

TEXAS ASSOCIATION OF REGIONAL COUNCILS BI-ANNUAL STAFF TRAINING

Texas and Federal Wage and Hour Laws

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What Wage and Hour Laws Do – U.S.

The FLSA covers:

- minimum wage (\$7.25/hour)
- Overtime (time and a half)
- child labor
- equal pay

What Wage and Hour Laws Do - Texas

The Texas Payday Law covers:

- timely payment of wages in full at least twice each month for non-exempt employees
- enforcement of the wage agreement
- wage deductions
- final pay – within six calendar days if laid off or fired, or by the next regularly-scheduled payday if employee quit
- wage claims

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

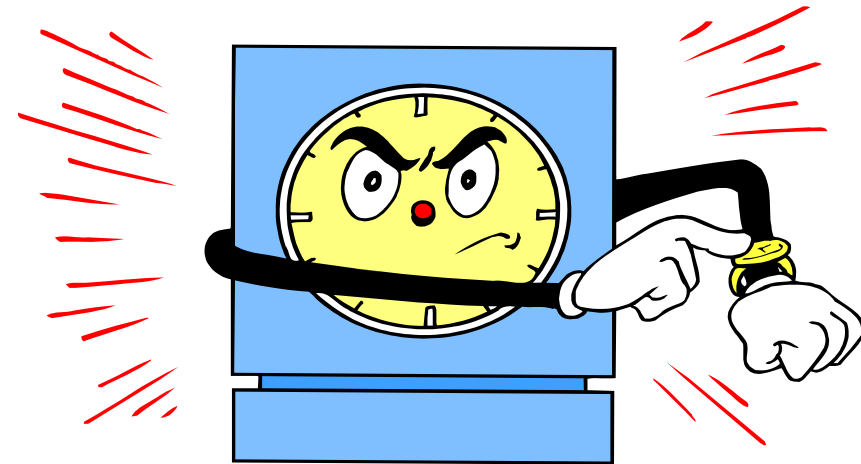
- payroll taxes and other legally-required deductions
- court-ordered garnishments (child support)
- meals, lodging, and other facilities
- voluntary wage assignments, loans, and advances
- vacation pay advances
- uniforms and uniform cleaning costs *
- tip credits
- union dues
- cash losses due to misappropriation *
- Keep the Texas Payday Law 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: regular rate = $\text{salary} \div \text{total hours}$, then pay half-time for all hours over 40
- Other pay methods: 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

Salary Basis Test

- True salary of at least \$684/week (including commissions and non-discretionary bonuses up to 10% of the salary amount)
- No partial-day deductions except for public employers
- Partial-week deductions only if specifically allowed (absences due to personal business, medical reasons, unpaid suspensions)
- Special exception for FMLA
- Special rules apply for governmental employers – partial-day deductions from the salary are permitted, except in the case of a furlough – see DOL regulation 29 C.F.R. § 541.710
- Extra pay for extra work is OK

Executive Exemption

- Primary duty is management of the enterprise or a recognized department or division
- Customarily and regularly supervises two or more employees
- Authority to hire and fire, or else has substantial power to recommend such actions
- Examples: president, CEO, department head, COO, CFO, general manager

Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of employer or employer's customers
- Exercises discretion and independent judgment as to matters of significance
- Not “line employees”
- Examples: department head, personnel director, CFO, VP for Administration, marketing manager, database administration

Professional Exemption

- Primary duty is work requiring advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction
- At least a four-year college degree in employee's field of work
- Not skilled trades, but rather established professions, generally involving state licensure or certification
- Examples: physician, attorney, teacher, engineer, architect, CPA, scientist, pharmacist, registered nurse

Creative Professionals

- Primary duty is work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Does not include work that primarily depends upon intelligence, diligence, and accuracy, or that can be done with general manual ability or training
- Examples: musician, novelist, playwright, actor, painter, photographer, cartoonist, editorial writer, investigative journalist

Outside Salespeople

- Customarily and regularly engaged in the primary duty of making sales outside of the employer's principal place of business
- Paid by commission – no salary or minimum wage necessary
- Overtime exemption as well

Computer Software Professional / Computer Employee Exemption

- Top computer programmers, systems analysts, or network administrators
- Webmasters arguably included as well, depending upon scope of job
- Straight-time hourly pay of at least \$27.63 per hour, or salary of at least \$684/week

Salary Schedules and Compensation Agreements

- Local Government Code Section 391.0117:
 - Classified positions and specified salaries
 - Exempt positions and specified salaries
 - Consistent with legislative and State Auditor standards
 - The salary schedule constitutes the basic wage agreement for each covered position
- Municipal employee wage deductions – Section 141.008
- County employee wage deductions – Chapter 155
- Written authorization for deductions

Specific Pay Deduction Problems

- Recovery of wage overpayments:
 - Texas Property Code Section 42.001(b)(1) – no attachment of current wages without written authorization
 - *Benton v. Wilmer-Hutchins I.S.D.*, 662 S.W.2d 696 (Tex.App. - Dallas 1983) – written authorization needed
- Group benefit plan deductions: obtain written authorization

Coverage of the Texas Payday Law

- all private employees in Texas
- all private employers in Texas
- governmental employers and employees are not covered, but many TPL provisions have corresponding provisions in the Government Code and the Local Government Code
- independent contractors and volunteers are not covered

Purposes of the Texas Payday Law

- Enforces the wage agreement in effect when the work was performed
- Prohibits illegal wage deductions – only legal if:
 - ordered by a court
 - required or specifically authorized by a law
 - made for a lawful purpose and authorized in writing by the employee
- Requires timely payment of wages due, at least twice/month for non-exempt employees and once/month for exempt employees
- Provides a deadline for final pay
- Provides a claim and appeal process for wage claims

Deductions Under The Texas Payday Law

- deductions do not have to be authorized in writing by the employee if they are ordered by a court (child support), or else are required or specifically authorized by law (payroll taxes, etc.)
- deductions made for any other reason must be authorized in writing by the employee
- have all employees sign wage deduction authorization forms listing all reasons you are likely to ever need to deduct pay (sample form is in the book at [https://twc.texas.gov/news/efte/wage deduction authorization agreement.html](https://twc.texas.gov/news/efte/wage_deduction_authorization_agreement.html))

Pay Agreements

- verbal or written – enforceable either way
- any pay method is allowed
- the more complicated the arrangement is, the more important it is to put it in writing
- methods and rates of pay may be changed, but never in such a way that a retroactive pay cut results
- pay whatever the agreement promises

Methods of Pay

- hand-delivery to employee at work
- hand-delivery at other place agreed to by employee
- registered mail, to arrive no later than payday
- delivery to another person designated by the employee in writing by a method similar to first three methods
- any reasonable method agreed to by employee in writing
- direct deposit if employee has bank account
- payroll or debit card

Direct Deposit

- Permitted under both FLSA and TPL
- Must be voluntary on employee's part, according to DOL (minimum wage issue)
- EEOC issues as well (minimum wage and disparate impact)
- Texas law doesn't cover issue of forcing employee to have a bank account - CFPB prohibits employers from requiring employees to have a specific bank
- 60 days' advance written notice to employees
- Payment by debit card needs 60 days' advance written notice, plus employee's consent re the card issuer, plus written notice of opt-out procedures and alternative payment methods

Texas Payday Law – Miscellaneous Rules

- wage payments in kind must be authorized in writing by the employee (meals, lodging, and other facilities - keep exact records as required by DOL regulation 531.27!)
- fringe benefits are payable only if promised in a written policy or agreement - payable as promised - if policy is silent, benefit is not enforceable under the Payday Law

Paying on Time

- No specific penalty for paying late, but upon a second payday law violation, TWC may impose a penalty for a “bad faith” failure to pay properly
- Employer cannot hold a paycheck pending return of items or repayment of loans
- Employer cannot hold paycheck pending submission of timesheets, unless there is no way to calculate pay otherwise
- Excessive late payments may lead to a bonding requirement

Final Pay

- Must include all components of final pay
- Layoff or discharge: within six calendar days of discharge
- Voluntary quit: by next regularly-scheduled payday
- Exception: commissions, bonuses, and fringe benefit payments covered by written contract, policy, or agreement – simply follow the agreement and the timeline in it
- Nature of work separation is determined by TWC's rules on unemployment claims

Property Return Security Deposit

- Method for encouraging return of property
- Small deduction each pay period for PRSD
- 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
- TPL compliance: written authorization for deduction; written policy; the two can be combined into one form for ease of use
- Sample form is in the book at https://twc.texas.gov/news/efte/property_return.html

Lower Wage for Final Pay Period

- Not particularly recommended, but if it cannot be avoided, there are two ways to do this legally
 - as part of a written wage agreement (more difficult and risky)
 - in conjunction with a “resignation notice security deposit” agreement (easier to enforce, but more trouble to set up and administer)
- Doing it any other way makes it look like a retroactive pay cut, which violates the law
- Do not condition the lower wage on something that is beyond the employee’s power to control

Thanks for your attendance!

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Texas Guidebook for Employers book:
twc.texas.gov/news/efte/tocmain2.html
Web app: twc.texas.gov/tbcapp

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