

Texas Employment Law Update

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Tommy Simmons

Legal Counsel to Commissioner Ruth Hughs

Texas Workforce Commission

tommy.simmons@twc.state.tx.us

Book: www.twc.state.tx.us/news/efte/tocmain2.html

Web app: texasworkforce.org/tbcapp

Toll-free: 1-800-832-9394; Direct: 1-512-463-2967



Increased Agency Enforcement

- DOL and IRS have teamed up for a major initiative to discourage misclassification of employees as independent contractors – TWC is a partner with both agencies on that
- DOL has hired hundreds of new wage and hour investigators
- USCIS / ICE are ramping up their I-9 audits – less lenience toward I-9 violations (even clerical errors)
- OSHA is getting more aggressive toward retaliation issues
- EEOC issued new regulations for the ADAAA – focus is on reasonable accommodation, not whether something is a disability
- EEOC is also looking closely at discrimination against the unemployed



Action on Proposed Salary Rule

- “Old” new salary rule (minimum of \$913/week) set for December 1, 2016 was put on hold by a federal court on November 22, 2016 and later invalidated by HJR 42 on March 31, 2017 – current level is still \$455/week
- DOL issued a Request for Information on July 26, 2017 asking for public input on “questions related to the salary level test, the duties test, inclusion of non-discretionary bonuses and incentive payments to satisfy a portion of the salary level, the salary test for highly-compensated employees, and automatic updating of the salary level tests”
- 60-day comment period ended on September 25, 2017
- Link: <https://www.dol.gov/whd/overtime/rfi2016.htm>



I-9 Requirements

- Main problem: “document abuse” (going beyond I-9 requirements) - possible national origin / citizenship discrimination charges
- Not for applicants - only for new hires
- Employer has three business days following hire to get the information
- Use only the latest version of the form
- Accept only unexpired documents to begin with
- Copies of documents are not required, but keeping them helps show they were reviewed
- Keep I-9 documentation for three years after hire or one year after employee leaves, whichever comes last



TWC Enforcement of Federal Actions

- FLSA – TWC enforces minimum wage and overtime requirements
- FLSA – new companionship and domestic employee regulations
- EEOC – TWC’s Civil Rights Division generally enforces Chapter 21 according to EEOC standards (not quite exact match)
- NLRB – recent NLRB developments have begun to be reflected in unemployment appeal rulings
- OSHA – same as for NLRB – unsafe working conditions may affect the outcome of UI appeal hearings
- In general, an employer’s compliance with federal standards can make a real difference in an unemployment claim
- TWC is responsible for E-Verify rules affecting state agency hiring



NLRB on Social Media

- NLRB has questioned employer policies regarding employees' comments about the work or the company on social media sites
- No real changes to the labor laws – what was protected activity before is still protected, while what was unprotected before is still unprotected
- NLRB's focus is on the primary intent of the posting – if it relates to the terms and conditions of employment, chances are it will be protected
- The law does not protect violations of others' rights, such as statements that are themselves defamatory, discriminatory, or create a hostile work environment that would violate EEO laws
- Theft of company secrets is of course not protected activity



EEOC Rules on Use of Criminal History Records

- http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- If criminal background exclusion has disparate impact, EEOC requires “targeted screen”:
 - Nature/gravity of crime, time passed, specific duties
- Excluded applicants get the following:
 - Individualized assessments (is the hiring standard “job-related & consistent with business necessity”?)
 - Opportunity to explain circumstances
 - Consideration by employer of whether any new information from the applicant justifies hiring
- Remember FCRA requirements: prior notice and written authorization



Sexual Orientation/Transgender Issues

- Discrimination on the basis of sexual orientation and gender identity is included in the category of gender discrimination
- EEOC and courts generally follow the “failure to conform to gender stereotypes” rationale (*Macy v. DOJ* (Appeal No. 0120120821 - 2012); *EEOC v Boh Brothers Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013)); *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017; *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2018 U.S. App. LEXIS 4608 (2nd Cir., February 26, 2018); *EEOC and Aimee Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (6th Cir. March 7, 2018); *Wittmer v. Phillips 66 Co.*, 2018 U.S. Dist. LEXIS 57316 (S.D.Tex.-Houston, April 4, 2018)



2017 TWC Bills That Passed

- HB 88 – equal leave rights for foster parents
- HB 2443 - wage claims under the Texas Payday Law may be filed electronically
- HB 1432 - TWC may cash a warrant with a restricted or conditional endorsement without settling the amount of money due to TWC



Minimizing Risk of Wage Claims

- ★ Have clear written wage agreements
 - Best evidence rule: whoever has the best evidence of the wage agreement or of time worked will prevail on those points
 - Written wage agreement and good time records avoid confusion and misunderstandings
- ★ Get written authorization for any deduction that is not ordered by a court or required by a law
- ★ Keep documentation or get receipts for all wage payments, especially cash!



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)!



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



Handle UI Claims Properly

- Respond adequately and on time
- Adequate response = factual basis for the work separation, including relevant adverse facts
- Return investigators' phone calls
- Furnish relevant information:
 - Firsthand witnesses are critically important
 - Documentation (policies, warnings, logs, etc.)
- Be specific as to the circumstances of the work separation
- Appeal on time at all levels of the process



What Does An Employer Need to Show?

- Voluntary work separation
 - Show how a reasonable employee would not have quit for such a reason
- Involuntary work separation
 - Show that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, **and**
 - That the claimant either knew or should have known that discharge could occur for such a reason.
- Evidence needed: documentation of problems, and firsthand testimony from eyewitnesses



Final Warning

- Do not give a final warning until and unless the company is truly ready to sever ties
- A real final warning lets the employee know:
 - that it is the employee's last chance,
 - that no further chances will be given,
 - and that if the complained-of problem occurs even one more time, the employee will be subject to immediate discharge
- Have the employee sign it (or a witness in the employee's place), and give the employee a copy



Poor Performance Cases

- Inability and incompetence are not misconduct
- Failing to do one's best *is* misconduct
- Best argument for claimant: "I tried my best – it just wasn't good enough."
- Best tactics for employer: documentation, firsthand testimony, past satisfactory performance, claimant passed up training opportunities, work was too simple to mess up



Poor Performance Cases 2

- Employer has to show how the poor performance was within the claimant's power to control
- Too many breaks / breaks too long
- Excessive visiting and other time-wasting with coworkers
- Excessive personal phone calls
- Too much Internet surfing
- Failing to double-check the work for negligent or avoidable mistakes
- Not enough time devoted to job because of avoidable absences or tardiness



Poor Attitude

- That's not in my job description.
- Why doesn't Joe have to do that?
- Why do you always ask me?
- That's Linda's job.
- You told me to do the other thing first.



How to Handle a Poor Attitude Case

- Don't start off accusing the claimant of having a "bad attitude".
- Be specific about behavior or conduct that violated a rule or interfered with the work of others.
- Document the warnings that were given.
- Present firsthand testimony from those affected.
- Let the hearing officer independently arrive at the conclusion that the claimant had a bad attitude.



Best Practices for Staffing Firms

- Keep the lines clear between the staffing firm and the client
- Educate clients and employees as to the nature of the employment relationship
- Have clear policy and procedures for reporting back after assignments
- Educate clients to remind separating employees to report back to the staffing firm, where relevant
- Mention the three-day waiting period, when relevant
- In clear misconduct cases, take the position that the employee is completely terminated, and then prove misconduct



Independent Contractors - Red Flags

- Terms such as “1099 employees” or “contract labor”
- Having contractors fill out job applications
- Having contractors wear company badges or uniforms, or carry company business cards, indicating their affiliation with the company
- Giving contractors a company e-mail address
- Inviting contractors to company parties and other events using the same invitation that goes to regular employees
- Giving contractors company benefits or wage advances
- Having contractors sign company policy handbooks
- Non-competition agreements



What TWC Looks For In Independent Contractor Cases

- Corporate status
- FEIN
- Registration with Texas Secretary of State
- TWC tax account number
- Reporting wages of their own employees
- Their own business cards
- Invoices on their own stationery
- Advertising
- Written contracts
- E-mails, letters, or other documentation relating to negotiating the parameters of the work
- Substantial investment in their own business



Minimizing UI Tax Problems

- Report wages and pay all taxes on time - deadlines can be extended for good cause shown - set up a payment plan if necessary - timely payment of taxes enables the wages to be used to compute the tax rate, which serves to keep the tax rate lower.
- Main tax rate component is the **benefit ratio**: three-year chargeback total divided by the three-year taxable wage total.
- Take the potential cost of a transfer of compensation experience into account when negotiating the sale or purchase of another business.
- A successor entity is liable for the unemployment tax debt of its predecessor.
- The election to be a reimbursing employer must be timely and is effective for two years.



Thanks for your attendance
and
Good Luck!

Remember the toll-free number:
1-800-832-9394

tommy.simmons@twc.state.tx.us
www.twc.state.tx.us/news/efte/tocmain2.html
Web app: texasworkforce.org/tbcapp
Toll-free: 800-832-9394 Direct: 512-463-2967

