

# Texas Business Today

First Quarter 2016

Your Blueprint  
for Building a  
Skilled Workforce  
in the New Year

Ruth R. Hughs  
Commissioner Representing Employers

# 2016

Legal Updates ■ UI Tips for 2016 ■ Payroll Problems ■ Employee Credibility

## New Year, New Opportunities!

### Commissioner's Corner

As employers move to Texas and grow in Texas, they have proclaimed, "We found a dedicated and enthusiastic workforce in Texas that has supported growth throughout the state." In 2016, the workforce commission will work to continue to meet employers' demands for a skilled workforce. As we look to 2016, we must remember 2015 to better understand how we can continue our support of Texas employers in the future.

In 2015, we sponsored Texas Business Conferences, a series of employer seminars held each year throughout the state. More than 4,179 individuals attended 18 Texas Business Conferences. Employers who attend the seminars learn about state and federal employment laws and the unemployment claim and appeal process. Individuals interested in attending the conferences in 2016 can now register online at [www.twc.state.tx.us/texas-business-conferences](http://www.twc.state.tx.us/texas-business-conferences).

Last year was an exciting year for employers and colleges throughout Texas. In partnership with 67 businesses, the Texas Workforce Commission (TWC) awarded Skills Development Fund grants to community and technical colleges that supported the creation of 3,664 new jobs and elevated the skills of 9,431 incumbent workers. I had the privilege of presenting some of these grant awards in 2015. Some examples include the partnerships between PECOFacet and Weatherford College; Rackspace and Alamo Colleges; McKinney, Jack Henry & Associates and Emerson Process Management Regulator Technologies and Collin College; and

voestalpine Texas LLC and Del Mar College in Corpus Christi, Texas. The custom training provided through these collaborations will allow us to ensure that Texas businesses have the workforce they need to maintain our economic competitiveness.

TWC partnered with public junior colleges, public state colleges, and public technical colleges under agreements with school districts across the state to expand dual-credit and career and technical education programs through the use of Skills Development Funds. Projects are funded in an effort to respond to industry demands for skilled workers in technical fields, while enabling high school students to complete college credit hours in addition to high school coursework, better preparing them for employment or further education. Last November, I recognized one of these projects between Laredo Community College and the Laredo and United Independent School Districts. Through the TWC skills grant high school students are provided customized training in a high-demand field as well as the opportunity to earn college credit.

Also in 2015, the commission dedicated skills funds to support small businesses. Texas has over 480,000 private-sector employers with fewer than 100 employees. Because we recognize that these employers are an integral part of the economy, TWC

dedicated \$2 million from the Skills Development Fund to implement the Skills for Small Business program. This initiative provides small businesses, the opportunity to address workforce training needs and improve overall business operations. More information about the Skills for Small Business program is available online at [www.texasworkforce.org/ssb](http://www.texasworkforce.org/ssb).

These are just some examples from 2015. There will be new opportunities for schools, colleges, and employers to benefit from TWC programs in 2016. At TWC, we have an entire team dedicated to advising and assisting you and your education partners in submitting proposals. To learn more please contact our TWC Business Services team at [skills@twc.state.tx.us](mailto:skills@twc.state.tx.us).

My office is committed to supporting employers, keeping UI taxes low, and connecting employers to qualified labor. Please don't hesitate to contact my office if you need any assistance or want to learn more about our workforce development programs. 

*Sincerely,*



*Ruth R. Hughs*

*Texas Workforce Commission  
Commissioner Representing Employers*



December 4, 2015, TWC Commissioner Representing Employers Ruth R. Hughs presented a \$192,376 Skills Development Fund grant to Del Mar College and voestalpine Texas LLC.



# TEXAS BUSINESS CONFERENCES EMPLOYMENT LAW UPDATE

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

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

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

The non-refundable registration fee is \$125 (one-day) and \$199 (two-days). Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

## 2016 CONFERENCE DATES

- El Paso .....February 26**
- Austin ..... March 11**
- Corpus Christi ..... April 8**
- Longview ..... May 6**
- Victoria ..... May 20**
- College Station ..... June 10**
- McAllen ..... June 24**
- Amarillo ..... July 1**
- Arlington 2-day (*tentative*) ..... July 21-22**
- Fredericksburg ..... August 5**

**To register, visit [www.texasworkforce.org/tbc](http://www.texasworkforce.org/tbc)  
or for more information call 512-463-6389.**

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# Business and Legal Briefs

## New Overtime Exemption Regulations Effective July 1, 2016

Concerning the U.S. Department of Labor (DOL) regulations pertaining to the upcoming increase in the minimum salary needed for an exempt salaried employee, the DOL website indicates that the increase will become effective on or about July 1, 2016. The new weekly salary minimum will be \$970. You can view the DOL's web page on the new salary requirements at [www.reginfo.gov/public/doc/AgendaViewRule?pubId=201510&RIN=1235-AA11](http://www.reginfo.gov/public/doc/AgendaViewRule?pubId=201510&RIN=1235-AA11). Employers should definitely take care to remember certain fundamentals that have not changed: a salary alone does not make an employee exempt from overtime pay; a job title is also insufficient by itself to make an employee exempt; the overtime exemptions for salaried employees are intended for so-called "white collar" jobs, such as the company presidents or CEOs, vice-presidents, general managers, department heads, chief financial officers, attorneys, physicians, registered nurses, and senior IT staff in charge of a company's computer network. There is also an exemption for outside sales representatives, but that does not require a salary. For details on the white-collar exemptions, see [www.twc.state.tx.us/news/efte/focus\\_on\\_the\\_white\\_collar\\_exemptions.html](http://www.twc.state.tx.us/news/efte/focus_on_the_white_collar_exemptions.html).

## Enforcement Begins for New DOL Overtime Rules for Caregivers

Due to conflicting court decisions in 2015, many home health care companies that provide companions for the elderly and helpers for household chores received

contradictory information on the status of the companionship and domestic employee exemptions from minimum wage and overtime laws. The U.S. Department of Labor's (DOL's) new regulations for the companionship and domestic employee exemptions went into effect on January 1, 2015 as planned, but DOL announced that during the first six months of the year, the agency would focus on awareness and outreach about the rule, rather than audits and penalties. On January 14, 2015, a federal district court invalidated the rule, forcing DOL to put the whole effort on hold while it prepared an appeal. On August 21, 2015, the U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court's ruling and held in favor of DOL that the rule was valid. The rule was thus reinstated by the action of the appeals court (DOL has a copy of that court decision on its website at [www.dol.gov/whd/homecare/0821appealdecision.pdf](http://www.dol.gov/whd/homecare/0821appealdecision.pdf)). The plaintiff, the Home Care Association of America, has indicated that it will appeal the D.C. Circuit's ruling to the U.S. Supreme Court. DOL's current plans for enforcement are outlined at [www.dol.gov/whd/homecare/litigation.htm](http://www.dol.gov/whd/homecare/litigation.htm). According to that document, all-out, strict enforcement was set to begin on January 1, 2016. Accordingly, it is important for home care companies to come into compliance with the new regulations as soon as possible. Basically, the minimum wage and overtime exemption is no longer available for home care companies with respect to their employees who serves patients as companions, and the overtime exemption for domestic employees is unavailable for workers who perform general household tasks

or patient care-related duties. Detailed guidance is found on the following DOL web pages: [www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014\\_2.htm](http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.htm); [www.dol.gov/whd/regs/compliance/whdfs79e.htm](http://www.dol.gov/whd/regs/compliance/whdfs79e.htm); and [www.dol.gov/whd/homecare/](http://www.dol.gov/whd/homecare/).

## Arbitration Agreements at Risk under the National Labor Relations Act (NLRA)

The National Labor Relations Board (NLRB) ruled on December 31, 2015 in the case of *GameStop Corp.* (Case 20-CA-080497) that the employer's use of an arbitration agreement as a condition of employment violates the National Labor Relations Act (NLRA) if it waives employees' rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The NLRB held that such agreements might cause employees to believe that they would not have the right to file unfair labor practice charges with the NLRB. The NLRB's decision was based on its 2012 ruling in the *D.R. Horton* case (357 NLRB No. 184; *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013)). Notwithstanding the fact that the *Horton* decision from the 5th Circuit Court of Appeals held that arbitration agreements do not violate the NLRA unless they foreclose the possibility of filing an administrative claim with the NLRB, and the NLRB found that the arbitration agreement used by GameStop was structured so as to allow reasonable employees to believe they could not exercise their rights under the NLRA. Coupled with existing laws that prohibit

agreements to waive administrative claim rights under the FLSA (see unemployment compensation statutes), this decision illustrates how important it is to consult an experienced labor law attorney before attempting to implement an arbitration agreement. Companies with existing arbitration agreements should consider having them reviewed by such an attorney.

## New Open-Carry Law in Texas

Employers have been asking a lot of questions about what Texas' new open-carry law means for their businesses. The changes in the law were not as great as what some have assumed. While extra signage is needed for a business that wishes to bar both concealed and open-carry firearms from its premises, there is no change to the law regarding an employer's legal right to prohibit employees from carrying or possessing any kind of weapon in the building. Likewise, there has been no change to the law allowing employees to store, in a closed and locked personal vehicle parked in company-provided parking spaces, a gun and ammunition that they are legally entitled to possess. What has changed is the signage requirement for private businesses that do not want guests or visitors to bring firearms onto the premises. Concerning what kind of signage is needed to denote a gun-free zone in or at a business, the sign just needs to comply with the revised statute, which was changed by HB 910 effective January 1, 2016. One sign will not suffice to bar both concealed and open-carry handguns – there is a separate sign for each purpose. Here is the relevant text from the bill in question (see [www.legis.state.tx.us/tlodocs/84R/billtext/html/HB00910F.htm](http://www.legis.state.tx.us/tlodocs/84R/billtext/html/HB00910F.htm) for the full text of the bill):

- The sign for concealed handguns must state the following: "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun.
- The sign for open-carry handguns must state the following: "Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly."

Each such sign must include the required language in both English and Spanish, must appear in contrasting colors with block letters that are at least one inch in height, and be displayed in a conspicuous manner that is clearly visible to the public. Many sign businesses offer signs like that for sale, so businesses should have no trouble locating appropriate signs for purchase. Watch out, though, for signs that do not feature the required wording. A sign is not sufficient for trespass law purposes if it only has an image like a red circle and slash over a gun, or something like that. Without the wording shown above, the sign would be insufficient. More commentary on workplace weapons policies is available at [www.twc.state.tx.us/news/efte/weapons\\_at\\_work.html](http://www.twc.state.tx.us/news/efte/weapons_at_work.html).

## New Online Parent Portal links to Resources for Texas Families

As announced on TWC's *Solutions* blog ([texasworkforce.wordpress.com/](http://texasworkforce.wordpress.com/)) on January 14, 2016: "The Texas Workforce Commission's (TWC) Child Care Services department has created an online parent website as a new resource for families seeking information to meet the needs of children. [TexasChildCareSolutions.org](http://TexasChildCareSolutions.org) is an online source of information to assist parents in making informed choices for early childhood education, quality child care, children with special needs and child care financial assistance. ..." The site "connects Texas parents with up-to-date parenting information, ideas and resources. With the new [TexasChildCareSolutions.org](http://TexasChildCareSolutions.org) website, TWC provides resources to continually improve the quality of early childhood environments throughout Texas. TWC's child care program offers subsidized child care services for low-income families, promoting long-term self-sufficiency by enabling parents to work or attend workforce training or education activities. TWC also provides resources to educate parents about the availability of quality child care, which enhances children's early learning and development. ... More information can be found at [TexasChildCareSolutions.org](http://TexasChildCareSolutions.org) or by emailing [childcare.programassistance@twc.state.tx.us](mailto:childcare.programassistance@twc.state.tx.us). Detailed information about TWC's child care program and employment support resources can be found by exploring the TWC Job Seekers & Employees webpage." (Note: employers can visit that page at [www.twc.state.tx.us/jobseekers/employment-support-resources](http://www.twc.state.tx.us/jobseekers/employment-support-resources)) 🇺🇸

*William T. (Tommy) Simmons  
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# Improperly Paying the Piper: When Payroll Goes Wrong

One challenge that employers continually face in the operation of their businesses is how to deal with inaccuracies or mistakes created by their payroll departments. Among the most frequently cited obstacles in managing payroll is how an employer should deal with a situation in which it has either overpaid or underpaid an employee. Understandably, when faced with this scenario many questions can arise: Can the employer recoup the overpaid money? Is the employer in violation of the Texas Payday Law because, through an honest mistake in payroll, they have underpaid an employee? Is there anything the employer could have done to prevent the mistake? To assist the employer in answering these important questions, this article will explore effective ways to rectify accidents that can occur in the payroll department.

## What happens if the employer mistakenly overpays an employee?

A classic payroll hiccup occurs when an employer accidentally pays an employee more money than the employee is owed. Employers will be pleased to find that they can indeed recoup the overpaid wages, provided that they adhere to a few key guidelines.

First, the employer must not lose sight of the fact that recouping overpaid wages from an employee is no different than making a deduction from an employee's paycheck. As such, the employer should be aware that deducting from an employee's paycheck without that employee's

express written permission can result in a violation of the Texas Payday Law. In order to overcome this hurdle, many employers have their employees sign Wage Deduction Authorization Agreements. These agreements, if properly drafted, provide the employer the written permission required to properly make pay deductions. In addition, it should be noted that employers will likely have a higher success rate in securing a signed wage deduction agreement from their employees before any mistake occurs. For an example of a Wage Deduction Authorization Agreement (specifically, item #5), please visit: [www.twc.state.tx.us/news/eft/wage\\_deduction\\_authorization\\_agreement.html](http://www.twc.state.tx.us/news/eft/wage_deduction_authorization_agreement.html).

Second, employers might be concerned that in some instances

deducting overpayments from an employee's paycheck could reduce their pay to an amount below minimum wage. Normally, a pay deduction that reduces the employee's pay below minimum wage is not permissible under the Texas Payday Law or the Fair Labor Standards Act (FLSA). However, the Department of Labor has taken the stance that overpayments fit into the same category as loans and wage advances (see Opinion Letter FLSA2004-19NA at [www.dol.gov/whd/opinion/FLSANA/2004/2004\\_10\\_08\\_19FLSA\\_NA\\_recoup.htm](http://www.dol.gov/whd/opinion/FLSANA/2004/2004_10_08_19FLSA_NA_recoup.htm)). This is important because loans and wage advances are two of the extremely limited exceptions where an employer can deduct an employee's paycheck



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below minimum wage. As a result, if the employer has a signed Wage Deduction Authorization Agreement from the employee, deductions from pay below minimum wage for wage overpayments should not be a problem.

## What happens if the employer mistakenly underpays an employee?

On the flip side of overpaying an employee is, of course, underpaying an employee. While no one likes to be shortchanged on pay that is owed, there are several ways an employer can minimize potential problems that can arise when the proper amount of wages has not been paid to an employee.

To begin, the Texas Payday Law states that all employees must be paid in full and on time on the employer's regularly scheduled payday(s). In addition, that same law states that non-exempt employees must be paid at least twice a month and exempt employees must be paid at least once a month. Accordingly, if an employer underpays one of its employees, even if by accident, that employer has technically violated the Texas Payday Law. If this situation occurs, the employer should make the affected employee whole by delivering the owed wages immediately. The sooner that the employer delivers the proper wages to the employee, the better its chances in avoiding a payday law complaint.

It is important to remember that even the most technical violations of the Texas Payday Law give an affected employee the right to file a wage claim with the Texas Workforce Commission (TWC) for payments owed. If an employer has a history of wage claims filed against it, there is a good chance that future claims filed against the employer will result in administrative

penalties. If employers act speedily to rectify any underpayments, they lower the chances that any affected employees become so irritated that they resort to filing wage claims with TWC.

## Suggestions on what employers can do to prevent payroll mistakes

The best way to avoid mistakes from occurring is doing what you can to prevent them from happening in the first place. Preventive measures can go a long way towards heading problems off at the pass and employers should adopt them whenever possible.

For example, each employer should consider having a policy in their employee manual or handbook dealing specifically with wage overpayments/underpayments. The policy should carefully describe what will happen if such an overpayment or underpayment occurs, and what procedures will be followed to remedy the situation. For an example of what an overpayment/underpayment policy might look like, please visit [www.twc.state.tx.us/news/efte/wage\\_overpayment\\_policy.html](http://www.twc.state.tx.us/news/efte/wage_overpayment_policy.html).

Also, as mentioned above, if the employer plans on making any deductions from an employee's paycheck it will need that employee's express permission in writing in order to be in compliance with the Texas Payday Law. As such, the employer can elect to have its employees sign Wage Deduction Authorization Agreements to secure the written permission needed to make pay deductions. Usually, the best time to do this is when the employee is initially hired. Employers should also keep a signed copy of the agreement in the employee's personnel file so that if a problem arises, they can quickly locate

the agreement and use it as proof that they are in compliance with applicable wage laws.

## In Conclusion

Processing payroll is one of the most integral operations that employers perform at their places of business. With the amount of hours to be tracked and rates to be tabulated for each employee, mistakes can occur – especially if the employer is dealing with other forms of compensation beyond the straight-time pay such as travel time, mileage, and so forth.

Despite this challenge, the employer should remember that wage overpayments can be recouped if the employer has a signed Wage Deduction Authorization Agreement from the affected employee. Additionally, employers should make every effort possible to immediately deliver any wages owed to an employee resulting from an accidental underpayment to minimize chances of a wage claim being filed. Lastly, employers should implement preventive measures to ensure that mistakes are kept to a bare minimum. By following these steps, the employer will be in a better position to deal with payroll errors if they occur. 

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

# Liar, Liar: Prevention and Protection Against Dishonesty in the Workplace

Lies happen every day. Every employer has likely caught someone in a lie, and some lies do not result in much harm. However, when a job applicant or an employee falsifies, conceals, or misrepresents certain information, the results can be devastating. For this reason, many employers proceed with the utmost caution when hiring employees in an effort to protect their businesses. Unfortunately, these efforts are not always successful, and we often get calls on our employer hotline (800-832-9394) with questions on what employers can do to protect their businesses from deceptive applicants and employees.

People can embellish anything on their resumes, and they often do. Recent statistics reveal that approximately 53 percent of job applications reviewed by employers contain falsifications. (For more information, please see the following link: [www.statisticbrain.com/resume-falsification-statistics/](http://www.statisticbrain.com/resume-falsification-statistics/)). Some of the data can be distorted or exaggerated, including GPA, skills, and prior job duties. Other data can simply be omitted, such as criminal history. Applicants also completely fabricate information, such as past employment, schools attended, degrees held and job references.

Once hired, employees can be dishonest regarding anything job-related—they can deny things they did, things they heard, whether they were warned, and why they were fired. While an employer may never be able to identify every lie every time,

it is certainly possible to mitigate the damage by taking certain steps when moving forward.

For employers, the work begins when reviewing applications. Statistics show that 26.5 percent of people polled indicated that they have or would lie on a resume. In addition, over 75 percent of resumes are misleading. Given this data, it is likely that every employer has been misled by information in a resume. Many employers will attempt to verify resume information by contacting past educational institutions, employers, and job references. That is a good step towards verification. However, a simple phone call may not be enough these days, as certain technological advancements have made it considerably easier to deceive.

Several companies in recent years have gone into the business of selling lies. For a relatively small fee, a person can pay a stranger to tell whatever lie he or she wants. These companies pride themselves on being willing to lie about anything, and the bulk of their profits come from job seekers. These companies employ trained liars who can act as a fictitious reference or a former boss, and their popularity has grown over the years because they are easy to find. Many of these companies advertise their services online.

Some deception services even offer fake writing samples and “resume rewriting,” which sounds innocent enough, but really involves fabricating data to help someone appear qualified for the job. Educational institutions attended, degrees received, past

employers, job titles, pay, dates of employment – almost nothing is off limits. Other companies sell fake diplomas or certifications from anywhere in the world and they pride themselves on the fact that their work has deceived some of the most prestigious institutions and companies in the country.

Employers should also be aware that phone applications (apps) have made it very easy for people to disguise their own voices. The reference you call may just be the applicant using the phone app. Other technology can re-route a call so that the number an employer dials will be redirected to a person on the other line who is prepared to deceive. These services have proven useful to both prospective and current employees alike. Employees can use any of these services to help them verify an excuse given to take time off work or to vouch for their whereabouts on a certain day.

Knowing all of this information can cause an employer to feel helpless. At what point can you ever trust that you have hired the person you thought? While an employer may never be 100 percent safe from this type of deception, there are a few things that should be done to help minimize the risk of harm to the business.

First, when reviewing applications, try to verify the information provided to you. If an applicant looks promising, take the time to contact the educational institutions, prior employers and job references. Given the websites and apps just mentioned, there is a possibility that employers can be deceived during



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the verification process. However, just knowing about these services can help employers be on guard so that they can proceed with caution. From there, the best an employer can do is to pay close attention to the information provided and take note of any red flags that may come up.

In addition, if an applicant seems promising, be sure to have him or her sign an authorization form so that each prior employer can release information relating to that applicant's employment. This should occur prior to contacting past employers to verify information. A sample is available for review and use at the following link: [www.twc.state.tx.us/news/efte/authorization\\_to\\_release\\_information.html](http://www.twc.state.tx.us/news/efte/authorization_to_release_information.html).

Employers may also be tempted to research an employee online using search engines and checking social media websites to search for information. There are differing opinions on whether or not this is a wise decision, as employers may come across private information that they do not need to know. For example, employers may accidentally become aware of health issues or other private information, thereby giving prospective employees the opportunity to argue that they were not hired because of this information. Therefore, any employer who elects to use the internet for these

purposes should exercise caution and avoid looking at any information that may be deemed private, protected information.

In the case of background checks, employers can move forward with one as long as the applicant authorizes such in writing. The authorization form must be signed before investigation begins. A sample form is available here: [www.twc.state.tx.us/news/efte/authorization\\_for\\_background\\_check.html](http://www.twc.state.tx.us/news/efte/authorization_for_background_check.html). Denying an applicant a position due to a negative background check also requires further action, which is explained here: [www.twc.state.tx.us/news/efte/background\\_check.html](http://www.twc.state.tx.us/news/efte/background_check.html).

There are other things employers can do when verifying past employment and skills. When interviewing, you may want to have applicants describe a work experience related to a skill they mentioned. Take notes and ask for detailed information. Once they have explained, you can ask for a name to contact to verify the information.

Employers may also want to test an applicant's skills before hire. This can include soft, personality-driven skills such as communication skills and office etiquette, or hard skills, such as reading, writing, typing, and knowledge of software programs. Make sure that your pre-employment

test or examination does not allow the applicant to perform actual work for the employer. For example, when testing software knowledge, you may ask the applicant to open a computer program and perform a certain function, but you may not allow the applicant to work on a document the employer needs for business use. This would transform the applicant into an employee, which goes against an employer's intention in this instance. The following link provides additional information on pre-employment tests and examinations, which employers are encouraged to review: [www.twc.state.tx.us/news/efte/pre\\_employment\\_tests.html](http://www.twc.state.tx.us/news/efte/pre_employment_tests.html).

Employers should also have a clear policy informing employees that falsification, concealment, or misrepresentation is prohibited. The employer should clarify the consequences that will result from such activity, whether it be a warning or immediate discharge. The policy should address falsification in the job application or during the interview process, concealment of information during the hiring process, misrepresentation of qualifications, and employee dishonesty. This policy can help deter deceitful activity altogether and can also shield an employer from liability on an unemployment claim. Additional information regarding these particular hiring issues can be found here: [www.twc.state.tx.us/news/efte/hiring\\_issues\\_in\\_ui\\_claims.html](http://www.twc.state.tx.us/news/efte/hiring_issues_in_ui_claims.html).

In addition, even though it can be time-consuming, it is important for employers to document the process. Documentation can serve as both a sword and shield. Also, remember: trust your instincts, as they can often reveal more to you about a person than what you know from a resume. 🇹🇽

*Velissa R. Chapa  
Legal Counsel to Commissioner  
Ruth R. Hughes*

# Interesting Questions from Employers, Asked and Answered

**Q:** *Can you clarify whether non-salaried exempt employees must clock in and out for the first 40 hours or if they are only required to clock in and out for anything that exceeds 40 hours in a work week? I'm wondering if the Department of Labor (DOL) would just accept a default 40-hr setting in a timekeeping system for this group of employees?*

**A:** There is no discretion under DOL regulations with respect to keeping time records – an employer must keep exact records of all days and hours worked by each non-exempt employee. In the event, however unlikely, of a wage claim, an employer's failure to keep exact, reliable records allows an employee to convince the DOL or a court that he or

she really worked more time than what the employer paid the employee for. The specific method of keeping such detailed records is up to an employer to work out with its employees. However, the employer has the burden, in the event of a challenge, of showing that its records are the best evidence of the time actually worked. For details on the legal issues involved, please see the following article in our book *Especially for Texas Employers*: [www.twc.state.tx.us/news/efte/recordkeeping\\_requirements.html](http://www.twc.state.tx.us/news/efte/recordkeeping_requirements.html).

**Q:** *I have a situation that I need some guidance on. An employee became upset about another employee leaving the company, and walked off of the job. The manager called the employee's home number and the*

*employee picked up the phone and then hung up on the manager without talking to her. The manager called back and left a voicemail message that she needed to talk to her. At 10:30 am, the employee came back to the office and verbally said she was giving her 30-day notice, used some profanity, and walked out of the office, slamming the door. The employee did not return to work and we considered this a voluntary quit with no notice. Later that morning, the employee sent an e-mail to the owner of the company stating she had found another job and to please consider this her 30-day notice. We have already terminated the employee and she has not tried to return to work. Here is my question.*

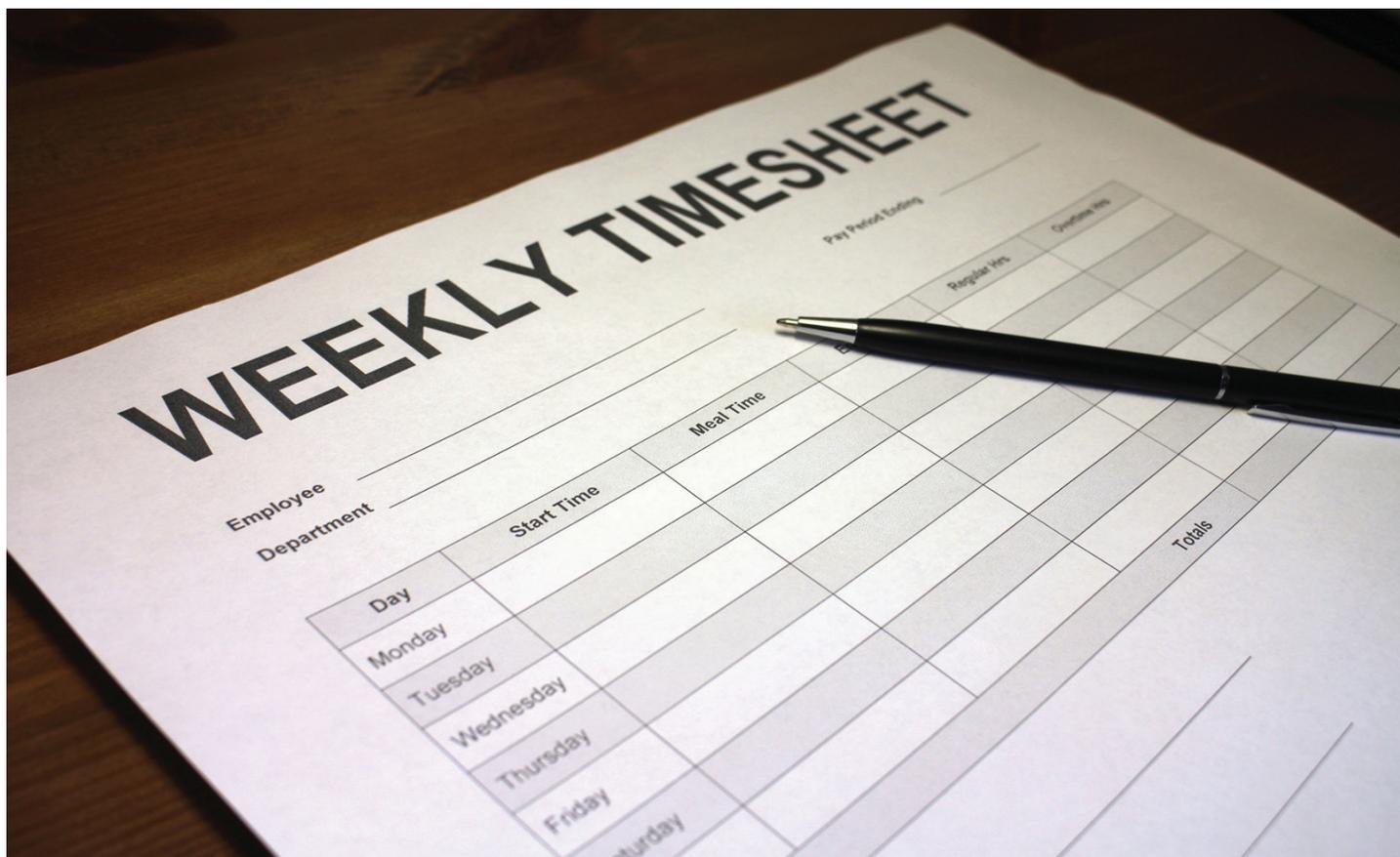


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*I know that if someone gives a two-week notice, you can make the termination effective immediately and not be obligated to pay the two-week “notice” period to the employee. If someone gives a 30-day notice, and you ask them to leave immediately and not work the notice, you are obligated to pay two weeks of the 30-day notice period. This situation I have is a little different, the person verbally gave 30-days notice to the manager and then walked off the job and did not continue working... then sent a written 30-day notice later that day to the president of the company (who is not going to respond to an e-mail like that and did not forward the e-mail he received from this employee until three days later). Bottom line: the employee is terminated for voluntary quit /job abandonment and I do not know if I need to pay two weeks of pay or not.*

**A:** Under Texas and federal laws, there would be no obligation for your company to pay the employee anything beyond the wages she earned for the time that she actually worked. An employer does not need to pay wages for any part of a notice period during which the employee does not work. The only exception to the general rule that no pay is owed for an unworked notice period would be in the situation of an employee who works under some kind of express employment contract that has a provision requiring payment for a notice period, regardless of whether it is worked. In such a situation, the employer would simply follow the contract.

**Q:** *I recently hired a new senior staff employee who fails to filter verbal comments in a professional environment. I have managed to soften their edges a bit in the office, but they are starting to feel comfortable associating with my*

*administrative and technical staff outside of business hours and it concerns me a bit, as they are privy to sensitive information in capacity as a senior staff member. When the senior staffer goes out with the administrative and technical staff, the senior staffer tends to drink heavily and have “loose lips” so to speak. I found out that my new senior staffer went to a non-work event with our competition where alcohol was served. My new employee knows the plans for our new office, sensitive information, and a tremendous amount of potentially costly information if it were shared with our competition. I have a policy in place to limit fraternization among staff members, but this employee is under a contract that does not state anything about maintaining a distance while intoxicated. I fear that this behavior will continue and I am unsure as to how to proceed. I would like to know how to prevent this in the future or if I even have the ability to do so. Can I dictate what an employee can do in their personal time if it affects the business?*

**A:** I would say that the following things are important to keep in mind:

1. An employer has the right to prohibit any sharing of company information between employees and competitors. It sounds like what has already happened may fall into that category.
2. It is also legal to prohibit any off-duty conduct that harms, or has a significant likelihood of harming, the company, if the conduct has nothing to with exercising legally-protected workplace rights. In this situation, the employee does not have a legally-protected workplace right to engage in after-hours social activity with

a competitor. While you cannot prevent them from actually doing that, your company can take corrective action against the employee for violating known rules or policies – see below for more commentary on that point.

3. Professional-level employees may be held to a higher standard than other employees.
4. Abiding by a contract is important, of course, but the fact that the contract with that employee mentions nothing about maintaining an appropriate distance from competitors while intoxicated does not mean that it cannot be read or interpreted to prohibit contacts with competitors that result in breaches of confidentiality, unauthorized sharing of company trade secrets, loss of clients, and the like. It is hard to imagine that the contract, as written, does not have anything in it that would protect the company from a professional employee revealing confidential information to a competitor.
5. Most employment contracts also have a provision regarding termination of the contractual relationship under various circumstances that might include professional misconduct, violation of a law, regulation, or guideline pertaining to the industry, intentional action resulting in harm to the company, and so on. It would just be a matter of reading the contract and finding what that provision says about termination of the contract. Then, the company can exercise its right under the contract and give



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the employee an appropriate warning that the complained-of conduct must stop, or else the company will exercise its contractual right to terminate the contract and release the employee from employment.

6. As a new professional, the employee may not yet understand what the appropriate bounds for their conduct are. Accordingly, they could probably benefit from having one or two older, more experienced peers counsel them about where they fit in and how they can promote their career by acting in accordance with their position.

**Q:** *We have live-in attendants who provide care (activities of daily living) to our clients in their homes over extended periods of time. I wanted to confirm that unless there is an agreement to exclude a defined period of sleep & breaks/meal times from hours worked, we owe for that time (compensable), if the employee is “engaged to wait” or interrupted from personal activities. Is that correct?*

**And if they are completely relieved from duty and able to use the time for personal reasons (i.e., run personal errands), that time isn’t considered time worked. Is this interpretation correct? This question came up because of the reversal decision on the FLSA Companionship Exemption Rule and I understand that the regulations concerning hours worked didn’t change.**

**A:** The current status of the companionship exemption is outlined in the official U.S. Department of Labor (DOL) guidance found at [www.dol.gov/whd/homecare/litigation.htm](http://www.dol.gov/whd/homecare/litigation.htm). The most important part of that guidance relating to timelines is the part that reads: “Through December 31, 2015, the Department is in the second phase of its previously announced time-limited non-enforcement policy. As of January 1, 2016, we will continue to provide employers technical assistance for coming into compliance with the Rule. As with all of our enforcement actions, employers and workers can expect that we will strategically use our enforcement resources, including

complaint-based and agency-initiated investigations, to achieve compliance with these new important protections” Thus, beginning January 1, 2016, DOL will begin enforcing full compliance with the new regulation, which basically states that the companionship exemption does not apply to employees of third-party providers. You correctly note that the regulations on hours worked did not change. Under those regulations, if an employee's shift is set to last 24 hours or longer, the employee and employer may agree to exclude from work time a reasonable amount for sleeping (no more than eight hours), as well as meal breaks (see [www.twc.state.tx.us/news/efte/wh\\_part785.html#785\\_22](http://www.twc.state.tx.us/news/efte/wh_part785.html#785_22)). Time off during a day during which the employee is effectively relieved of duties and is able to use the time for personal affairs is also not work time. Time spent waiting for duties to be assigned, during which time the employee is waiting to be engaged in work or waiting for instructions and cannot engage in normal personal activities, is work time.

**Q:** *We have an employee who was off work on workers compensation leave for six months due to a broken wrist. During this same time period, he complained about having a shoulder injury. The insurance company denied his claim that the shoulder injury was related to the wrist injury. In December 2015, he was medically cleared to return to full duties with no restrictions. Via the company grapevine, the owner heard a rumor that this same employee might seek to find a way to go back off on a workers compensation leave, claiming he re-hurt the shoulder. To avoid this risk, the owner has asked that I send a note to this specific employee stating he is not to lift anything heavier than a specific weight (e.g., 5 or 10 pounds). And, if he does and he re-injures the*

*shoulder, then the company can claim he lifted a weight that was not sanctioned by the company. While the owner's idea has some merit, I see a number of pitfalls and this is where I would like your input. Specifically, if we restrict his lifting to a certain weight and he unknowingly lifts something more than that, he might be able to argue the employer did not provide any adequate way to check weights before lifting items. Given he has medical clearance from the carrier to return to full duties with no restrictions, if the company now restricts only his job duties out of concern (not medical fact) and this causes him a loss of income, I worry that the company might be vulnerable to a mistreatment/unfair treatment claim. Am I making too big a deal out of this? Can the employer do this sort of action (i.e., setting a lifting limit for one employee) without worries of any liability risk?*

**A:** It is understandable that you would be concerned about an employee who, shall we say, may be unduly prone to further “injuries.” The following thoughts come to mind:

1. A certain amount of risk and unfairness is inherent in the current system of workers' compensation. If an employee is determined to ride the system, it is practically impossible to prevent it.
2. About the most that a company can do is secure a good workers' comp provider that strikes the right balance between expediting claims and passing along costs to the employer on the one hand, and being vigilant and willing to control unjustified claims on the other; maintain a clean, safe, and healthy workplace that is fully compliant with OSHA standards and the best practices for the industry;

and adhere to guidelines for disability-related laws such as the Americans with Disabilities Act (ADA).

3. After controlling those controllable things, the employer is left with whatever uncontrollable things arise, such as freak accidents, wrongful acts of others, and employees who for some sad reason known only to themselves decide to try to ride the system.
4. All that having been said, and to address the issues raised by the owner, telling one employee to observe weight restrictions in the absence of medical advice would stick out too much and be too easy to use as evidence that the company has some kind of animus toward the employee because he had earlier filed a workers' comp claim. That would particularly be the case if the weight restrictions result in a realignment of duties that leads to a reduction in pay. The reduction in pay could be viewed as a tangible adverse employment action that would be evidence of the company's intent to create a hostile work environment for him.
5. The law would not prevent the company from meeting with the employee (one person to lead the discussion, and another present to be a witness) and discussing the report of a possible shoulder injury. Document what the employee says about the report that came to the company's attention. Explain the question in terms of the company's concern for the employee's well-being and its desire to help the employee avoid further injuries. If a need for accommodation becomes apparent, make the

accommodation as long as it would be feasible without creating an undue hardship for the company (to lower the risk of an ADA claim).

6. Ensure that the employee understands that the company will be watching out for his safety and that it is up to him to immediately alert a supervisor if a job task leads to a potential problem.
7. With a safe workplace, proper accommodations for known problems, and workers' compensation coverage, there is nothing more that a company can do. The worst that can happen is that the employee might claim a further injury, in which case the company is already protected by its workers' comp coverage. The employee certainly could not file a successful lawsuit faulting the company for allowing him to return to work and engage in activities that he says he can do, and that are consistent with any known medical restrictions. 

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# UI & You: 16 Tips for Handling Unemployment Insurance Cases in 2016



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It's a new year, and while unemployment insurance (UI) cases are surely one of the last things employers want to think about as they plan for the year ahead, many employers may find themselves in the unenviable situation of having to handle a UI claim in 2016. While the best defense against an unemployment claim is to never have one in the first place, some job separations are simply unavoidable.

The following tips will provide some guidance and assistance to those employers navigating their way through a claim.

**1.** Remember the number 14.

Deadlines are very important when it comes to UI claims. The most common deadline in a unemployment claim is 14 days, measured from the date a document was mailed to the party, and not from the date the party received

it. Not responding in a timely manner to a deadline is the easiest way for an employer to lose a UI case. For more information about timeliness: [www.twc.state.tx.us/news/efte/ui\\_law\\_claim\\_notices.html](http://www.twc.state.tx.us/news/efte/ui_law_claim_notices.html)

**2.** If you fax a response, appeal, or other time-sensitive document to the Texas Workforce Commission (TWC), don't wait until the last day to do it. And if you do, stay at the fax machine – do not walk away – until you receive confirmation of a successful transmission. TWC fax machines have been known to be very busy. Keep a copy of the fax confirmation sheet.

**3.** It's all about the base period. Whether employers will bear financial responsibility for a claim depends on whether or not the employer reported wages for the claimant during the base

period of the claim – a period of 4 calendar quarters measured backward in time from when the claim was filed. If you are not a base period employer, you have no financial liability in a claim, and your stress level will probably decrease. Learn more about the base period here: [www.twc.state.tx.us/news/efte/ui\\_law\\_claim\\_notices.html#baseperiod](http://www.twc.state.tx.us/news/efte/ui_law_claim_notices.html#baseperiod).

**4.** If you choose it, you must prove it. The party who initiated the job separation – whether employer or claimant – has the burden of proof when it comes to a UI claim. This means that in cases of a discharge initiated by the employer, the employer must prove that the claimant was discharged for misconduct connected with the work in order to prevail on the claim. For more information about misconduct visit: [www.twc.state.tx.us/news/efte/ui\\_law\\_qualification\\_issues.html#dq-mc](http://www.twc.state.tx.us/news/efte/ui_law_qualification_issues.html#dq-mc).

**5.** Tip the scales in your favor. A UI case is not the same as a criminal case that must be proved “beyond a reasonable doubt.” A party just needs to show that it was more likely than not that the event in question happened. That means that employers should provide TWC with all the evidence they have to support their position. It's better to submit more information and not use it, than to really need something and not have it. This is your story, make sure you tell it.

**6.** Use the best evidence. In trying to prove misconduct, employers should not simply describe evidence they reviewed and have available, such as videos, photographs, audio recordings or documents. Employers should provide copies of these videos, photos, recordings, etc. to TWC if this evidence supports the employer's position. Remember that any evidence submitted to a hearing officer for use in an appeal hearing must also be provided to the opposing party.

**7.** If using color photos as evidence, mail – do not fax – good quality color copies to TWC. Employers who fax copies of photos usually learn at a UI hearing that the image quality substantially deteriorated. Most faxed copies end up completely illegible and unusable.

**8.** Place important dates, such as appeal deadlines and hearing dates, on a calendar accurately. Remember that failure to meet a deadline or appear at a hearing, because the employer noted it on the wrong date or at the wrong time, is an easy way for an employer to lose a case. To learn more about appeal hearings, see: [www.twc.state.tx.us/news/efte/ui-law\\_the\\_claim\\_and\\_appeal\\_process.html#ui-at](http://www.twc.state.tx.us/news/efte/ui-law_the_claim_and_appeal_process.html#ui-at).

**9.** Check your mail, even when you're not at work. In many small businesses, business owners trust only themselves to check the mail. This means that in their absence – when they are on vacation or out ill, for example – the company's mail will not be collected or opened. It's important to assign someone to open or handle the mail, if the owner will be out of the office, to ensure that TWC correspondence is timely processed. There is no good cause exception to the timeliness rules, which means that it doesn't matter that the business owner had a really good reason for being out of the office and responding late. Remember #1 above.

**10.** Review the hearing packet – all of it. When a party appeals a claim, an appeal hearing is scheduled and a hearing packet is mailed to the parties. The hearing packet contains very important instructions for parties, as well as important case information and documents. If employers want to be prepared for the upcoming appeal tribunal hearing, they should read the entire hearing packet.

**11.** Make your firsthand witnesses available to testify at an appeal hearing. This is fully explained in the hearing instructions sent to the parties, but many employers fail to read them. See #10. Firsthand witnesses are those who saw or heard what happened using their own eyes and ears. Written statements are not given the same weight as firsthand testimony, under oath, and subject to cross examination. Secondhand hearsay testimony is usually insufficient to overcome a claimant's firsthand denial of wrongdoing.

**12.** Prepare witnesses for a call from TWC. The hearing officer should not be cold-calling witnesses at an appeal hearing. If the employer plans to have witnesses participate in a hearing, and these witnesses will not be testifying from the same location as the employer, the witnesses should be informed to expect a call from an unknown or unidentified number on the appropriate date and time. Witnesses do not need to be in the same room, they just need to be available by phone.

**13.** Ensure that you have a working phone when participating in a hearing. If using a cell phone, make sure that the reception is good, that the phone is fully charged or plugged in, and that the cell phone bill is paid. If using an office phone, ensure that the receptionist is aware that a hearing officer will be calling. Ironically, employers have lost cases, due to non-participation, when

well-meaning receptionists refused to patch hearing officers through to awaiting employers. Apparently the receptionists were told that these employers were going to be busy on a phone conference and shouldn't be disturbed.

**14.** Don't count on getting a second hearing if you've already had one. The appeal tribunal hearing is the first – and possibly only – opportunity that a party gets to present its most complete case. If an employer leaves out some evidence at the hearing and later offers to present it, there is no guarantee that the Commission will grant another hearing. This is one time when employers should put all their eggs in one basket.

**15.** Just because you won, doesn't mean you're done. Keep checking the mail for TWC correspondence even after a victory. Because the claimant has the right to appeal a disqualification, it's a good idea to continue to be vigilant of the mail and be on the lookout for either a hearing notice or an acknowledgement that the claimant has filed an appeal to the Commission. Remember #9 above.

**16.** Call our office first. Before taking serious adverse action – such as firing an employee – call the Office of the Commissioner Representing Employers for some guidance. We have staff attorneys available to provide guidance and information on UI cases. The number is **1-800-832-9394**.

Confronting the year ahead and meeting all the challenges that employers face as they manage their employees can be a daunting task. And while the prospect of having to defend an unemployment claim is never welcome, keeping these 16 tips in mind for 2016 will help employers prevent costly and avoidable mistakes. 🇺🇸

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# Texas Business Today

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