quarter 2	Calendar Quarter 3	Calendar Quarter 4	Lag Quarter	Quarter In Progress When Claim Is Filed
✓	✓	✓	✓	X	X

The basics of pregnancy rights in the workplace

Employers often call the TWC Commissioner Representing Employers office for information on employee pregnancy issues. Here the basic things to keep in mind about the rights of a pregnant employee:

- 1) If a business has fewer than 15 employees (counting anyone who works for the business, performing services for pay, for each working day in each of twenty or more calendar

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weeks in the current or preceding calendar year), it is not covered by any employment law relating to pregnancy or disability, and the business would be free to handle the situation in any way it deems appropriate. Of course, a business not covered by such laws would still want to treat its employees as fairly and consistently as possible, if for no other reason than to minimize complaints and unnecessary turnover. Businesses with 15 or more employees should see the comments below.

- 2) If the business has 15 or more employees, it is covered by state and federal pregnancy and disability discrimination laws, which require non-discriminatory treatment of pregnant employees and reasonable accommodation for employees with disabilities. Disability laws can come into play for a pregnant employee if the pregnancy becomes complicated and results in



Avoiding liability for pregnancy discrimination involves ensuring that employees are not adversely treated due to pregnancy, making reasonable accommodation for pregnant employees, and extending the same benefits and treatment toward them as the company extends to other employees who have medical conditions. *Digital Vision/Getty Images*

- 3) From a practical standpoint, avoiding liability for pregnancy discrimination involves ensuring that employees are not adversely treated due to pregnancy, making reasonable accommodation for pregnant employees, and extending the same benefits and treatment toward them as the company extends to other employees who have medical conditions. Pregnant employees do not need to be treated any better

than other employees with medical conditions, but need to be treated at least as favorably.

- 4) If an employee claims that she cannot do certain duties due to being pregnant, the company has the right to require her to medically document such claims. Have the employee obtain a statement from her doctor showing clearly which duties of her job she can perform, which duties she cannot perform, and what accommodations might be necessary to enable the employee to continue working. Documentation requirements like this should be applied consistently and fairly to anyone who asserts a medical difficulty in doing their job functions.
- 5) Reasonable accommodation is something that the company can do, without undue hardship to the business, that allows the employee to work and manage any periods of leave.
- 6) Among other things, reasonable accommodation could include things such as redesigning job duties temporarily, furnishing health or safety aids, and extending a reasonable amount of maternity leave.
- 7) Concerning the length of maternity leave, there is no hard-and-fast rule in the statute or in regulations. However, based upon guidance of the Equal Employment Opportunity Commission (EEOC) and court cases, it would appear that at a minimum, a covered

employer can be expected to allow at least two weeks of unpaid or paid leave for pregnant employees. Paid leave is not required unless it is promised in a written policy or agreement, and unless others who miss work for medical reasons are allowed to use available paid leave for medical absences. The best practice is usually to allow pregnant employees to apply their available paid leave as long as it lasts.

- 8) The larger the company is, the longer the time is that the EEOC or a court might consider reasonable in terms of duration of leave. Employers at the lower end of coverage, i.e., between 15 and 25 employees or so, can usually get away with two weeks or so, but larger companies might be expected to increase the time somewhat. In such situations, a neutral absence control policy can help. A basic sample of such a policy appears at the following link: http://www.twc.state.tx.us/news/efte/neutral_absence_control_policy.html.
- 9) Another thing to keep in mind is the issue of notice. In this case, that would be notice of her intent to return to work. Some companies, but not all, have policies requiring employees on extended leaves of absence to check in at stated intervals regarding their return-to-work status. If a company has such a policy, and the employee has not adhered to it, then the company would likely want to see what the policy says about employees who fail to keep in touch as the policy requires.
- 10) Pregnancy leave can be related to other forms of medical leave, such as the Family and Medical Leave Act (FMLA) (for employers with 50 or more

employees) and disability leave. Generally speaking, if two or more leave-related laws apply to a particular employee, the company should determine which law affords the greatest degree of protection for the employee and apply that result. Concerning the way that various medical leave-related laws fit together, see the following topic in the book:

http://www.twc.state.tx.us/news/efte/medical_leave_laws.html.

- 11) Benefit continuation during maternity leave should be handled the same as it is for anyone else who goes on leave for other reasons.
- 12) If the company eventually arrives at the point where it can no longer readily accommodate the absence, and assuming that such action would not violate company policy or any individual employment agreement with the employee, it would be a good idea to advise the employee in writing that unless she is able to return to her duties by a stated deadline, the company will not be able to guarantee that it can continue to hold her job open and may have to replace her.
- 13) If the employee is ultimately laid off due to medical unavailability for work, and she files an unemployment claim, the company might consider responding to the claim with an explanation that the layoff was due to the claimant's medical unavailability for work, i.e., it was a medical work separation, and that the employer's account should be protected from chargeback of any benefits the claimant might receive. See the section headed

“Medical Separations” in the following article in the book *Especially for Texas Employers*:

http://www.twc.state.tx.us/news/efte/ui_law_qualification_issues.html.

- 14) In the event of a layoff for such a reason, try to end the work relationship on as positive a note as possible. Let the employee know that she is welcome to check back with the company once she is able to return to work, and that the company will be glad to consider her for any vacancy that might exist at the time. The company does not promise her a job thereby, but it sounds positive and will help dispel any notion that the company does not want her back.
- 15) Since any kind of discrimination claim can be a very serious matter, it could be well worth investing in an hour or two of an employment law attorney's time regarding the company's position in such matters, prior to taking any action with respect to a pregnant employee, just to help ensure that the company is not missing some kind of important issue.
- 16) The EEOC's official fact sheet on pregnancy discrimination law is at the following link: <http://www.eeoc.gov/laws/types/pregnancy.cfm>.
- 17) The main EEOC regulation dealing with pregnancy and maternity leave is here: http://edocket.access.gpo.gov/cfr_2006/julqtr/29cfr1604.10.htm. 

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New notice requirements for Earned Income Tax Credit

The Earned Income Tax Credit (EITC) is a federal tax credit for which certain individuals who meet income guidelines may qualify. The more qualified Texans take advantage of the credit, the more money stays in Texas to circulate in local economies and create and preserve jobs here. To help encourage more Texas employees to use the credit, the Legislature last session passed HB 2360, under which everyone who employs at least one person must give each employee “information regarding general eligibility requirements for the federal earned income tax credit” no later than March 1 of each year. HB 2360 may be seen in bill form at <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/HB02360F.htm>.

The notice cannot simply be a poster, but must be given to the employee in person, via e-mail, as a payroll stuffer, or via first-class mail. The Texas Workforce Commission’s (TWC) EITC notice rule will likely require that the employer use IRS Notice 797, available on the IRS Internet site at <http://www.irs.gov/pub/irs-pdf/n797.pdf>.

Texas does not restrict such notices to mail delivery. The notices may be delivered by any means that are documentable and can reasonably be expected to be reliable.

Most companies use such notices as envelope stuffers. It is likely that many companies will send such notices electronically. While merely sending a link to the IRS notice and having employees download it directly from the IRS site is not one of the methods of delivery specifically allowed under the law, the wording of the notice could be copied and pasted into an e-mail and sent to employees. A workable solution would be to send

Basic Qualifications for Earned Income Tax Credit	
1. You must have a valid Social Security Number	– be at least age 25 but under 65 at the end of the year,
2. You must have earned income from employment, self-employment or another source	– live in the United States for more than half the year, and
3. Your filing status cannot be “married, filing separately”	– not qualify as a dependent of another person
4. You must be a U.S. citizen or resident alien all year, or a nonresident alien married to a U.S. citizen or a resident alien filing a joint return	7. You cannot file Form 2555 or 2555-EZ (related to foreign earned income)
5. You cannot be the qualifying child of another person	8. For 2009, your investment income must be \$3,100 or less.
6. If you do not have a qualifying child, you must:	Source: http://www.irs.gov

a PDF copy of IRS Notice 797 as an attachment to each employee’s company or personal e-mail address and maintain a log showing such transmissions.

In addition to that notice, the employer can give employees other IRS publications on the EITC (see below), an EITC notice prepared by the Comptroller’s Office (still under development), or IRS EITC tax forms for claiming the credit. For its part, TWC must post a notice about the law on its Web site and include information about the law with any other periodic information sent to employers (such as tax rate notices, quarterly forms, and the like). That has already begun - TWC’s Tax Department included information about the new law on its fourth quarter 2009 Employer’s Quarterly Tax Report form sets that were mailed in December,

2009. The other standard IRS handouts that are currently available can be downloaded and used for distribution to employees.

- On the IRS Web site, you can find a detailed publication at: <http://www.irs.gov/pub/irs-pdf/p596.pdf>;
- a quick summary online at: <http://www.irs.gov/individuals/article/0,,id=150557,00.html>;
- and a handy brochure at: <http://www.irs.gov/pub/irs-pdf/p3211esp.pdf>. 

Companies decide policies regarding employee breaks

For the vast majority of Texas workers, breaks are not required. Since breaks are optional under Texas and federal law, they may be granted and managed in any manner by the company. Breaks are not only the employee's time, but also the employer's, because as the U.S. Department of Labor points out in regulation 29 C.F.R. § 785.18, they

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promote the efficiency of employees and are

regarded as time worked for which the employee must be paid. The employer's break policy can prescribe whether, when, how, where, in what manner, and for how long breaks may be taken. Regarding the issue of location of breaks, some companies choose to tell employees that they may not leave company premises during breaks in order to reduce the risk of accidents or other events off-premises that prolong break times or else make it impossible for the employee to return. Each company must decide for itself what to do about breaks, but the bottom line is that breaks and how to handle them are completely up to the company to decide. Meal breaks may be unpaid, as long as the employee is fully relieved of duty and may eat a meal in peace - see 29 C.F.R. § 785.19.

Statute clarifies genetic information privacy

This new federal statute (known as The Genetic Information Nondiscrimination Act or GINA) went into effect on November 21, 2009, and covers employers with 15 or more employees. It prohibits the use, gathering, and disclosure of genetic information in the context of employment relationships and basically codifies certain principles and best practices that most employers had already adopted pursuant to the Americans with Disabilities Act (ADA)



The employer's break policy can prescribe whether, when, how, where, in what manner, and for how long breaks may be taken. *Digital Vision/Getty Images*

and Health Insurance Portability and Availability Act (HIPAA). Bottom line: avoid solicitation or discussion of genetic information; prohibit employees from discussing such topics in the workplace; and adopt a clear written policy regarding confidentiality of medical information (see http://www.twc.state.tx.us/news/efte/medical_information_confidentiality_policy.html for a sample of such a policy.) Employers may obtain multi-language posters from EEOC that feature the new GINA information: <http://www1.eeoc.gov/employers/poster.cfm>.

New legislation limits workplace arbitration

The defense spending bill for 2009-2010 contains a provision prohibiting mandatory arbitration of employment discrimination claims and workplace torts, if the employer has a military contract worth \$1 million or more. Due to the relative lack of clarity in the language of the bill, most employment attorneys feel that it would be best to be as careful as possible with arbitration provisions – consultation with qualified legal counsel is essential. This may be a precursor to wider-ranging legislation prohibiting mandatory arbitration of employment disputes – there is a

pending bill in Congress called the Arbitration Fairness Act that would enact such a rule.

COBRA premium subsidy law extended

Under stimulus legislation known as ARRA (the American Recovery and Reinvestment Act of 2009), eligible individuals (those who did not resign or get fired for gross misconduct) pay only 35 percent of their COBRA premiums, and the remaining 65 percent is paid by the employer and reimbursed by a federal tax credit (see Form 941). The premium reduction applies to periods of health coverage beginning on or after February 17, 2009, and lasts for up to 15 months. Under federal law, Texas and federal COBRA are both covered by the premium subsidy program. For guidance from the U.S. Department of Labor (DOL) on this program, see the information at www.dol.gov/ebsa/newsroom/fsCOBRAPremiumReduction.html. Employers may also call the DOL help line at (866) 444-3272. Employers should watch for additional extensions of the premium subsidy program, since there are currently proposals before Congress to extend the subsidies to 18 months and extend the dates of coverage for eligible work separations. 

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