

Texas

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

Under a new law, an employer commits an unlawful employment practice if sexual harassment of an unpaid intern occurs and the employer or its agents or supervisors know or should have known that the conduct constituting sexual harassment was occurring and fail to take immediate and appropriate corrective action.

Sexual harassment is defined as an unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature if: 1) submission to the advance, request, or conduct is made a term or condition of an individual's internship, either explicitly or implicitly; 2) submission to or rejection of the advance, request, or conduct by an individual is used as the basis for a decision affecting the individual's internship; 3) the advance, request, or conduct has the purpose or effect of unreasonably interfering with an individual's work performance at his or her internship; or 4) the advance, request, or conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.

An individual is considered to be an employer's unpaid intern if: 1) the individual's internship, even though it includes engagement in the employer's operations or the performance of productive work for the employer, is similar to training that would be given in an educational environment; 2) the individual's internship experience is for his or her benefit; 3) the individual does not displace the employer's regular employees but works under close supervision of the employer's existing staff; 4) the employer does not derive any immediate advantage from the individual's internship activities and on occasion the employer's operations may be impeded by those activities; 5) the individual is not entitled to a job at the conclusion of the internship; and 6) the individual is not entitled to wages for the time spent in the internship.

The new law applies only to a claim of discrimination based on conduct that occurs on or after its effective date. A claim of discrimination that is based on conduct that occurs before the effective date is governed by the law in effect on the date the conduct occurred.

Tex. Lab. Code § 21.1065 (Effective Date 09/01/2015).

II. Pre-Employment Inquiry Guidelines

A. Voluntary Veterans' Preference

Texas has enacted a new law that creates a voluntary veterans' preference to be applied in hiring, promotion, and retention decisions. A private employer may adopt an employment policy that gives preference to a military veteran over other qualified applicants or employees. An employer that elects to implement a veterans' preference policy must apply the policy reasonably and in good faith in employment decisions regarding hiring, promotion, or retention during a reduction in the employer's workforce. The law defines "veteran" as an individual who has served on active duty in the armed forces of the United States and was honorably discharged from military service.

In applying the veterans' preference policy, the employer may require appropriate documentation from a veteran that demonstrates the veteran's eligibility for the preference.

The new law also provides that an employer who applies the veterans' preference will not be deemed in violation of any state equal employment opportunity law.

Tex. Lab. Code § 23.001 through Tex. Lab. Code § 23.003 (Effective Date 09/01/2015).

B. Order of Nondisclosure of Criminal History

An individual who has been convicted of certain offenses may petition the court for an order of nondisclosure of criminal history record information. "Criminal history record information" means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, information, and other formal criminal charges and their dispositions. Upon receiving an order of nondisclosure, the individual is not required to state in any application for employment that s/he has been the subject of any criminal proceeding related to the information that is the subject of the order of nondisclosure. However, a court or a criminal justice agency may disclose information that is the subject of an order of nondisclosure for criminal justice or regulatory licensing purposes.

Tex. Gov't Code § 411.071 et seq. (Effective Date 09/01/2015).

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

No new laws or regulations enacted in 2015 or 2016.

V. Drug Testing

No new laws or regulations enacted in 2015 or 2016.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

A. Franchisor Not an Employer of Franchisee and/or Its Employees

Under new and/or amended laws, a franchisor is generally not considered an employer of either a franchisee or a franchisee's employees under the following labor law areas: 1) fair employment practices; 2) wage payment; 3) minimum wage; 4) professional employer organizations; 5) unemployment; 6) general provisions; and 7) workplace safety.

However, concerning a specific claim for relief under the laws, the exclusion does not apply to a franchisor that has been found by a court in Texas to have exercised a type or degree of

control over the franchisee or its employees not customarily exercised by a franchisor for the purpose of protecting its trademarks and brand.

Under the laws, "franchisee" and "franchisors" are defined per federal regulations (16 C.F.R. § 436.1):

- Franchisee: Any person who is granted a franchise.
- Franchisor: Any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, it includes subfranchisors, which means a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance.

The change in law applies only to the liability of a franchisor based on conduct occurring on or after the bill's effective date. Conduct by a franchisor occurring before the effective date is governed by the law in effect on the date the conduct occurred.

Tex. Lab. Code § 21.0022, Tex. Lab. Code § 61.0031, Tex. Lab. Code § 62.006, Tex. Lab. Code § 91.0013, Tex. Lab. Code § 401.014, Tex. Lab. Code § 411.005, and Tex. Lab. Code § 201.021 (Effective Date 09/01/2015).

B. Employee Wellness Program

Texas has enacted a new law designed to encourage employers to institute employee wellness programs. An "employee wellness program" is a program established by an employer that provides an incentive to an employee to promote wellness or a healthy lifestyle. The new law shields an employer from civil liability by prohibiting an employee from filing suit against the employer for establishing, maintaining, or requiring participation in an employee wellness program unless:

- The program discriminates on the basis of a prior medical condition, gender, age, or income level; or
- The employee's cause of action is based on intentional or reckless conduct.

Tex. Civ. Prac. & Rem. Code § 142A.001 and Tex. Civ. Prac. & Rem. Code § 142A.002 (Effective Date 09/01/2015).

C. Falsification of Military Record

Texas law prohibits an applicant or employee from falsifying his or her military record for monetary or other tangible gain. The new law provides that an employer may discharge an employee if the employer determines, based on a reasonable factual basis, that the employee, in obtaining employment or any benefit relating to the employment, falsified or otherwise misrepresented any information regarding the employee's military record. Such a termination is valid regardless of whether the employee is employed under an employment contract. An employment contract entered into in which the employee has been found to have falsified his or her military record is deemed void and unenforceable as against public policy. The new law defines "employer" as a person who employs one or more employees. "Military record" means an enlistment record, occupation specialty, medal, award, decoration, or certification obtained by a person through his or her service in the armed forces of the United States or the state military forces.

An employee who believes s/he was wrongfully terminated under the new law may file suit against the employer in the appropriate county court. Available remedies include rehiring or reinstatement to the employee's previous job, payment of back wages, and reestablishment

of employee benefits to which the employee otherwise would have been eligible if the employee had not been terminated.

Tex. Lab. Code § 105.001 through Tex. Lab. Code § 105.003 (Effective Date 09/01/2015).