

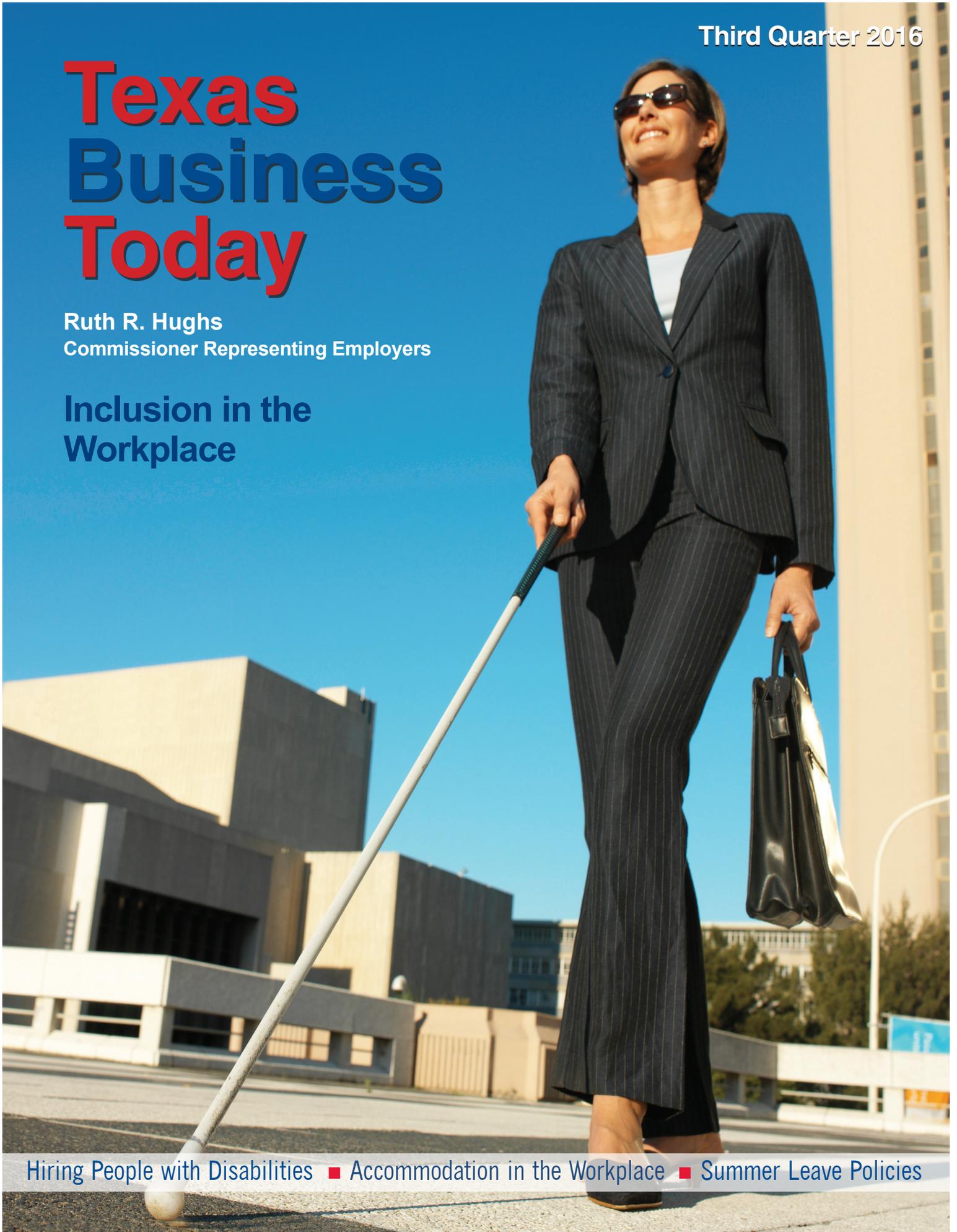
Third Quarter 2016

Texas Business Today

Ruth R. Hughs
Commissioner Representing Employers

Inclusion in the
Workplace

Hiring People with Disabilities ■ Accommodation in the Workplace ■ Summer Leave Policies



TWC Welcomes DARS!

Commissioner's Corner

Dear Texas Employer,

Welcome to our third quarter issue of *Texas Business Today*! We have been very busy this quarter with the upcoming Department of Assistive and Rehabilitation Services Program (DARS) transition, Tri-Agency meetings, Texas Business Conferences, preparation of our Legislative Appropriations Requests, and staying up-to-date on Unemployment Insurance (UI) Policy trends.

Last quarter, the commissioners from the Texas Education Agency, the Texas Higher Education Coordinating Board, and the Texas Workforce Commission (TWC) traveled the state to assess the needs of employers and other workforce related issues. This was in response to Governor Abbott's Tri-Agency Workforce Initiative. I want to thank all the community leaders for participating in the many successful conversations that led to learning what is working best for our employers, and what we can do to improve their interactions with our system. We are looking forward to participating in the *Texas Education Workforce Summit* which is being held in response to the Governor's charge for the Tri-Agency Initiative.

In June, I had the privilege of attending the 2016 National UI Issues Conference. This conference is hosted by the National Foundation for Unemployment Compensation and Workers' Compensation which is the only national association representing the interests of the business community on unemployment insurance issues. This conference



Commissioner Representing Employers Staff: Top left to right—Lisa Ried, Mario R. Hernandez, Commissioner Ruth Hughs, Elsa Ramos, and Bonnie Fletcher. Bottom left to right—Velissa Chapa, William T. Simmons, and Brian Owens.

provides a great perspective on the ongoing evolution of the UI system by promoting productive dialogue between the stakeholders about administrative best practices, integrity, reemployment and long-term solvency of the program. The conference highlighted the strength of our system here in Texas.

On September 1st, some programs from DARS will officially join TWC. We have been working tirelessly to ensure this smooth transition and are looking forward to officially having these programs at TWC. I am grateful that our agency will be gaining the expertise and talents that each new team member will provide. This merger will improve talent development services to employers and promote diversity and inclusion in the workplace. We strive to empower all Texans with the skills and resources they need to prosper.

TWC will continue to improve employment outcomes for people with disabilities. Employers that hire people with disabilities gain motivated workers and promote an inclusive culture. A diverse workforce gives you a competitive advantage by adding new ideas, view

points, and approaches to solving your business challenges. If you are interested in hiring someone with a disability, please contact your local Workforce Solutions office.

In this issue of *Texas Business Today*, you will find some helpful articles discussing the benefits of hiring people with disabilities, reasonable accommodations in the workplace, summer leave policies, and articles with the latest updates on U.S. Department of Labor (DOL) rules.

Finally, we wanted to share a photo of our team and officially welcome DARS to TWC. We look forward to working with you to help Texas continue to be the best state in which to do business! 🇹🇽

Sincerely,

Ruth R. Hughs
Texas Workforce Commission
Commissioner Representing Employers



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, the Unemployment Claim and Appeal Process, and Texas and Federal Wage and Hour Laws.

The non-refundable registration fee is \$125. Texas Workforce Commission and Texas Society for Human Resources Management (SHRM) State Council are now offering SHRM and Human Resources Certification Institute (HRCI) recertification credits targeted specifically for Human Resources professionals attending this conference. For more information on how to apply for these Professional Development Credits upon attending the Texas Business Conference, please visit the Texas SHRM website. Continuing Education Credit (six hours) is available for CPAs. General Professional Credit is also available.

2016 CONFERENCE DATES

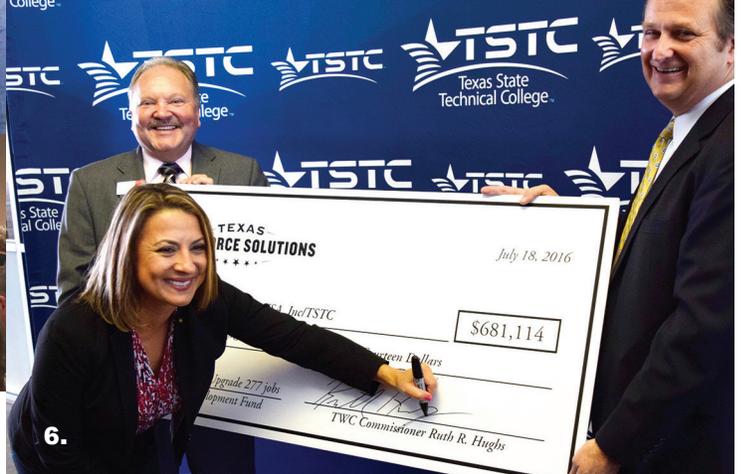
- Fredericksburg..... August 5**
- Abilene..... August 19**
- The Woodlands.....September 1**
- Midland..... September 16**
- MesquiteSeptember 30**



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

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Making Connections Across the State



1. Visiting with the Northeast Texas Economic Alliance.
2. Commissioner Hughs meets with employers attending the Texas Business Conference in College Station.
3. Presenting at the Accenture Leadership Summit in Austin.
4. Speaking at the Rural Texas Challenge on a panel about how to strengthen the economy through entrepreneurship and small business development.
5. Addressing the attendees at the Texas Business Conference in Amarillo.
6. Skills grant presentation with Coca-Cola and Texas State Technical College in Waco.
7. Meeting with the local community leaders in Amarillo.



Inclusion Works for Texas Employers

The Texas Governor's Committee on People with Disabilities (GCPD) is looking ahead to October and Texas' observance of National Disability Employment Awareness Month (NDEAM), a nationwide campaign celebrating the talents workers with disabilities bring to our workplaces. The GCPD's Lex Frieden Employment Awards ceremony will be held October 27th by the Houston Mayor's Committee for the Employment of People with Disabilities and the Greater Houston Business Leadership Network. They are seeking nominations to recognize employers who have consistently gone above and beyond the legal requirements to ensure full inclusion of people with disabilities in the workplace. You can read Submission Guidelines and find entry forms on the Governor's Committee on People with Disabilities website.

Awards categories include:

Small, Medium, Large, and Non-Profit Employers
Entrepreneurship

The Governor's Trophy, the highest honor to an individual for lifetime achievement in support of Texans with disabilities

There is NO FEE for submissions. Self-nominations for employers are encouraged. The deadline for submissions is August 12, 2016.

The GCPD is taking orders for free copies of the Texas NDEAM poster, featuring an original work of art from an artist with a disability and displaying the national NDEAM theme from the Department of Labor's **Office of Disability Employment Policy**. This year's theme, "#InclusionWorks" is the first to include a hash tag to stimulate discussion on social media about the many ways to include people with disabilities in the workplace.

"By fostering a culture that embraces individual differences, including disabilities, businesses profit by having a wider variety of tools to confront challenges," said Jennifer Sheehy, U.S Deputy Assistant Secretary of Labor for Disability Employment Policy. "Our nation's most successful companies proudly make inclusion a core value. They know that inclusion works. It works for workers, it works for employers, it works for opportunity, and it works for innovation."

Last month, the Governor's Committee announced the winner of the 2016 NDEAM Texas Poster Art competition. Denise R. Tidwell of Ingleside, TX, was selected for her pastel drawing titled "Butterfly," which depicts a young girl with colorful butterflies on her head. The young girl's hands are signing "butterfly" in American Sign Language.

*Ron Lucey, Executive Director,
Texas Governor's Committee on People with Disabilities*



2016 Texas NDEAM Poster Contest Winner "Butterfly"

The poster, designed by **Apple Specialty Advertising** in San Antonio, will be distributed to businesses and organizations throughout Texas and posted on **GCPD's NDEAM website**. Visit the site to see previous winners.

To request a free poster

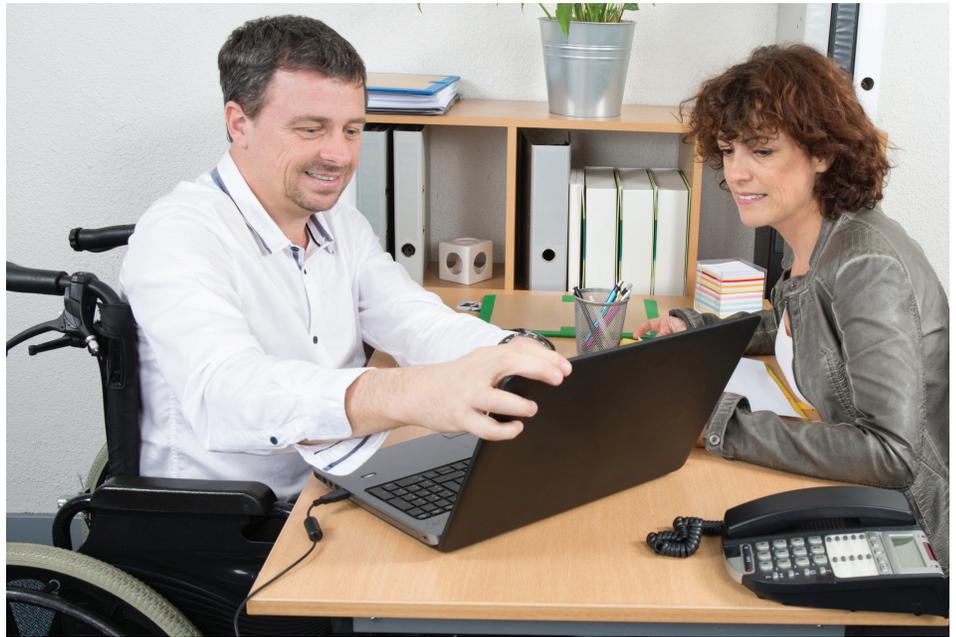
Email GCPD@gov.texas.gov
or call 512-463-5739.

The Benefits of Hiring People with Disabilities

You may have noticed that in movies made before 1970, people carried their suitcases. This is because suitcases did not have wheels before then. However, thanks to the brilliance of Mr. Bernard Sadow, we now have access to this invention that makes traveling easier for everyone. What was first a solution to a problem has become a wonderful accommodation benefitting people worldwide. The same is true for Siri on our iPhones; it was developed to assist disabled users and is now a tool used by the masses.

These technological advancements serve as excellent examples of how the need for accommodation can lead to positive change. In fact, these changes often yield benefits beyond our expectations. Hiring people with disabilities can allow companies to capitalize on opportunities that will benefit the bottom line. This article will highlight the benefits involved, as well as provide information on various resources, tax incentives, and tools available for employers.

The benefits of hiring people with disabilities are significant, and one major benefit is the attraction of new markets. Roughly 18 percent of the American population consists of potential customers with disabilities. According to the U.S. Department of Labor (DOL) this equates to about \$200 billion in discretionary spending power, not including the customer's family or friends. This significant market segment remains untapped by many businesses. If a business employs workers from this



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talented pool and makes its facilities accessible, it will attract a vital customer base, as easily accessible locations can benefit all.

In addition, employers need innovative ideas in order to grow, and studies show that employing workers with disabilities allows for a competitive advantage in this respect. It increases diversity, which leads to an influx of new ideas, perspectives, and solutions. This can lead companies to make business practices more efficient and effective, resulting in an overall improvement of the work environment.

Employers also value stability. Various statistics show that hiring people with disabilities increases worker retention, which generates longer tenures and reduces training costs. In addition, this workforce is adaptive and flexible, which often elicits lower absenteeism rates. Studies have also shown that the

quality of the work does not suffer, as people with disabilities have nearly identical job performance ratings. As an added benefit, companies have found that providing for accommodations promotes an inclusive culture that leads to improved morale.

Despite these benefits, employers still shy away due to the perceived costs associated with accommodating. However, the cost is not as expensive as one might think. Most accommodations are not costly and can provide a great return on your investment. Examples of low cost common accommodations include dress code allowances, more breaks, or flexible scheduling. The DOL's Employment Training Administration even offers grants to employers to help with training and employing workers with disabilities: www.doleta.gov/grants/.

Various tax incentives exist to help minimize any financial impact

even further. The IRS provides several ways to assist employers with costs, both in terms of credits as well as deductions. These include: 1) the Disabled Access Credit, 2) the Work Opportunity Tax Credit (WOTC) (which includes an extension credit for hiring veterans within one year of leaving the military), and 3) the Architectural Barrier Removal Tax Deduction. More information on these incentives is available here: www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities. The TWC website also provides additional information on the WOTC: www.twc.state.tx.us/businesses/work-opportunity-tax-credit.

Federal regulations prohibit disability discrimination involving any aspect of employment, from the job posting all the way to termination of employment: www.eeoc.gov/laws/types/disability.cfm. Actively hiring people with disabilities can help to prevent violation of these regulations and reduce litigation costs, as long as the process is done properly. Various free services exist to assist employers in this area. American Job Centers offers free assistance with job postings, recruitment, and training programs: www.careeronestop.org/resourcesfor/business/business.aspx. The Employer Assistance and Resource Network (<http://askearn.org/>) also provides free resources for hiring and retaining workers with disabilities.

Employers have access to databases listing individuals with disabilities who are seeking employment. The Workforce Recruitment Program for College Students with Disabilities (www.dol.gov/odep/wrp)

provides a free database consisting of qualified students looking for work. The Talent Acquisition Portal (<https://tapability.org/>) is a paid service providing access to a large talent pool of workers with disabilities and provides a system for employers to post open positions.

Additional programs exist to assist employers from beginning to end. DARS provides outreach, technical assistance, training, and help with recruiting, hiring, and retention of people with disabilities: www.dars.state.tx.us/services/servicesforbusiness.shtml. Effective September 1, 2016, these services will be provided by TWC. The Americans With Disabilities Act (ADA) National Network (<https://adata.org/>) provides information on the ADA as well as training and technical assistance, similar to that of the Disability and Business Technical Assistance Centers: www.disability.gov/resource/disability-business-technical-assistance-centers-dbtacs-the-national-network-of-americans-with-disabilities-act-ada-centers/.

For employers looking to hire disabled veterans, the National Employment Team of the Council of State Administrators of Vocational Rehabilitation (www.rehabnetwork.org/) offers employers a point of contact to connect with qualified applicants in their area. The U.S. Department of Veterans Affairs provides a Veterans Employment Center database to search for qualified applicants: www.vets.gov/employment/employers/. Finally, the DOL's Veterans Employment and Training Service (www.dol.gov/vets/hire/index.htm) provides assistance in finding qualified veterans and information on

available apprenticeships. The employer toolkit (www.dol.gov/vets/ahaw/) provides hiring and recruiting strategies for veterans, including guidance on policy and compliance.

Once employers leave assumptions at the door and begin to focus more on ability over disability, they can see the benefits of employing people from this valuable workforce. It is an opportunity for growth that, if embraced, could improve business as well as quality of life. Luckily, employers are not alone; the fantastic tools and resources mentioned above can help guide employers towards positive change. 🇺🇸

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

Reasonable Accommodation in the Workplace

Over 820,000 of the more than 13 million Texans in the workforce in 2014 had a disability (*June 2016 Update, Texas Workforce Investment Council*). The ADA protects the rights of people with disabilities by eliminating barriers to their participation in many aspects of living and working in America. Many Texas employers understand that employing people with disabilities contributes to a diverse workforce and can give businesses a competitive edge. However, employers may be unclear about their duties and responsibilities when complying with the ADA. Whether the ADA requires employers to take certain actions depends on the number of employees that an employer has: less than 15, 15 or more but less than 50, and 50 or more.

Less than 15 employees:

If an employer has fewer than 15 employees, it is not covered by any anti-discrimination laws related to disability. That means that the employer is not legally required to hold a job, provide a certain amount of leave, modify the job duties, or change the employee's schedule because of an employee's disability. The employer is free to handle an employment situation with an individual with a disability in any way the employer deems appropriate.

However, if an employer's policies contain provisions that would be applied to any and all employees, then an employer should abide by those policies and allow all employees the benefit of the policies.

15 to 49 employees:

If an employer has at least 15 employees but less than 50, then it is covered by the ADA, contained in Title 42 of The Public Health and Welfare Act, Chapter 126 - Equal Opportunity For Individuals With Disabilities. The complete text of the regulation can be found here: www.ada.gov/pubs/adastatute08.htm.

Simply put, the ADA prohibits covered employers from discriminating against people with disabilities in the full range of employment-related activities, from recruitment to advancement, to pay and benefits. To that end, the ADA requires employers to reasonably accommodate the limitations of a qualified individual with a disability unless doing so would impose an undue hardship on the employer. But what is reasonable accommodation?

The Job Accommodation Network (JAN), a service of the Office of Disability Employment Policy of the

DOL, provides that, "A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. The ADA requires reasonable accommodation in three aspects of employment: **1)** to ensure equal opportunity in the application process, **2)** to enable a qualified individual with a disability to perform the essential functions of a job, and **3)** to enable an employee with a disability to enjoy equal benefits and privileges of employment. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials or policies; providing qualified readers or interpreters; and reassignment to a vacant position."

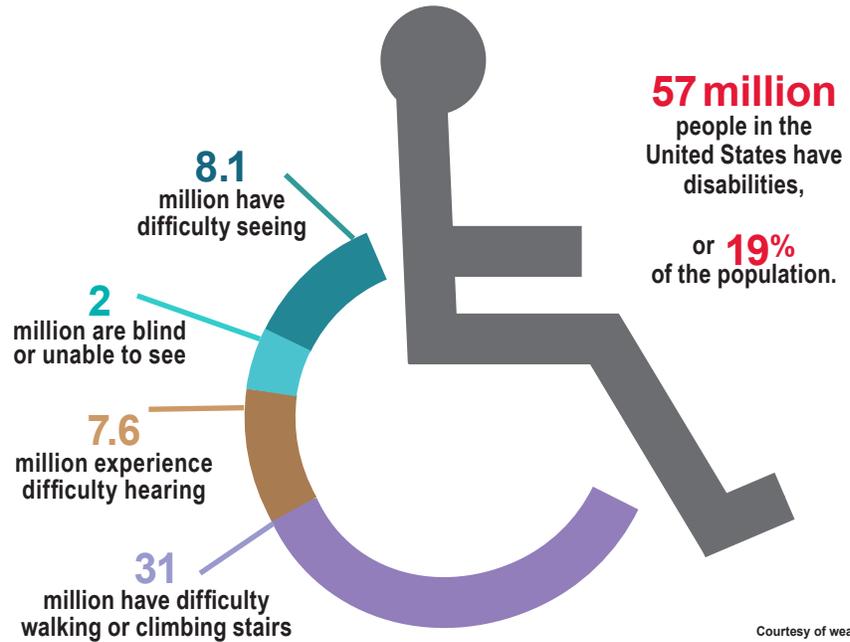


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In addition to the examples listed, permitting the use of accrued paid leave, or unpaid leave, is also a form of reasonable accommodation when necessitated by an employee's disability. Under certain circumstances, employers may consider modifying their policies and granting more time off than initially allowed as a means of accommodating a need for additional leave. There is no general rule regarding how much leave is considered reasonable under the ADA. Each case is considered individually on its own facts. To read more about the Equal Employment Opportunity Commission's (EEOC) position on employer leave as a reasonable accommodation, please see: www.eeoc.gov/eeoc/publications/ada-leave.cfm.

Employers have the right to require employees to provide medical documentation from a healthcare provider outlining any medical restrictions on their ability to work. By reviewing this documentation, employers can better assess their ability to reasonably accommodate employees' restrictions in an effort to enable employees to continue working. Employers can learn more about their obligations under the ADA with

American Disabilities



respect to medical exams here: www.eeoc.gov/laws/types/disability.cfm.

While providing reasonable accommodation may seem a bit daunting at first, and a common misconception is that doing so would be quite costly, the DOL emphasizes that providing most accommodations for employees with disabilities is not expensive. More information about the advantages to hiring individuals with disabilities is found in the article "The Benefits of Hiring People with Disabilities" in this issue. This DOL

fact sheet clears up other common misconceptions about the ADA and employment: www.dol.gov/odep/pubs/fact/ada.htm

In addition, here are more available resources for employers:

1. JAN provides an *Employers' Practical Guide To Reasonable Accommodation Under The Americans With Disabilities Act*, which contains information about ADA compliance in the workplace, including helpful examples. The guide can be accessed here: <https://askjan.org/Erguide/ErGuide.pdf>.
2. The EEOC provides guidance for employers regarding many aspects of the ADA. For additional information about reasonable accommodation under the ADA, visit: www.eeoc.gov/facts/ada17.html and www.eeoc.gov/policy/docs/accommodation.html.
3. JAN also provides a free consultant service at 800-526-7234. Employers who are



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having difficulty identifying a reasonable accommodation may take advantage of this service to help them with individualized accommodations.

50 or more employees:

Employers with at least 50 employees are covered by the Family Medical Leave Act (FMLA) in addition to the ADA. The FMLA requires employers to provide up to 12 weeks of job-protected leave for absences due to qualifying medical conditions, or for certain specified family reasons. A qualifying medical condition could be classified as a disability for purposes of the ADA. Because

reasonable accommodation includes providing a reasonable amount of leave, FMLA leave could be considered as part of an employer's reasonable accommodation. For more information about the interplay of ADA and FMLA please review: www.eeoc.gov/policy/docs/fmlaada.html.

Conclusion:

The following steps summarize the procedure to follow when considering reasonable accommodation: **1)** evaluate whether the employee or applicant is qualified to do the job with or without reasonable accommodation,

2) engage in an interactive process to determine possible accommodations, **3)** obtain medical documentation to assess and confirm limitation and need, **4)** determine if the employer can reasonably accommodate the request.

Ultimately, when hiring and employing individuals with disabilities, awareness and knowledge of the relevant laws and available resources will aid employers in their quest to create a more diverse and inclusive workforce. 🇺🇸

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

Hiring Red, White & You!™ Statewide Hiring Fair



Save the Date
NOV 10
2016

Join the Texas Workforce Commission and Texas Workforce Solutions in partnership with Texas Medical Center for the 5th annual Hiring Red, White & You! Statewide Hiring Fair to connect veterans, service members and their spouses to Texas employers.

No cost to veterans, participants or employers.

www.texasworkforce.org/hrwy



Summer Leave Policies

By this point in the year, many employees have already formulated plans for time off and will go on vacation soon, or have taken some vacation time already. This article will highlight some of the important legal issues to be aware of when scheduling time off or handling pay and leave issues.

1. Time off from work is an optional benefit of employment, and the time off does not need to be paid.
2. Employers may require a certain amount of advance notice before a vacation, or vacation pay, will be approved.
3. Vacation time may be limited to one or two weeks to minimize staffing issues.
4. A company does not have to grant time off—it is legal to condition time off on it being mutually convenient for the employee *and* the company.
5. Extensions of time off may be denied or granted, but be as consistent as possible.
6. Unauthorized time off is usually handled as a policy violation under the company's standard corrective action procedures.
7. If an employee takes more time off than they have in their accrued leave bank, the company may either let that extra time off be unpaid, or else pay it, in which case the company effectively gives the employee a vacation pay advance. Via company policy, an employer can either take that paid leave advance from future accruals, or else let it "ride" and take the value of the vacation pay advance out of



the final paycheck. *Caution:* the Texas Payday Law requires the employer to have the employee's written authorization to make such a deduction—see item 11 in the sample wage deduction authorization agreement in the book *Especialty for Texas Employers* at www.twc.state.tx.us/news/efte/wage_deduction_authorization_agreement.html.

8. How to handle benefit accruals while an employee is on vacation is a matter of company policy. Since most vacations are relatively short, there is no reason not to let regular benefits accrue during the vacation period.
9. Paid leave promised in a written policy is an enforceable part of the wage agreement under the Texas Payday Law. Be sure to follow company policy exactly when applying paid leave or reconciling paid leave advances.

10. If an employee performs any work during the vacation (answering calls, e-mails, or texts from a supervisor, and the like), pay the employee for that time and do not apply paid leave to it.
11. If an employee reports back from vacation unfit for duty, that is something to handle through the corrective action process.
12. For more on leave policies, see www.twc.state.tx.us/news/efte/vacation_and_sick_leave.html. 🇹🇽

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

What Does Undue Hardship Mean for Employers?



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Discrimination in the workplace can be a very serious issue for all employers. As it stands, an employer is prohibited from taking adverse employment action (demoting, firing, cuts in pay, etc.) against employees that are protected under various discrimination laws. In particular, non-compliance with the ADA can result in undesirable consequences for employers. This article will explore the limits of the ADA and how far employers are expected to go in their efforts to accommodate an employee with a disability.

Setting the Groundwork

As mentioned elsewhere in this issue, the ADA provides that an employer who has 15 or more employees must provide a reasonable accommodation to an employee who has a disability unless the accommodation creates an undue hardship on the employer. The phrase “undue hardship” is important for employers to grasp because it represents the limit of accommodation that they are

responsible for under the ADA. For a better look at what undue hardship means, a useful reference is the law itself.

A review of the ADA (<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section12111&num=0&edition=prelim>) reveals that undue hardship is defined as “an action requiring significant difficulty and expense, when considered in light of” several factors. Those factors include the cost of the accommodation, the financial resources of the employer, and the size of the company. However, noticeably absent from the law is any detailed information as to what specific situations would qualify as an undue hardship for the employer. Fortunately, the law itself is not the only resource available to employers attempting to understand undue hardship. The Equal Employment Opportunity Commission (EEOC) and court rulings are also useful sources to consider when approaching the undue hardship topic as well.

The Equal Employment Opportunity Commission (EEOC)

The EEOC is one of the main government agencies responsible for enforcing the ADA. Accordingly, employers may consult EEOC guidance and fact sheets to gain a better handle on how to identify an undue hardship situation.

First, the EEOC takes the position that before any conclusion can be reached on undue hardship, the employer must make an individualized assessment of the accommodation being sought and how it would create significant difficulty or expense. In other words, the EEOC has said that undue hardship situations should be treated on a case-by-case basis. This means that no two undue hardship scenarios will be the same. Therefore, if an employer is going to claim that an accommodation creates an undue hardship, it will need more than just generalizations to substantiate its claim.

Next, the EEOC has outlined some scenarios that would not qualify as an undue hardship. For instance, an employer may not use employees’ or customers’ “fears or prejudices” about the individual’s disability as the basis for claiming undue hardship. Nor can the employer use low employee morale as a significant reason for its undue hardship claim. Additionally, if the employer is going to use “significant cost” as its foundation for undue hardship, it will need to show more than just its own internal costs of providing an accommodation. Indeed, the EEOC has held that the employer should also consider outside funding

in the form of tax credits, funding from a state rehabilitation agency, and whether it is eligible for deductions to offset costs before declaring undue hardship. Also, keep in mind that the larger the employer, the more challenging it will be to show undue hardship as it will be presumed that larger employers have access to larger amounts of resources.

While the EEOC has been diligent in expressing what kind of activity *does not* constitute undue hardship, it has also supplied employers with scenarios that *do* establish an undue hardship. For example, the EEOC has provided guidance showing that an undue hardship exists if the accommodation being sought would have the effect of preventing other employees from doing their jobs. EEOC guidelines also state that an undue hardship may exist when a critical or high ranking employee cannot provide the employer with a fixed date of return from his or her medical leave. For more information on this and other fact patterns from the EEOC please visit: www.eeoc.gov/policy/docs/accommodation.html.

Guidance from the Judiciary

In addition to the EEOC, the courts have also offered their wisdom on key aspects of the ADA on undue hardship. If an employer finds themselves in an ADA lawsuit, it is important to know how courts will analyze such a case.

In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the U.S. Supreme Court held that the burden of showing that an accommodation is reasonable lies with the individual with the disability. Once that requirement is met, the burden then shifts to the employer to show “case-specific evidence” proving an undue hardship exists. Such evidence may include



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documentation showing lost sales, the need for the employer to defer projects/assignments, an increase in customer complaints, lower quality of work, and so forth.

As the ADA continues to be at the forefront of discrimination issues facing employers with 15 or more employees, it appears inevitable that more decisions regarding undue hardship will be handed down from the judiciary. However, until that occurs, employers would be well advised to treat each ADA situation on a case-by-case basis.

In Conclusion

The ADA will continue to be a law that many employers grapple with in the operation of their businesses. While employers should make every effort to accommodate an employee that is experiencing a disability, the obligation is not infinite and can be excused if the accommodation creates an undue hardship on the employer.

Proving undue hardship can be

difficult and this particular area of law is still developing. However, employers that keep up with the EEOC guidance materials and ADA court cases will be in a better position to identify an instance of undue hardship should it arise. 🇺🇸

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

New Overtime Rule from the U.S. Department of Labor

Most Texas employers are covered by the nation's main wage payment law known as the Fair Labor Standards Act (FLSA), which, among other things, controls minimum wage and overtime pay for most employees of private and public employers in Texas. One of the biggest concerns employers have under the FLSA is which employees qualify as salaried employees exempt from overtime pay and which do not. For most "white collar" overtime exemptions, the employee must be paid a minimum salary and meet certain tests for the kinds of duties they perform. Those requirements have been the same since 2004.

On Monday, May 16, 2016, the *White House issued a press release* along with the DOL regarding the new minimum salary requirements for the white collar overtime pay exemptions. The DOL announcement is online at www.dol.gov/whd/overtime/final2016/. That same web page also contains links to more detailed information from DOL on the new changes.

According to that announcement, the new minimum salary for salaried exempt employees will increase from the current level of \$455 per week to the new level of \$913 per week (\$47,476 per year) starting on December 1, 2016. The DOL had originally publicized an effective date of July 1, 2016 or thereabouts, but they decided to give employers more time to prepare for the rather substantial changes. The new minimum salary for highly-compensated employees (easier test to meet for an exemption to

apply) will increase to \$134,004 per year at the same time. The new regulation also contains a procedure for automatically increasing those minimum salary levels every three years, starting on January 1, 2020, according to the same criteria that were used to establish the new salary amounts for this year. Here is what the DOL fact sheet explaining the automatic increase procedure indicates on that: "... the Department will update the standard salary level to maintain it at the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census Region [the southern U.S.], and the Department will update the HCE [highly-compensated employee] total annual compensation level to maintain it at the annual equivalent of the 90th percentile of earnings of full-time salaried workers nationwide."

The new rule provides that bonuses and commissions can constitute up to 10 percent of the required salary amount, as long as the commissions or bonuses are paid on at least a quarterly basis. Further details are explained in the DOL guidance at the following link: www.dol.gov/whd/overtime/final2016/faq.htm#N1. Accordingly, if the guaranteed salary plus commissions

and/or bonuses equal at least \$913 per week, and the salary makes up at least 90 percent of that amount, then the compensation will meet the new requirements for a salaried exempt employee.

The new regulation will not change the duties tests for the various exemption categories. Those remain the same, meaning that they will continue to apply in general to the highest-ranking employees (executive and administrative leaders within the company), or to those who have college degrees for the work they do and who usually have licenses from the state to practice their professions (learned professionals). The exemptions also continue to include outside sales representatives and computer professionals (programmers, network engineers, webmasters, and the like).



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The official definition of “highly-compensated employee” (HCE) is found in DOL regulation 29 C.F.R. §541.601(a), which is online at www.twc.state.tx.us/news/efte/wh_part541.html#541_601. Starting December 1, 2016, the HCE must receive total annual compensation of at least \$134,004, which can include salary, commissions, non-discretionary bonuses, and other non-discretionary pay (see subsection (b)(1)). The total can include a final, post-year payment if it is made within one month of the end of the year (see subsection (b)(2)). Partial years can have pro-rata amounts corresponding to the HCE minimum compensation (see subsection (b)(3)). The employee must perform at least one of the exempt duties of an executive, administrative, or professional employee (see subsection (c)). The employee’s primary duty must fall into the category of office or non-manual work (see subsection (d)).

As to which employees might fall into the category of HCE, based on the wording of 29 C.F.R. §541.601, the term would certainly include the president or CEO of a company, but could also include well-paid top managers at companies who do not necessarily have hiring and firing authority, but still supervise two or more full-time employees. Those would be department or division managers, primarily, with regard to the executive exemption. By the same token, HCE might also apply to non-supervisory employees whose non-manual duties are important enough to merit the high pay (administrative exemption). No matter what, a professional-exempt employee’s “primary duty must be the performance of work requiring advanced knowledge in a field of

science or learning customarily acquired by a prolonged course of specialized intellectual instruction.”

In the DOL’s Notice of Proposed Rulemaking (<https://www.gpo.gov/fdsys/pkg/FR-2016-05-23/pdf/2016-11754.pdf> (starting on pg. 126)), the agency included a table of occupational codes with probability codes assigned for likelihood of exemption. In general, a job category with Code 1 would be an easy one to classify as exempt with the payment of the required salary. A probability Code of 2 would be less likely, although if a Code 2 employee is also highly-compensated, the likelihood of the exemption applying would increase significantly.

There are a few interesting exceptions to the salary test for exempt employees. First, there is the “business owner” exception: an employee who is actively engaged in the management of the company and owns at least 20% of the company does not need to be paid on a salary basis (www.twc.state.tx.us/news/efte/wh_part541.html#541_101). Second, the so-called “classic professions”—doctors, lawyers, and teachers—are subject to an exemption from the salary requirement (www.twc.state.tx.us/news/efte/wh_part541.html#541_304 and www.twc.state.tx.us/news/efte/wh_part541.html#541_303). Third, administrators at educational institutions are exempt from the salary requirement if they are given the same salary as entry-level teachers at their schools (www.twc.state.tx.us/news/efte/wh_part541.html#541_600). Fourth, outside sales representatives do not have to be paid a salary (www.twc.state.tx.us/news/efte/wh_part541.html#541_500).

In view of the upcoming changes to the salary requirements, the bottom-line considerations for employers will be the following:

- Carefully analyze which positions meet the duties tests for white-collar exemptions and which do not.
- For currently exempt positions in which it will not be possible to pay the new minimum salary, those employees will become non-exempt, and the employer will have to track and pay for all hours they actually work, just as they do for the employees who are paid overtime.

Employers should also pay close attention to DOL wage and hour developments at www.dol.gov/whd/index.htm and look out for changes that might come in the duties tests for the various exemption categories. 

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

Business and Legal Briefs

The following is a quick overview of important recent employment law developments and upcoming enforcement actions:

National Labor Relations Board (NLRB) Joint Employment Rule

In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) (see <http://apps.nlr.gov/link/document.aspx/09031d4581d99106>), the NLRB held that two separate companies can be joint employers not only when they share direct control over certain employees, but also when they reserve the authority to do so. That ruling raised alarm in the employer community, particularly among companies that obtain workers from staffing firms and companies that are in a franchisor-franchisee relationship. Some members of Congress have considered legislation to block that rule, and *Browning-Ferris Industries of California, Inc.* has appealed to the U.S. Court of Appeals for the D.C. Circuit. In June 2016, the U.S. Chamber of Commerce published a position paper on this issue—the link to download the paper is at www.uschamber.com/sites/default/files/documents/files/uscc_ifa_joint_employer_standard_report.pdf.

DOL “Persuader” Rule

In last quarter’s issue, we highlighted the DOL’s recent changes to the “Persuader” rule, under which employers and their consultants / attorneys would have to report any consultations regarding how to respond to union organizing activities, even if the consultant or attorney did not have any direct contact with affected employees. We mentioned that business and attorney groups had filed federal lawsuits in Arkansas, Minnesota, and Texas. Two of those lawsuits

saw some significant activity in June 2016. First, the federal court in Minnesota ruled that although the circumstances were not right for issuing an injunction, the plaintiff law firms would likely prevail on their main argument that the revised rule exceeded the DOL’s authority under the federal statute (there is a good report on the Minnesota lawsuit at www.bna.com/court-declines-block-n57982074736/). Second, the federal court in Texas found that the evidence was strong enough to warrant an injunction against the DOL enforcing the new rule. The Texas injunction has a nationwide effect, meaning that the new rule that was to become effective on July 1, 2016, has been put on hold pending further court action. The Texas Association of Business report on this case is at <http://web.txbiz.org/news/newsarticledisplay.aspx?ArticleID=1122>. The Society for Human Resource Management has an in-depth article on this issue at www.shrm.org/legalissues/federalresources/pages/texas-court-persuader-rule.aspx. Finally, more useful guidance from the U.S. Chamber of Commerce is online at www.uschamber.com/article/dol-persuader-rule-double-jeopardy.

More on FLSA Tipped Employee Cases

In the second quarter 2016 issue of *Texas Business Today*, we highlighted the case of *Oregon Rest. & Lodging Ass’n v. Perez*, 816 F.3d 1080, 26 Wage & Hour Cas. 2d (BNA) 10 (9th Cir., Feb. 23, 2016), in which the majority held that the DOL had the authority to issue a regulation to the effect that the tipped

employee regulations, including the one restricting application and use of a tip pool, apply even to employees who are paid the full minimum wage, instead of a subminimum cash wage plus a tip credit, if they receive tips from customers. We also mentioned that the 9th Circuit decision was rejected by a district court in Utah dealing with the same tip credit issue: *Brueningsen v. Resort Express, Inc.*, 2016 U.S. Dist. LEXIS 39747 (D. Utah Mar. 24, 2016). After the *Brueningsen* decision came out, an Ohio federal district court (*Carter v. PJS of Parma, Inc.*, 2016 U.S. Dist. LEXIS 54171 [N.D. Ohio, Apr. 22, 2016]) ruled that under Ohio law, servers who receive tips from customers, but who are paid at least minimum wage, do not have to resort to the FLSA to prove their entitlement to the tips. Rather, they may prove under state law that to allow the employer to keep the tips would result in the employer’s unjust enrichment. Thus, the most important thing under such a state law or legal doctrine would be what the wage agreement provides, i.e., the wage agreement will control the outcome, in the absence of the FLSA.

Time Clock Rounding Case

Corbin v. Time Warner Entm’t-Advance/Newhouse P’ship, 821 F.3d 1069, 26 Wage & Hour Cas. 2d (BNA) 727 (9th Cir. Cal., May 2, 2016): The 9th Circuit Court of Appeals held that a time clock rounding policy did not violate 29 C.F.R. §785.48(b), as applied to call center employees paid on an hourly basis, because it was neutral on its face and resulted in time gained

and time lost averaging out to even over time. The court noted that the regulation did not intend for employers to analyze and account for every minute every day, as long as the result for the employee evens out over time. In a similar vein, the same decision held that one minute of time spent loading an auxiliary program to enable use of the timekeeping system was de minimis and, pursuant to 29 C.F.R. §785.47, did not have to be paid.

New Overtime Exemption Regulations Effective December 1, 2016

As a reminder, DOL's upcoming increase of the minimum salary for a salaried exempt employee, from \$455/week to \$913/week, will go into effect on December 1, 2016. DOL's website at www.dol.gov/whd/overtime/final2016/ supplies links to further guidelines, FAQs, and commentary regarding the new salary regulations.

New EEOC Guidance

The Equal Employment Opportunity Commission (EEOC) has issued new guidance in a couple of significant areas, and employers looking for answers may find them on the EEOC website. The EEOC has announced it will revise and update its guidance regarding national origin discrimination. Information on how to obtain the proposed guidance and how to comment on it is at www.eeoc.gov/eeoc/newsroom/release/6-2-16a.cfm.

OSHA Weighs in on Drug Testing

The Occupational Safety and Health Administration (OSHA) has issued important new guidance regarding the permissibility of mandatory drug testing after accidents involving employees.



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According to OSHA, requiring employees who have an accident or health issue as a result of work could have a chilling effect on the employees' willingness to report accidents, which in the agency's view would arguably violate the OSHA statutes. On the FAQ page for the new electronic accident reporting rule (www.osha.gov/recordkeeping/finalrule/finalrule_faq.html), OSHA has the following question and answer: "May an employer require post-incident drug testing for an employee who reports a workplace injury or illness? The rule does not prohibit drug testing of employees. It only prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and this rule would not prohibit such testing." The announcement of the final rule at www.federalregister.gov/articles/2016/05/12/2016-10443/improve-tracking-of-workplace-

[injuries-and-illnesses](#) contains many comments demonstrating how concerned OSHA is that mandatory drug testing policies could potentially violate the anti-retaliation/anti-discrimination provisions of OSHA. Employers would be well-advised to seek the advice of their own employment law counsel regarding the effect of the new OSHA rule on their drug-free workplace policies.

Workplace Safety: Texas Safety Summit

The Division of Workers' Compensation of TDI will host the 20th Annual Workplace Safety and Health Conference, the Texas Safety Summit, August 8-10 at Sheraton Austin at the Capitol, 701 East 11th St. The summit is a learning opportunity for anyone who plays a role in safeguarding Texas employees. For more information, call 512-804-4610, email safetytraining@tdi.texas.gov, or visit www.tdi.texas.gov/wc/safety/summithome.html. 

*William T. (Tommy) Simmons
Legal Counsel to
Commissioner Ruth R. Hughes*

Answers to Frequently Asked Questions from Employers

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

Q: *Our company is a tech services firm that advises client companies on the design of their internal computer networks. We had an employee who retired some time ago. He wanted to know if we could use him on a part-time basis. So we are thinking of hiring him as a contractor limiting him to 20 hours a week. Before he retired, he was the supervisor over the whole work group. My question is can we treat him as a contractor?*

A: A former employee who returns to work to do a job similar to the one he used to do would not qualify as an independent contractor. He would be just like any other worker he used to supervise, the only differences being that he would work part-time and be supervised, presumably, by someone who took his place. His work would still be directly integrated into the business of the company, and the company would still have the right to direct and control the details of his work. He would be dependent upon the company for his assignments, and your customers would view him as being associated with your company. Thus, he would really be an employee.

Q: *How long should we keep unsolicited employment applications?*

A: Unsolicited employment applications do not have to be kept for any particular amount of time. The company may discard them on any schedule that seems appropriate. For more on the legal issues involved in employment applications, see the following topic in our book *Especially*



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for Texas Employers: www.twc.state.tx.us/news/efte/job_applications.html (especially items 1 and 12).

Q: *Is the time that a non-exempt employee spends voluntarily completing training courses after hours through our online learning management system considered "hours worked" if the training is related to his/her current position but not required?*

A: If the employee is not told or instructed to take such courses, and does so in his or her own free time on a purely voluntary basis, then the time so spent would not be considered time worked. For the U.S. Department of Labor criteria regarding the compensability of training time, see the following topic in the book: www.twc.state.tx.us/news/efte/g_meetings_training.html (look at the first paragraph under "G.2. Focus on Training" toward the bottom of the page).

Q: *I attended one of your seminars recently and had a question. We had an employee who was here full time for 14 days and was terminated.*

He is requiring us to put something in writing about why we fired him. I know Texas is still an at-will state so are employers required to put in writing why an individual was fired?

A: As noted in our book *Especially for Texas Employers* at www.twc.state.tx.us/news/efte/work_separations_general.html (items 4 and 6) and at www.twc.state.tx.us/news/efte/exit_interviews_notice_of_discharge.html (all 7 items), a Texas employer is not required to give any explanation, written or otherwise, as to why it is letting an employee go. If a company chooses to give such an explanation, keep it as short and to the point as possible, and avoid anything negative unless there is an urgent and compelling reason to have something negative in there. When in doubt, leave it out.

Q: *I would like to hire an employee to fill the Fire Extinguisher Tech Position. This position requires certification from the State Fire Marshal. If we hire him, can I make it a condition of his employment that he receive his certification within 90*



days? If he does not receive the certification, this will result in termination. Can this type of termination be considered misconduct?

A: Generally, i.e., in most cases that we see of that type, if a person is hired under a requirement that he or she achieve licensure or certification within a particular period of time, or pass some kind of required test during that period, and is discharged for failing to meet that requirement, TWC will disqualify that person from unemployment benefits if they file an unemployment claim based on that work separation. All cases are highly fact-specific, and sometimes unusual facts result in unusual rulings, but in the clear majority of cases, the outcome is disqualification from benefits if the claimant was fired for failing a test or certification requirement that was a known condition of employment at the time of hire. In such cases, it usually helps the employer defend its position if the employer stays on top of the situation and gives the employee plenty of reminders about upcoming

deadlines, as well as reasonable assistance in gaining a required certification. After all, it is in the company’s best interest to get a good return on the investment it made in hiring and training that worker.

Q: *One of my construction clients has started using drug testing in situations where an employee is suspected of being drunk at work. They just had a situation where the initial screen indicated that the sample was adulterated, so the employee was asked to submit a second sample. However, the employee stormed off without giving a second sample, so the test lab told my client that no test could be done. The client has asked whether the adulterated test will be enough to show misconduct if the person files for unemployment.*

A: If I were a claim investigator looking at this case for TWC, I would pay a lot of attention to the fact that the employee failed to complete the testing process. I would be anticipating that the next thing the employer would mention, after telling me about the single

test result, is that the employer’s policy regarding testing requires employees to complete the testing process, and that failure to complete the testing process for a reason under the employee’s power to control constitutes a separate, and immediately terminable, violation of the employer’s policies. I would also expect the employer to offer two or more firsthand witnesses to the claimant’s conduct and demeanor that led to him or her being asked to undergo the test, and to the claimant’s act of storming off after the first test was done. Finally, since the employee refused to complete the drug test, this fact situation could be compared to a long-standing precedent case, *TEC v. Hughes Drilling Fluids*, 746 SW 2d 796 (CA Tyler, 1988), in Section MC 485. 46 (3) of TWC’s Appeals Policy and Precedent Manual (see www.twc.state.tx.us/files/jobseekers/appeals-policy-precedent-manual-misconduct-twc.pdf), in which a claimant’s refusal to take a drug test constituted misconduct connected with the work. 🇹🇽

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

Texas Business Today

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Telephone: 800-832-9394 • 512-463-2826

Fax: 512-463-3196 Email: employerinfo@twc.state.tx.us

www.texasworkforce.org



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