

TWC Update – Pay, Privacy, and Other Workplace Issues

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What Every Texas Employer Needs to Know

- Texas and federal laws apply to most situations.
- When two or more laws apply, the one providing the greatest protection for the employee takes precedence.
- Texas is an employment-at-will state.
- Any worker doing the work of your organization while subject to supervision is presumed to be an employee.
- Have employees sign written wage agreements.
- Any deductions from pay that are not ordered by a court or required by a law should be authorized by the employee in writing.
- Treat employees equally according to known rules and standards, and document any significant problems that arise.

Employer Liability for Workplace Illnesses

- Workers' compensation will cover illnesses acquired by employees in the course and scope of employment.
- Liability for customers or patients who allege their illnesses were caused by employees would be covered by the entity's general liability insurance policy.
- The importance of maintaining health and safety at work is what gives employers the legal basis for requiring employees to follow various guidelines under applicable laws and regulations or under company policies:
 - Facial coverings (with some exceptions);
 - Vaccinations (except for COVID-19);
 - Social distancing; and
 - Other precautions such as sanitation practices.

Health Guidelines

- If required by law, regulation, the employer's insurance company, a client's wishes, or an employer policy, an employer can legally require those who work around others to follow safety-related precautions.
- Religious objections or medical exemptions, if documented, may need to be considered for a reasonable accommodation, but if there is no accommodation that would not create an undue hardship for the employer, the employer may take whatever steps are necessary to ensure that health guidelines are followed.
- Reasonable accommodation could be reassignment to different duties, being required to work remotely, or being assigned to a different office space.

Other Health Precautions and Issues

- Social distancing may be required in a workplace, even if not required by law.
- Employers may require all employees to follow certain sanitation protocols mandated by applicable laws, regulations, guidelines, and best practices, such as gloves, hand-washing, and use of sanitizers.
- Employee objections to working with customers or patients who fail to follow recommended health guidelines should be carefully considered, since they could lead to unemployment claims or OSHA reports.

Vaccinations - General

- Vaccinations related to workplace health requirements are allowed, but keep reasonable accommodations (medical or religious) in mind if employees have a particular reason not to be vaccinated
- Important exception: COVID-19

COVID-19 Vaccination Policies

- Texas Governor Abbott's executive order (GA-40) from 2021, prohibiting all employers from requiring employees to be vaccinated, has expired.
- For public employers, SB 29 (2023) took the place of EO GA-40, so public employers cannot mandate COVID-19 vaccinations for their employees.
- Senate Bill 7 (3rd Called Special Session, 2023) took the place of EO GA-40 for private employers (effective February 6, 2024) - complete prohibition of COVID-19 vaccine requirements for private employers and of adverse action against unvaccinated employees, contractors, and applicants.

Important Exception to SBs 29 and 7

- In general, neither SB 29 nor SB 7 prohibit an employer from requiring health and safety precautions that are unrelated to a person's COVID-19 vaccination status.
- However, SB 29 also prevents most public employers from requiring facial coverings to prevent the spread of COVID-19. Private employers have no such limitation.
 - Interestingly, SB 29 does not prohibit facial covering requirements unrelated to COVID-19.

2025 Legislation Affecting Employers

- HBs 323, 1019, 1308, 1488; SB 324 – would require political subdivisions to use the E-Verify system for all new hires.
- SB 339 - would authorize a county or municipality to establish a local minimum wage (unlikely due to Section 1.005 of the Labor Code).
- HBs 239 and 2062; SB 240 - public restrooms and other private spaces within public facilities that are usable by more than one person at a time must be designated for use by persons of a particular biological sex and may only be used by individuals of the designated biological sex.

2025 Legislation Affecting Employers - 2

- HBs 317, 822, 841, 1351, and 1880 - paid family and/or sick leave requirements
- SB 1002 - county employee family leave pool program

What Wage and Hour Laws Do – U.S.

The FLSA covers:

- minimum wage (\$7.25/hour)
- Overtime (time and a half) - compensatory time at time and a half is allowed for public employees in lieu of money for overtime hours
- child labor
- equal pay

What Wage and Hour Laws Do - Texas

- Local Government Code, Chapter 141 - 144 - municipal employees
- Local Government Code, Chapter 151 - 157 - county employees
- Fundamentals:
 - Minimum wage and overtime pay under federal law
 - Texas Labor Code Section 62.0515 provides that the Texas minimum wage supersedes local minimum wage requirements (Texas minimum wage is indexed to the federal minimum wage) – also keep Labor Code Section 1.005 in mind (local employment-related ordinances may not exceed state law thresholds)

What Wage and Hour Laws Do Not Do

Neither law requires:

- breaks
- premium pay
- shift differentials
- raises
- vacation or sick leave*
- holiday pay*
- severance pay*
- pension benefits
- expense reimbursements**

* unless such benefits are promised in a written policy or agreement

** unless business expenses take an employee below minimum wage

Minimum Wage – Allowable Deductions

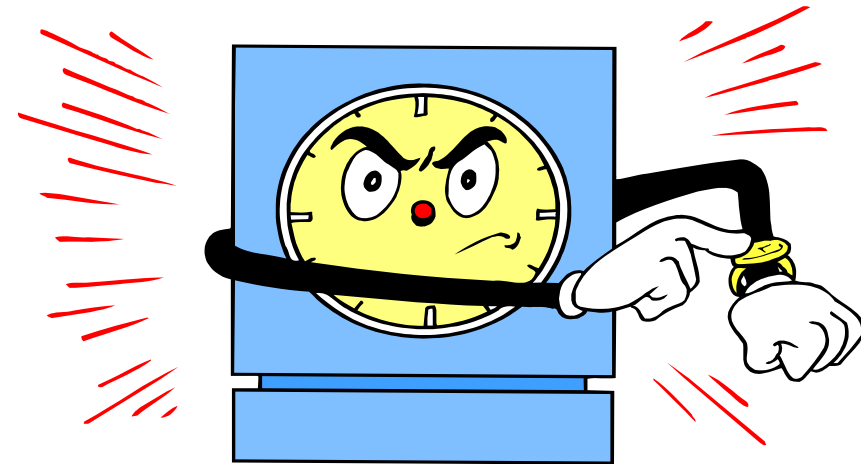
- payroll taxes and other legally-required deductions
- court-ordered garnishments (child support)
- meals, lodging, and other facilities
- voluntary wage assignments, loans, and advances
- vacation pay advances
- uniforms and uniform cleaning costs *
- tip credits
- union dues
- cash losses due to misappropriation *
- Keep state laws in mind (written authorization needed for everything but the first two categories)!

Hours of Work

- Includes all time during which the employee is at the disposal of the employer, i.e., “suffered or permitted to work”
- Waiting or on-call time
- Breaks
 - Sleeping time
- Preparatory and concluding activities
- Time spent in meetings and training programs
- Travel time
- Time worked does not include paid leave
- Hours worked and the FMLA – goes by FLSA rules

Voluntary or Unauthorized Overtime

- If overtime is worked, employer must pay for it
- Whether it was authorized or wanted is irrelevant
- Employer may handle unauthorized overtime as a disciplinary matter
- Employees may not voluntarily give up the right to overtime pay – agreements to the contrary are **void**
- No working “off the clock” allowed



Calculating Overtime Pay

- Hourly: time and a half over 40 hours
- Salary: $\text{salary} \div \text{number of hours the salary is intended to compensate} = \text{regular rate}$
 - Regular hours < 40: add regular rate for each hour up to 40, then pay time and a half for hours over 40
 - Regular hours = 40: time and a half
 - Regular hours > 40: pay hours from 40 up to regular schedule at half-time, then time and a half past that
 - Irregular hours: $\text{regular rate} = \text{salary} \div \text{total hours}$, then pay half-time for all hours over 40
- Other pay methods: $\text{regular rate} = \text{total pay} \div \text{total hours}$; add half the regular rate for each overtime hour

Exempt White-Collar Employees

- Executive, administrative, professional, outside sales representative, computer professional
- Both salary and duties tests must be satisfied
- Minimum salary - \$684/week, up to 10% of which can consist of commissions and non-discretionary bonuses
- Duties test – focus is on “primary duty” of exempt work – exempt employees customarily and regularly perform an exempt duty as their primary duty
- Discretion and independent judgment as to the details of the work

Exempt Salaried Employees

- their hours do not matter as much as the results they achieve - the company is buying results, not specific amounts of time
- no way to tell how long specific projects or tasks will last
- discretion and independent judgment are major criteria
- other employees look to exempt employees for leadership
- their decisions affect other employees' jobs and the company as a whole
- examples: city manager, county administrator, general manager, CFO, HR / payroll director, licensed professional, software programmer, or network designer

Coverage of the Texas Payday Law

- all private employees in Texas
- all private employers in Texas
- independent contractors and volunteers are not covered
- governmental employers and employees, including councils of governments and their employees, are not covered
- Texas Payday Law was based in part on compensation-related statutes pertaining to public employees, and in part on court decisions

Minimizing the Risk of Wage-Related Claims

- Have all employees sign clear written wage agreements
- Follow the wage agreement as it is written
- Get written authorization for any deduction from pay that is not ordered by a court or required or specifically authorized by a law
- Do not hold paychecks pending return of city or county property
- Do not hold paychecks pending submission of documentation, unless its absence renders calculation of pay impossible
- Apply the FLSA and DOL regulations to any situation involving minimum wage and overtime pay

Workplace Privacy Issues - General

- Good starting point: all information relating to an employee's personal characteristics or family matters is private and confidential
- Information relating to an employee should be released only on a need-to-know basis, or if a law requires the release of the information
- All information requests concerning employees should go through a central information release person or office

Federal Laws

- Freedom of Information Act and Privacy Act apply only to federal agencies and state agencies working with federal information, not to private employers
- FOIA allows citizens to request certain government records relating to federal programs and activities carried out under federal law
- Privacy Act – agencies covered by federal law may not release personal data to outside third parties without permission

Public Information Act

- Texas law pertaining to government records
- Some exceptions to the general rule that agencies must release information upon request:
 - SSNs and other identity-theft information
 - Medical information from doctors and hospitals, FMLA, ADA, and the like
 - Invasion of privacy (court decisions)

Exceptions from Court Cases

- *Morales v. Ellen*, 840 S.W.2d 519 (Tex.App. - El Paso, 1992)
 - If the disclosure would constitute the common-law tort of invasion of privacy through the disclosure of private facts, the information may not be released.
 - Two conditions for invasion of privacy: the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person; and
 - The information is of no legitimate concern to the public
 - Purpose: protect the privacy rights of victims and witnesses

Focus on Personnel Files

- Under Texas law, public employers must release information in personnel files to employees upon request
- Best to protect such information from unauthorized disclosure
- Have different files for general purposes, medical information, grievances / investigations, I-9, and OSHA purposes



Personnel Files (Cont'd)

- Release personnel file information to prospective new employers only if ex-employee authorizes it in writing
- Train supervisors to never put anything into a personnel file that contains unprovable, undocumentable allegations – too much danger of defamation lawsuits if information is released
- Even then, employers should take great care as to what goes into a personnel file!

Searches

- Landmark case is K-Mart v. Trott, 677 S.W.2d 632 (1984)
 - employee won because she had a reasonable expectation of privacy in her locker. Even though it was K-Mart's locker, the company allowed her to put her own lock on it and didn't insist on a way to get into the locker.

Search Policy

- To establish compliance with safety and work rules
- All employees are subject to the policy
- Request to search is not an accusation of wrongdoing, but merely part of an investigation
- Search may include all work areas, lockers, vehicles, and personal containers
- All of those areas are subject to search at any time
- If employee uses personal lock, give key or combination to the employer
- Refusal to submit to search may lead to disciplinary action – make sure prior warnings are given!

Searches – Main Ideas

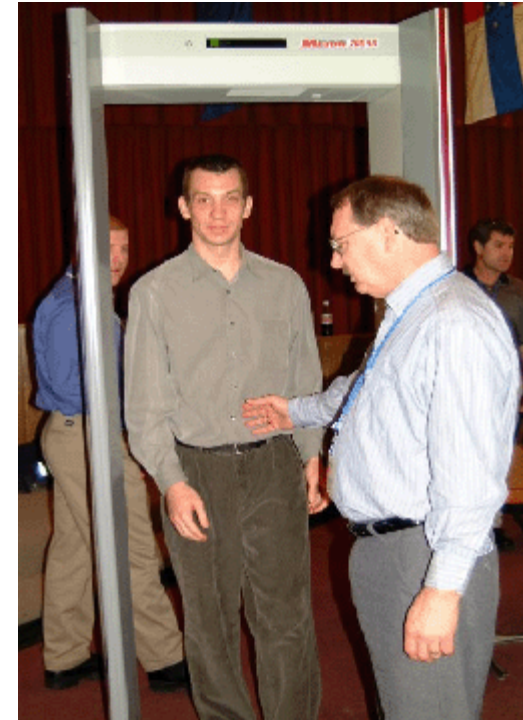
- The policy needs to let employees know they have no reasonable expectation of privacy in the areas that are subject to searches
- If employees have a problem with the idea of certain things being found at work, they should not bring those things to work at all!

Biometric Identifiers

- § 503.001 of the Texas Business and Commerce Code restricts employers' use of biometric identifiers for employees (retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry)
- Prior notice and consent necessary
- Among other things, this would be an issue for employers planning to encode employees' personal information into swipe cards, RFIDs, implantable microchips, or other electronic devices for ID and access purposes
- Requires secure deletion of employees' biometric data within one year of an employee's work separation, or until it is no longer needed for a claim or lawsuit

Metal Detectors – X-Ray Machines

- No restrictions on use of machines to detect metal objects or to “see into” employees’ bags, purses, briefcases, and other objects brought to work
- Use in conjunction with a search policy
- Can be a condition of continued employment
- Illegal items should not be handled further – notify local authorities



Drug Testing

- Federal law allows drug testing of employees in safety-sensitive positions
- Nothing under Texas law prohibits an employer from instituting a drug-testing policy
- Case law limits application of such a policy in case of government employees
- Such a policy is best restricted to safety-sensitive positions

DOT Regs – Test Results

- Common question: can an employer release test results to TWC in defense of an unemployment claim?
- Yes, according to both the DOL and the DOT – this comes under the exception for administrative agencies and courts
- Cite: 49 C.F.R. 40.323(a)(1).

Telephone Monitoring

- It is legal for an employer to monitor employees' use of the employer's phones for business purposes
- Let employees and outside callers know in advance that such monitoring will take place
- Stop listening as soon as it is apparent that personal, private details are being discussed – handle from there as a disciplinary matter

Recording of Conversations

- As long as one party to a conversation knows it is being recorded, it is legal to record it
- Be on guard against surreptitious recording of conversations in the workplace
- Frank B. Hall Company v. Buck case – company hit with defamation lawsuit after bad statements were made in context of job reference calls

Video Surveillance

- Same basic rules as for telephone monitoring – if audio is also recorded, notice of such monitoring is needed
- Only authorized personnel should ever view surveillance videos – defamation and invasion of privacy suits can result if videos are shown to unauthorized persons

Camera Phones

- Risk: invasion of privacy, theft of confidential information, improper photography
- Sexual harassment claims have been filed based on coworkers' use of such devices
- Employer may limit use or possession of such devices in the workplace



Electronic Surveillance

- With the right kind of policy, employers have the right to monitor the following:
 - Employees' e-mail at work
 - Employees' use of the Internet
 - Employees' use of work computers

Monitoring and Use Policy

- Every employer needs to have a detailed policy regarding use of work computers
- Each employee must sign – it can be made a condition of continued employment
- Employer has the right to monitor all computer usage at all times for compliance
- Right to inspect any electronic data or media at any time
- Right to withdraw access to computers, Internet, e-mail if needed
- No reasonable expectation of privacy in any use of the employer's electronic resources, since it is all public and official property and to be used only for job-related purposes

Focus on E-Mail

- Same basic rules as for telephone monitoring
- Let employees and the public know that monitoring will be done for whatever purposes
- If unauthorized personal use is detected, don't keep listening or reading. Just note the incident and handle it as any other policy violation would be handled.
- Have your computer experts attach a disclaimer to all outgoing official e-mail that warns of confidentiality and disavows liability for individual misuse or non-official use of e-mail.

Tracking of Vehicles via GPS

- No law against using such a system in employer's vehicles in Texas
- No notice needed under current law, but might as well let all employees know that all use of employer's vehicles is monitored that way
- If misconduct is detected, preserve the data files for use as evidence in the event of an unemployment claim or lawsuit
- Before taking action, give the employee a chance to comment on the information in writing and keep whatever statement the employee gives

Medical Information

- ADA requires all medical information about an employee to be kept in a separate, confidential medical file
- This would include any documentation requested by an employer in connection with the FMLA – always use Form WH-380
- Dental records are in the same category
- HIPPA regulations and Texas laws put strict penalties on unauthorized release of medical information

Medical Information Policy

- Controlled access to medical files
- Prohibition against improper release of such information
- Safeguards against improper disclosure
- Prohibition against discussion of such information
- Free speech does not include the right to gossip about others
- Warn of potential civil / criminal liability

Fair Credit Reporting Act

- Employers must do the following prior to a background check:
 - Provide clear notice of the check, and
 - Get the employee's written authorization.
- Separate form should be used for that purpose – a simple policy in a handbook would be insufficient
- The employer can make the written authorization a condition of employment (include the form in the new hire packet)
- Blanket authorization is OK

In Case of Adverse Action:

- Employer must give a pre-adverse action notice with a copy of the report – allow at least a week for the employee to respond
- Thereafter, employer must provide the employee or applicant with a copy of the report, the name and contact information for the reporting agency, and a written description of the employee's or applicant's rights
- Person investigated can also request the sources used for the report and the other recipients of the report

New Hire Paperwork

- I-9, W-4 forms, workers' compensation notices – get the W-4 first
- Acknowledgement of receipt of policy handbook
- Consent for drug testing / search policy, if applicable
- Consent for video surveillance, if applicable
- Consent for background checks, if not already obtained
- Agreements regarding pay, benefits, schedule, work location, and so on (with employment-at-will disclaimers)

New Hire Reporting

- Report new hires within first 20 days of employment - <https://employer.oag.texas.gov/employerportal/s/>
- Helps control benefit fraud and non-payment of court-ordered support

I-9 Requirements

- Only for new hires, not for applicants
- An employer has three business days following hire to get the information
- Use only the newest Form I-9
- The law does not require you to keep copies of documents you review, but keeping them helps show that you did review them
- Keep I-9 documentation for three years after hire or one year after employee leaves, whichever comes last

Background Checks - Criminal History

- Criminal history information is generally in public records
- Do not ask only about “convictions”, but rather if the person has ever been convicted or has pleaded guilty or no contest to a criminal offense
- Best bet is to hire an outside agency to do such checks – be aware of FCRA requirements
- Keep “job relatedness” in mind when using criminal history to screen applicants

Background Checks - Miscellaneous

- Job references - have applicant sign written information release and waiver of liability to send to prior employers
- Important: document your efforts to verify the work history given by the applicant
- Have applicant supply certified copies of transcripts, certificates, licenses, and so on
- Have applicant supply certified MVR copy for driving positions

Giving Job References

- An employer may give out any factual information
- Only untrue information can be the basis for a defamation lawsuit
- Avoid inflammatory terminology
 - Example: instead of “theft”, use terms such as “took without authorization”, “mishandled public property”, or “failed to properly account for assets entrusted to his care”
- Do not give out information over the phone unless identity of caller is known
- Ask for a signed release from the former employee

Guidelines for Interviews

- Just like with applications, keep the questions as job-related as possible
- Keep in mind that the applicant may be recording the entire interview
- Careful with note-taking - anything in writing or otherwise recorded is discoverable in a claim or lawsuit

Discrimination Claims

- An EEOC charge is serious, and the response must be carefully prepared, since it can tie an employer's hands if the case goes to court
- Main defense in a discriminatory treatment or discharge case: the charging party was treated the same as anyone else would have been treated under the same circumstances
- Main defense in a failure-to-hire case: the charging party was considered fairly on an equal basis with all other applicants, and the most qualified applicant ended up being chosen – show appropriate diversity statistics in the response and invite interviews with current or former employees

Refusal to Sign Policies

- Hold a mandatory staff meeting (such meetings count as work time)
- Publish an agenda that includes discussion of the new policy
- All employees should sign an attendance log
- Follow the agenda - distribute copies of the policy and discuss it with everyone
- Ask everyone to sign acknowledgements of receipt of the policy – those refusing to sign have already signed the attendance log
- Afterwards, publish minutes of the meeting, including the policy discussion, noting that everyone in attendance received a copy of the policy and had a chance to ask questions
- All of that documentation would make it difficult for anyone trying to claim that they did not know about a particular policy.

Refusal to Sign Warnings

- On warning forms, have spaces for "I agree with the reason for this warning" and "I disagree with the reason for this warning"
- Ask employee to choose one or the other and sign or initial their choice
- If they do, they will be unable to make a credible claim that they never saw the warning
- ***Alternative:*** have a witness sign in the employee's place
- Give the employee a copy of the warning

Property Return Security Deposit

- Method for encouraging return of property
- Small deduction each pay period for the deposit
- 100% return to employee upon work separation if everything is returned in decent shape; offset against PRSD for replacement cost if some items are not returned
- Legal compliance: have written authorization for the deduction, and a written policy; the two can be combined into one form for ease of use
- A sample form is in the book at https://efte.twc.texas.gov/property_return.html

Minimizing UI Tax Problems

- Report wages and pay all taxes or reimbursements on time - deadlines can be extended for good cause shown - set up a payment plan if necessary.
- The election to be a reimbursing employer must be timely and lasts two years.
- Any Tax Department determination may be appealed under Commission Rule 815.113.

Thanks!

Thanks for your attendance
and
Good Luck!

Remember the toll-free hotline for employers:
1-800-832-9394

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