

Texas Business Today

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Tom Pauken, Chairman
Commissioner Representing Employers

TEXAS
WORKFORCE SOLUTIONS

To Wear or Not to Wear: Dress Codes in the Workplace

• Frequently Asked Questions from Employers • OSHA Guidelines •

Texas has become a magnet for business and job creation

In April, a bipartisan group of California lawmakers visited Austin to better understand why companies and jobs are leaving the Golden State in droves for Texas. For Californians, there certainly is reason for concern. At the time of this writing, California's employment levels are still more than 7 percent below where they were prior to the recession, while Texas has experienced a steady increase in private sector job growth over the past year. Texas is poaching jobs from high-tax, high-regulatory states like California. In fact, Irvine-based business relocation consultant Joseph Vranich ranked Texas first among the most popular states and countries for California businesses to relocate in 2009 and 2010.

Of course, it is no secret why Texas has become a magnet for business and job creation. The Lone Star State consistently ranks first in *Chief Executive Magazine* as the best place in the U.S. to do business, and recently the Small Business and Entrepreneurship Council ranked Texas only behind North Dakota for having the best business tax system. This recognition of the importance of economic development and job creation by our governor and our state legislature has helped shield Texas from much of the economic strains still gripping many states due to the national recession. It is no wonder why some state leaders are beginning to look to Texas as a model for prosperity.

However, while Texas may be on its way toward recovery, the hazards of increased federal government spending, continued trade deficits, and high national joblessness continue to loom as dark clouds over the Texas horizon. In an interview following May's dismal national employment report, Professor Peter Morici of the University of Maryland said that private employment gains in the U.S. would need to average 365,000 a month for the next three years in order to bring the national unemployment rate down to 6 percent – a discouraging projection considering that private employment gains have averaged less than half of that since the beginning of this year. The bleak economic trends we are seeing nationally suggest that the persistently high U.S. unemployment rate is not simply the result of the most recent recession; it is the outcome of a decade-long trend of falling private sector employment, particularly in the export-oriented, goods-producing sectors.

Over the last 10 years, data from the Bureau of Labor Statistics shows private sector employment in the U.S. has actually experienced a net decline, while total manufacturing jobs have fallen by roughly one-third.



Texas Workforce Commission Chairman Tom Pauken speaks at the *Putting America Back to Work* Conference. *Texas Workforce Commission photo*

Likewise, U.S. multinational firms are shedding millions of American jobs while adding millions overseas. According to a recent *Wall Street Journal* story, newly released data from the U.S. Department of Commerce showed that from 2000 to 2009, big firms eliminated 2.9 million jobs in the U.S. while creating 2.4 million jobs in other countries. As a number of economists have suggested, replacing our nation's onerous business tax system with a revenue-neutral business consumption tax would get the private sector moving again and start bringing jobs home to America.

Despite a slight manufacturing uptick in parts of the country, serious structural impediments in the labor force continue to threaten American competitiveness as the manufacturing leader of the world. To accommodate rising input costs and low consumer demand, many U.S. firms have been making cutbacks on human capital spending for hiring, wage increases, and worker training. As more and more baby boomers enter retirement, firms will face the difficult challenge of finding workers with the necessary skill sets to replace the previous generation. We are beginning to see evidence of this already. According to a survey

from ManpowerGroup, a Wisconsin-based workforce solutions and services provider, the percentage of U.S. employers who say they are struggling to fill positions has risen from 14 percent in 2010 to 52 percent. Skilled trade positions topped the list of “hardest to fill jobs” with lack of experience and technical training being cited as the top reasons.

While these jobs pay well, high school students often are pressured into going to a four-year university on the theory that earning a college degree is the only path to success. Since 1990, the cost for college has increased by more than 285 percent, a growth rate that is three times higher than inflation during the same period of time. Yet, in a survey conducted by Rutgers University, only 56 percent of the Class of 2010 was able to find employment a year after graduating. We must stop pushing a one-size-fits-all approach to education which tells all high school students that they should pursue a four-year university degree. The skills required for so-called blue-collar jobs are impressive, and they allow young workers to make the kind of living needed to raise a family.

Revamping our current education models to recognize the value of other career paths in the skilled trades is just one of the needed reforms of our current labor market structure. Replacing our business tax

system with one which would level the playing field with our trading competitors and bring jobs home to America is of critical importance if we hope to rebuild our U.S. manufacturing base. While Texas remains the number one place in the United States to do business, we need a bold economic and tax policy to make the United States the number one place in the world to do business. Let’s bring jobs home to America and have the saying “Made in America” the rule, rather than the exception, once again. 

Sincerely,



Tom Pauken, Chairman
Commissioner Representing Employers



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Cover image: State Capitol building in Austin, Texas. *iStockphoto/ Thinkstock*

To wear or not to wear: dress codes in the workplace

Under Texas and federal laws, employers may have dress codes in their policy handbooks as long as the dress code bears a reasonable relationship to legitimate business needs and is enforced fairly. What is a business need? The business's concern with safety has been generally recognized by the U.S. Equal Employment Opportunity Commission (EEOC) as a legitimate business need. For

An Overview

example, a manufacturing company may require all employees to wear pants for safety reasons in the manufacturing facility to prevent fabric becoming caught in machinery. However, under Title VII of the Civil Rights Act of 1964, employers who have 15 employees or more, may not have dress codes which discriminate against employees based on race, color, religion, national origin, and gender.

Religious Discrimination. Employers who are covered under Title VII must try to reasonably accommodate employees whose religious beliefs or practices are burdened by the employer's dress code, unless it places an undue hardship on the employer. If the accommodation (e.g., making an exception to the dress code for an employee because of religious reasons) causes more than a minor cost on the employer's business, then the employer will not have to accommodate the employee. However, not only will monetary costs be considered in determining an undue hardship, but the burden on the employer's business will also be considered; for example, the effect the accommodation has on the business's safety or how the accommodation imposes on other employees' work rights or benefits. Therefore, an employer will have to be specific and have documented evidence of the



Applying the dress code to all employees can prevent claims of discrimination against women or minorities and may minimize complaints of unfair treatment. However, there will be some exceptions under the law. Jupiterimages/Getty Images/Thinkstock

hardship.

Nevertheless, an employer who has 15 or more employees and whose dress code prohibits head coverings or hats may need to accommodate a Jewish employee's request to wear his *kippah* or a Muslim employee's request to wear her headscarf. Religious dress may include face coverings, body piercing, or tattoos. In 2004, Costco, the wholesaler, had a "no facial jewelry" dress code which was successfully defended in a lawsuit by proving that the employee's facial piercings, which were in accordance with her religious beliefs, could not be accommodated because the company had a legitimate business need to deliver a professional image to its customers [see, *Cloutier v. Costco*, 390 F.3d 126 (1st Cir. 2004)]. The *Costco* employee was a cashier who saw customers every day, and it would have posed an undue hardship on the company to accommodate her because allowing the employee

to wear her facial piercings would "adversely affect the employer's public image." However, each case will depend on the facts, such as the type of business, the employee's job duties, and the employer's conduct. Usually, an employer's dress code will likely be upheld if the rules are applied consistently with all employees and involve business-related needs. For more information about dress codes relating to religious beliefs, go to the EEOC's website at http://www.eeoc.gov/policy/docs/religion.html#_Toc203359534; http://www.eeoc.gov/policy/docs/qanda_religion.html; and http://www.eeoc.gov/policy/docs/religion.html#_Toc203359523.

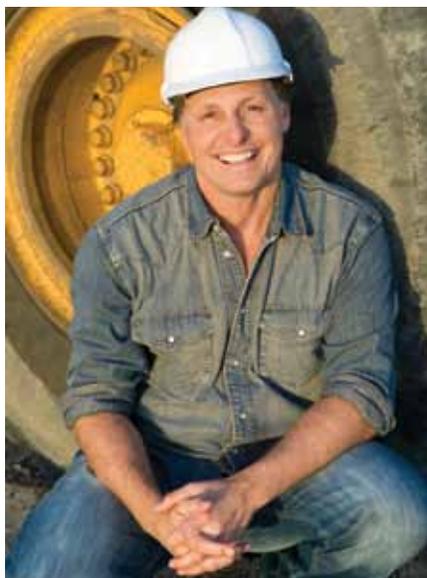
Race & Disability Discrimination. While some physical appearances are related to religious beliefs, some physical appearances may be medically related and can be considered a disability. For example, an employer who has a "no facial hair" policy may have to reasonably ac-

commodate employees, such as men with pseudofolliculitis barbae (PFB) (i.e., a skin condition that may affect some minorities) under the Americans with Disabilities Act (ADA), which applies to employers that have at least 15 employees. PFB may be considered a disabling condition and may fall under the ADA. In addition, a no facial hair policy may have a disparate impact on a protected class (e.g., minorities), creating a discriminatory policy. Therefore, a policy requiring employees to be clean-shaven may be discriminatory against some minority employees. For more information about ADA, go to the EEOC's website at <http://www.eeoc.gov/facts/ada17.html>, and for more information about no-facial hair dress codes, go to <http://www.eeoc.gov/policy/docs/race-color.html#VIIB5>.

Sex Discrimination. Employers may have different dress codes for men and women unless the policy has no basis in social customs, differs significantly between men and women, or places a greater burden on women. For example, a policy that requires female managers to wear a suit, while male managers are allowed to wear jeans and a t-shirt, is most likely discriminatory against women. Dress codes that conform to social norms are generally acceptable even when they affect only one sex. For example, an employer's policy that requires only male employees to cut their long hair is acceptable [see, *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1998)].

Basic Tips for Drafting & Enforcing Your Dress Code Policy:

- **Business-Related Reason.** Base the dress code on business-related reasons and explain the reasons in your policy so employees understand the rationale behind the restrictions. Some examples of business-related reasons include maintaining the company's public image, promoting a productive work environment, and complying with health and safety standards.



A manufacturing company may require all employees to wear pants for safety reasons in the manufacturing facility to prevent fabric becoming caught in machinery. iStockphoto// Thinkstock

- **Simple Dress Code First.** Be sure your policy requires your employees to simply have an appropriately well-groomed appearance. If you have a casual dress policy, specify what clothing is inappropriate (e.g., are sweatsuits, shorts, flip-flops, etc. appropriate?).
- **Communicate.** Explain the dress code to job candidates. Include your dress code in your company's policy handbook and be sure to explain the consequences for noncompliance. If any changes are made to the policy, have your employees acknowledge the new policy by signing an acknowledgement form. A general sample of an acknowledgement form from our book, *Especially for Texas Employers*, can be found at http://www.twc.state.tx.us/news/efte/acknowledgment_of_receipt_of_employee_handbook.html.
- **Apply Uniformly.** Apply the dress code to all employees. This can prevent claims of discrimination against women or minorities and may minimize complaints of

unfair treatment. However, there will be some exceptions under the law (see next point).

- **Reasonable Accommodations.** As mentioned above, an employer with 15 employees or more must comply with Title VII of the Civil Rights Act of 1964, which requires such employers to make reasonable accommodations when necessary. However, if an accommodation places an undue hardship on the business, then the business is not required to make the accommodation. An employer with fewer than 15 employees is not required to reasonably accommodate employees; however, such an employer would still want to treat the employee as fairly and consistently as possible.
- **Corrective Action.** Apply the dress code consistently. When disciplining employees for violating the dress code, explain why the employee's attire does not comply with the dress code. Be sure to document your disciplinary action and always have a witness present when presenting the employee with a written warning. Some ideas on how to create a disciplinary process are in our book, *Especially for Texas Employers*, located at <http://www.twc.state.tx.us/news/efte/discipline.html>.

For more information about dress codes, go to the EEOC's website at www.eeoc.gov. You can also find dress code information in our book, *Especially for Texas Employers*, at http://www.twc.state.tx.us/news/efte/dress_codes.html.

For creating an enforceable dress code policy, it is always best to consult with an attorney. 🇹🇽

Marissa Marquez
Legal Counsel for
Chairman Tom Pauken

Frequently asked questions from employers

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

Employer Policies

Q: Should the employee handbook be written by a lawyer?

A: Texas and federal laws do not require employers to have policy handbooks, but a policy handbook is helpful in defending lawsuits or unemployment insurance claims; likewise, they do not have to be written by a lawyer. However, it is a good idea to have an experienced employment law attorney review your policy handbook.

Q: Once employees have their initial training (e.g., sexual harassment, drugs in the workplace, etc.), do we or should we train annually? What is the law if any?

A: Unless a specific grant or contract provides otherwise, Texas employers are not required to train their employees in this state annually on sexual harassment, drugs in the workplace, or any other type of policy, but it is a good idea to remind your employees every now and then about your policies.

Q: Can an employer require that employees call instead of texting or e-mailing the office if they are going to be tardy or absent from work?

A: Yes, an employer can create a policy which requires calling, not texting or e-mailing, as the only proper means of notifying the employer of tardiness or absenteeism. An employer may also want to specifically identify *whom* an employee needs to notify, whether it is the manager, human resource representative, the owner,



Unless a specific grant or contract provides otherwise, Texas employers are not required to train their employees in this state annually on sexual harassment, drugs in the workplace, or any other type of policy, but it is a good idea to remind your employees every now and then about your policies. Jack Hollingsworth/Photodisc/Thinkstock

co-worker, etc.

Work Separations

Q: When I terminated an employee, she immediately got up and walked out of the office before I had a chance to ask her to sign a termination form. She is now asking me for a copy of the termination form. Do I have to give it to her?

A: That is not a requirement under Texas law (for details, see Attorney General Opinion No. JM-623, January 20, 1987, which is based on *St. Louis Southwestern Railway Co. of Texas v. Griffin*, 171 S.W. 703 (Tex. 1914)). However, giving an employee a termination notice can help document that the employment relationship has truly been severed as of a certain date, which can help an employer avoid certain problems; for example, a termination notice can be helpful when an employee claims

not to have known she was no longer employed and files a wage claim with the Texas Workforce Commission (TWC) claiming that she was not paid for time that she allegedly worked.

Q: If an employee quits or is terminated, when is an employer supposed to deliver their final paycheck?

A: The Texas Payday Law regulates the timing of the final paycheck in section 61.014 which applies to employees (i.e., not independent contractors) who work for private employers. If an employee is laid off, discharged, fired, or otherwise involuntarily separated from employment, the final pay is due within six calendar days of discharge. If the employee quits, retires, resigns, or otherwise leaves employment voluntarily, the final pay is due on the next regularly scheduled payday

following the effective date of resignation. For more information about final paychecks, please see a link from our book, *Especially for Texas Employers*, at http://www.twc.state.tx.us/news/efte/final_pay.html.

Q: We terminated an employee and mailed his final paycheck by certified mail. The former employee did not pick up the check at the post office and it was returned to our office. I ran a copy of the envelope to show it was returned in order to prove that we mailed it within the required time. Is it okay to just send it by regular mail this time and pay for proof of mailing receipt?

A: An employer is not obligated to *re-mail* the final paycheck if it has already been sent by registered mail and returned as unclaimed. The return envelope will be your documentation that you attempted delivery by mail within the required time. You can simply hold the paycheck at the office and await further contact from the employee. If the paycheck has been unclaimed for a year or more, it may be considered unclaimed property and turned over to the Unclaimed Property Division of the Texas Comptroller's Office. You can find information on how to contact that office on the comptroller's website at <http://www.window.state.tx.us/up/>. Thus, continue holding the paycheck until at least one year has passed since the date on which the wages were due and payable, then turn it over the Comptroller's Unclaimed Property Division. Further details are available in our book, *Especially for Texas Employer*, at http://www.twc.state.tx.us/news/efte/delivery_of_wages.html.

Questions About TWC

Q: We offered someone who is receiving unemployment benefits a job and he refused it. How do I report that to TWC?

A: You can call your local workforce office and report the claimant's identifying information and any relevant details about the job offer that was refused, including start

date, duties, location, pay, etc. After you make the report, TWC will investigate. You can search for your local workforce office at <http://www.twc.state.tx.us/dirs/wdas/wdamap.html>. You also can report the work refusal to your nearest Tele-Center, as listed on <http://www.twc.state.tx.us/ui/bnfts/offices.html>.

Q: I mailed my unemployment insurance claim appeal to the TWC Appeal Tribunal. Whom do I call at TWC to confirm that it was received?

A: You can confirm receipt of your appeal to TWC's Appeal Tribunal by calling the status desk at (512) 463-2807, or you can e-mail questions to appeals.status@twc.state.tx.us.

Employer Resources

Q: I would like to get a copy of TWC's book, *Especially for Texas Employers*. Can you please tell me how to go about getting a copy and how much it costs?

A: TWC's book, *Especially for Texas Employers*, is available online free of charge at <http://www.twc.state.tx.us/news/efte/tocmain.html>. You can also order a free copy of the book by going to this link: <http://www.twc.state.tx.us/news/efte/tocmain2.html> and clicking on "Click here to request a printed version." Once you click on that link, an e-mail will pop up addressed to the department that mails out the books.

Q: I want to subscribe to *Texas Business Today*. What do I do to subscribe?

A: An employer can e-mail a request to subscribe to TWC-Updates@businessink.com, or a request can be mailed to the address located on the back of this newsletter. Note: The above e-mail address is only for *Texas Business Today* requests such as discontinuing subscription, change of address requests, or requests for additional copies of the newsletter. Be sure the request includes the company name and address where it is to be sent.

Q: Where can I get the required workplace posters?

A: The required TWC posters can be ordered at no cost through our unemployment tax services on our website at <http://www.twc.state.tx.us/ui/tax/emtaxinfo.html>, or you can fax your request to (512) 936-3205. Be sure your fax request includes your TWC account number, your address for mailing posters, and the number of posters you need printed in English or Spanish (Spanish-language posters are not a requirement). You also can order posters by calling (512) 463-2747 or by contacting your local TWC tax office. A list of our TWC tax offices around the state can be found at <http://www.twc.state.tx.us/ui/tax/taxoff.html>. Required posters from other agencies can also be printed using links on our website at <http://www.twc.state.tx.us/ui/lablaw/posters.html>.

Q: How much does it cost to list a local job opening on WorkInTexas.com?

A: Job listings on WorkInTexas.com, TWC's job-matching website, are free.

Q: I am having technical problems with the WorkInTexas.com website. Whom can I contact for assistance?

A: Contact your local workforce center to speak to someone about your technical problem. You can use our workforce center locator at <http://www.twc.state.tx.us/dirs/wdas/wdamap.html> and follow the instructions. If you would like to e-mail your question, go to this website to submit your question: https://wit.twc.state.tx.us/WORKINTEXAS/wtx?pageid=CV_MSG_COMPOSE&cookiecheckflag=1 and your question will be answered by a workforce center representative near you.

TWC's Tax Department

Q: My business has moved and the name has changed. How do I contact TWC about these changes?

A: An employer can request name



If a business has fewer than 15 employees (counting anyone who works for the business, in payroll status, for each working day in each of 20 or more calendar weeks in the current or preceding calendar year), it is not covered by any employment law relating to pregnancy or disability. Hemera/ Thinkstock

and address changes from TWC's Tax Department by calling (512) 463-2700 or by e-mailing tax@twc.state.tx.us. The Tax Department's website is <http://www.twc.state.tx.us/ui/tax/taxdept.html>.

Q: I am having a problem filing my unemployment insurance tax quarterly report on TWC's website. Whom can I call for assistance?

A: TWC's Tax Department can assist with questions about filing your quarterly reports. See the tax department's contact information above.

Q: We have laid off our only employee, and may close the business entirely. Do we have to file any forms or notify TWC about this?

A: You are not obligated under Texas law to notify TWC about a work separation and there are no forms you need to file with TWC. However,

if you will no longer report wages, you should contact TWC's Tax Department to file a status change form (Form C3SCF). See the Tax Department's contact information above.

Employer Rights

Q: I found out that a current employee is working for another employer, too. What rights does an employer have regarding whether an employee is allowed to work for two employers simultaneously?

A: Under Texas law, an employer is not obligated to allow an employee to work in any outside employment and can require an employee to obtain company authorization before beginning any outside work. A company can prohibit an employee from working for a competitor or from any other employment that is inconsistent with their work for the company. For more information on this topic, please see this link from our book, *Especially for Texas Employers*: http://www.twc.state.tx.us/news/eft/conflict_of_interest.html.

Q: Can an employer make it a condition of employment to have a new employee sign a wage authorization deduction agreement?

A: An employer in Texas may make it a condition of continued employment that employees sign such a form. The best time to have such forms signed is at the time of hire when all the new hire paperwork is issued. The wage deduction authorization agreement is something that can be part of the standard new hire packet. Please see the following topic in our book, *Especially for Texas Employers*, for suggestions on what can be included in such a packet at http://www.twc.state.tx.us/news/eft/new_hire_paperwork.html.

Medical Issues

Q: I do not have a maternity leave policy and one of my employees is pregnant and wants us to grant

her maternity leave. We have eight employees. What laws apply to our business?

A: If a business has fewer than 15 employees (counting anyone who works for the business, in payroll status, for each working day in each of 20 or more calendar weeks in the current or preceding calendar year), it is not covered by any employment law relating to pregnancy or disability, and the business would be free to handle the situation in any way it deems appropriate. Of course, a business not covered by such laws would still want to treat its employees as fairly and consistently as possible. If the business has 15 or more employees, it is covered by state and federal pregnancy and disability discrimination laws. Please see the link from our book, *Especially for Texas Employers*, regarding medical-related laws that may apply to your business at Also see the topic on pregnancy rights at http://www.twc.state.tx.us/news/eft/pregnancy_rights.html. In the event of an unemployment claim from an employee who is laid off due to excessive medical absences, the employer should explain that it was a medical work separation and that the company's account should be protected from chargeback.



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OSHA guidelines set basic workplace safety and health requirements

The nation's main workplace safety and health law is the Occupational Safety and Health Act (OSHA) of 1970, which requires all private-sector employers to furnish a safe workplace, free of recognized hazards, to their employees, and requires employers and employees to comply with occupational safety and health standards adopted by the U.S. Department of Labor's OSHA division (for the main duty clause of OSHA, see 29 U.S.C. § 654). The complete listing of DOL's OSHA regulations is found at http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=STANDARDS&p_toc_level=0&p_keyvalue=.

Compliance with OSHA standards not only helps prevent needless workplace tragedies from accidents, but also helps to minimize the number of injury-related employee absences, keep workers' compensation and other insurance costs to a minimum, and promotes higher productivity from employees who can feel secure that the company is looking out for their safety and can thus concentrate on doing their jobs well.

A myth about OSHA is that the regulations are too complex to understand. Although the regulations are numerous and occasionally very comprehensive and detailed, almost all of them stem directly from common sense, best practices, and what experienced and prudent employees would do in their jobs anyway. For example, the regulations require wearing seat belts when driving vehicles or operating machines with seats, ensuring that safe scaffolding and fall protection are in place for employees working at heights, wearing goggles or other face protection during welding or while working with abrasive materials, using cave-in protection when working in trenches, using guards on any tools with moving blades, using guards and other protective barriers on machines with large moving parts, provid-

ing kill switches on machinery for immediate shut-off if anything goes wrong, providing adequate ventilation for workers in enclosed areas where fumes are present, protecting health-care workers from accidental pricks from needles and other sharp medical instruments, avoiding sparks near flammable materials, and so on.

Although employers have the right to take appropriate corrective action toward employees who violate known safety rules, OSHA protects an employee's right to report workplace safety concerns and violations of safety rules, and an employer that retaliates against an employee who reports safety-related problems or participates in an OSHA-related investigation is subject to enforcement action in court by DOL (see 29 U.S.C. § 660(c)(1, 2)).

Non-willful violations can result in civil penalties, which become more substantial for serious or repeated violations, and willful violations can result in both civil penalties and imprisonment for those responsible, depending upon the severity of the violation.

OSHA violations are not necessarily enough to prove an employer's negligence as a matter of law in a civil lawsuit arising from a workplace injury, but can be used as evidence of negligence. Similarly, evidence of compliance with OSHA may not be sufficient to avoid liability in such a lawsuit, and compliance is certainly not enough to prevent a workers' compensation claim from being filed, since workers' compensation claims are generally handled without regard to issues of fault (see 29 U.S.C. § 653(b)(4)).

Child labor presents special safety issues under both Texas and federal laws. Regardless of how safe a workplace may be for adult employees or how much in compliance with OSHA an employer may be, children may not perform hazardous duties or work

during restricted times. A complete list of prohibited duties and restrictions on work hours for children under both Texas and federal laws appears on the Texas child labor law poster available for free downloading at <http://www.twc.state.tx.us/ui/lablaw/llcl70.pdf>. For more information on child labor laws, see the topic "Child Labor" in our book, *Especially for Texas Employers*, online at http://www.twc.state.tx.us/news/efte/child_labor.html.

OSHA's official PowerPoint and video presentations for workplace safety education in various industries are excellent training tools for employers and employees alike and are available for free downloading at <http://www.osha.gov/SLTC/multimedia.html>. The department's self-guided study and training tools are available on the OSHA eTools page at <http://www.osha.gov/dts/osta/oshasoft/index.html>. In addition, OSHA offers free compliance training and consultation to small- and medium-size businesses at its site consultation page at <http://www.osha.gov/dcsp/smallbusiness/consult.html> for details.

The state agency in Texas with the greatest authority in the area of workplace safety is the Texas Department of Insurance (TDI), Division of Workers' Compensation (<http://www.tdi.state.tx.us/wc/indexwc.html>), which has enforcement responsibility for the Texas Workers' Compensation Act (for the general provisions of that law, see Chapter 401 of the Texas Labor Code). The main workplace safety resource information for Texas is on the TDI website at <http://www.tdi.state.tx.us/wc/safety/index.html>. The Workers' Compensation Division's Occupational Safety and Health Consultation Program (OSHCON) provides workplace safety and health consultations to Texas employers, including free OSHA compliance assistance,

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Big News for Small Business: Skills for Small Business focuses on training needs

There are more than 433,000 Texas businesses that employ fewer than 100 employees, creating a diverse industry base with more than 10 million jobs in sectors such as energy, information technology, and aerospace. The Texas Workforce Commission (TWC) recognizes that supporting these entrepreneurs means supporting the Texas economy. That's where Skills for Small Business comes in.

TWC's \$2 million Skills for Small Business program is designed to focus Skills Development Funds on the training needs of small businesses. Skills for Small Business provides tuition and fees for employees who participate in an existing course offered by two-year public community or technical colleges, or the Texas Engineering Extension Service (TEEX).

Skills for Small Business provides up to \$1,450 for each newly hired full-time employee trained and up to \$725 for each incumbent employee. An employee can participate once during a 12-month period. Businesses apply directly to TWC for training at a local college. TWC will evaluate applications and, upon approval, fund the college for the requested training.

"More than 80 percent of the state's businesses are small employers who need workers with the most current, in-demand industry skills," said TWC Chairman Tom Pauken. "We are pleased to offer a specific program that will meet the needs of these small businesses."

Corpus Christi businessman Jerry Hunt of Dykema Architects recognizes the value of TWC's Skills for Small Business program. Several of his employees took classes at Del Mar College, including a course on Revit, a modeling software program used for computer-aided design applications.

"Upgrading my employees' skills makes my company more successful," he said. "I know that skilled employees are my company's most

valuable assets."

Other courses small business employees are taking through this TWC program include QuickBooks, Business Communications, Microsoft Excel, and Project Management.

"Most of these classes are online which allow the employees to work on them at their own pace," said Olivia de la Rosa, continuing education coordinator at South Texas College in McAllen. "Skills for Small Business is a good program and I would encourage companies to take advantage of it."

Alpha Care Home Health in Edinburg is one of the companies participating in the program at South Texas College.

"It's a very good program," said Chief Financial Officer Elvira Lopez. "Taking an accounting course and a QuickBooks class has helped me tremendously in my job. I hope to expand participation in our company."

Skills for Small Business is in partnership with the Office of the Governor, which is conducting the Governor's Small Business Forums around the state that are designed to educate the Texas entrepreneur and small business community on workforce development, start-up essentials, marketing, hiring and managing employees, and training and growth opportunities. Representatives from TWC, local workforce boards, community colleges, economic development groups, and chambers of commerce are available at the Small Business Forums to help answer questions and businesses complete an application.

For more information, visit the Skills for Small Business website at <http://ssb.texasworkforce.org>, contact Workforce Business Services Project Development at skills@twc.state.tx.us, or call toll-free at 1-877-463-1777. 

Kate Hourin

TWC Communications Department

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at <http://www.tdi.state.tx.us/wc/safety/oshcon.html>.

As with many federal laws, OSHA does not preempt state laws that provide a greater degree of protection or benefit for employees. The following are examples of state-level workplace safety and health laws. Many occupations regulated under the Occupations Code have safety-related laws in the chapters for those occupations:

- Texas Health and Safety Code, Section 81.042 - Duty of Some Employers to Report Certain Communicable Diseases to Local Health Authorities or to the Texas Department of State Health Services at 1-800-705-8868 (for the list of reportable diseases, see <http://www.dshs.state.tx.us/idcu/investigation/forms/101A.pdf>)
- Texas Health and Safety Code, Chapter 256 - Safe Patient Handling and Movement Practices
- Texas Health and Safety Code, Chapter 437 - Regulation of Food Service Establishments, Retail Food Stores, Mobile Food Units, and Roadside Food Vendors
- Texas Health and Safety Code, Chapter 502 - Hazard Communication Act
- Texas Labor Code, Chapter 51 - Employment of Children
- Texas Labor Code, Chapter 52 - Miscellaneous Restrictions
- Texas Workers' Compensation Act, Texas Labor Code, Chapter 401, et seq.

This topic appears in our book, *Especially for Texas Employers*, which can be found online at <http://www.twc.state.tx.us/news/efte/osha.html>. 

William T. Simmons
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Skills Development Fund benefits businesses

Private-sector businesses in Texas have a unique opportunity to increase their business competitiveness while boosting their employees' skills through workforce training.

The Texas Workforce Commission (TWC) Skills Development Fund offers a customized training opportunity for businesses to train new and existing employees. A business, business consortium, or trade union identifies training needs and partners with a public community or technical college, or the Texas Engineering Extension Service,

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courses to be delivered at the employer's worksite during hours to match workers' shifts, online, and through the development of company-specific instructional examples.

Under the Skills Development Fund, the college is the business's partner throughout the whole process. The college works with the business to determine the curriculum; completes the grant application; and manages the grant administration, including fiscal and reporting activities. The business focuses on ensuring that employees participate in the training and maximizing the results through increased productivity and business profitability.

Private employers of all sizes are eligible to participate in the Skills Development Fund. See "Big News for Small Business: Skills for Small Business focuses on training needs" in this issue for details on how this program can help small businesses.

For more information, visit the Skills Development Fund website at <http://skills.texasworkforce.org>, e-mail skills@twc.state.tx.us, or call toll-free 1-877-463-1777.

Governor's Small Business Forums

There are still some chances for small businesses to participate in the Governor's Small Business Forums series held around Texas. Representa-

tives from the Governor's office and other key agencies are available to share information concerning financing, workforce development, starting a business, marketing, hiring and managing employees, networking, and identifying key government contacts. Information about the remaining forums is available at http://members.texasone.us/site/PageServer?pagename=sbs_forums.

OSHA's Distracted Driving Initiative

Due to an increasing number of injuries and deaths attributable to text-messaging while driving, the Department of Transportation and the Department of Labor, through OSHA, are teaming up to try to minimize that problem, and distracted driving in general. OSHA is actively discouraging employers from having any policies or practices that require or encourage employees to send text messages while driving. This is not a new subject; texting while driving is already prohibited for federal employees under an executive order issued on October 1, 2009. In addition, prudent employers are already trying to avoid needless added liability and have instituted strict prohibitions against distracted driving. OSHA's position is that employers that allow or promote distracted driving are not complying with their duty to ensure safe working conditions for employees. OSHA's official statement on this new policy is at <http://www.osha.gov/distracted-driving/initiative.html>.

Texas Named Best State for Business

For the seventh year in a row, *Chief Executive Magazine* has named Texas the nation's best state for doing business, based on "consistent policies and regulations that allow [businesses] to plan, as well as intangible factors such as [the] state's overall attitude toward business and the work ethic of its population." According to the May 2011 survey posted at <http://chiefexecutive.net/best-worst-states-for-business>, Texas "gets strong marks in all areas impor-

tant for business creation, and has the second-lowest taxes in the nation. The state has created more jobs than any other—about 250,000 last year. Not surprisingly, it also enjoys the highest inward net migration rate of any state." At the other end of the spectrum is California, classified for seven years in a row as the worst state in which to operate a business.

Showing that even Texas has room for improvement in some areas, a recent study released in April 2011 by the Council on State Taxation indicates that Texas ranks 20th in the nation with regard to effective tax rates on new investments by business (weighted by capital investment), and 19th when weighted by jobs. Maine, Oregon, and Ohio led the nation in business tax competitiveness, and the District of Columbia and New Mexico trailed all other states by a significant margin. The full study is available online at <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=78442>.

New Website Devoted to the Form I-9

On May 13, 2011, U.S. Citizenship and Immigration Services (USCIS) launched "I-9 Central", a new online resource center at <http://www.uscis.gov/I-9central> that brings together its resources, tips, and guidance on how to understand the Form I-9 process and properly complete and maintain the Form I-9. The agency notes that the Form I-9 is the most frequently accessed form on its website, which is no surprise to the tens of thousands of Texas employers who have taken advantage of the USCIS site in the past to download the form. One of the features is a link to the "E-Verify Self-Check" which allows employees and job-seekers in the U.S. to check on their own employment eligibility online (currently available only in Arizona, Colorado, D.C., Idaho, Mississippi, and Virginia). There is also an updated I-9 *Handbook for Employers* (M-274), an invaluable how-to manual for employers who want reliable guidance in completing the forms. 

EEOC issues new rules for 2008 ADA Amendments Act

Since March 25, 2011, new rules interpreting the Americans With Disability Act (ADA) Amendments Act of 2008 (ADAAA) have been in effect. Many good articles are available on the Internet concerning those rules, but to summarize, it is easier for an employee or applicant to

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show they have a protected disability, and the

focus now is on whether an employer made or could have made a reasonable accommodation for the disability in question. The text of the final rules is at <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>, and the Equal Employment Opportunity Commission's (EEOC) question and answer page is at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm. A special resource for small businesses trying to comply with the ADAAA is at http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

Another EEOC Alert

EEOC has held meetings recently showing that the agency is scrutinizing a problem that observers are noticing more and more: the refusal to hire those who are unemployed. Many at the agency and some outside observers have indicated that since unemployment has hit minorities particularly hard, refusing to hire applicants simply because they are unemployed could be seen as having a disparate impact on minorities and thus potentially in violation of Title VII of the Civil Rights Act of 1964. In a similar vein, some at EEOC feel that failing to hire those who are seen as over-qualified tends to have a disparate impact on older workers,



The U.S. Department of Labor has released a free iPhone and iPod Touch app that is intended to help employees track their work hours and keep a tally on any overtime pay they may be earning. *Creatas Images/ Thinkstock*

which is potentially a violation of the Age Discrimination in Employment Act. The best advice would be to focus on job-related skills, abilities, and fit, and be as careful as possible that various forms of bias do not appear to influence the hiring decision.

New Wage and Hour Regulations from DOL

On April 5, 2011, the U.S. Department of Labor released its final regulations amending Parts 516, 531, 553, 778, 779, 780, 785, 786, and 790 of the wage and hour regulations. Most employers will notice changes in Part 531 (governing wage payments) and Part 778 (overtime pay). In Part 531, the revised regulations on tip credits provide that employers must give written notice of the tip credit and any tip-pooling arrangement in advance of the work; the tip credit for employees participating in a tip pool is limited to the amount of tips actually received by each employee. In Part 778, DOL comments for 29 C.F.R. § 778.114

indicate that commissions, bonuses, and/or other forms of incentive pay are incompatible with the "fixed salary, fluctuating workweeks" method of paying overtime to salaried, non-exempt employees. The text of the new regulations is found in the Federal Register at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-05/pdf/2011-6749.pdf>.

Need to Track Overtime? "There's An App for That"

Speaking of DOL, the agency has released a free iPhone and iPod Touch app that is intended to help employees track their work hours and keep a tally on any overtime pay they may be earning. According to DOL, the app is "a timesheet to help employees independently track the hours they work and determine the wages they are owed. Available in English and Spanish, users can conveniently track regular work hours, break time, and any overtime hours for one or more employers. This new technology is

significant because, instead of relying on their employers' records, workers now can keep their own records in digital format. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." The DOL announcement, including a link to the iTunes store where the app can be downloaded, is at http://www.dol.gov/whd/Highlights/archived.htm#May9_2011.

Reminder on Workplace Poster from the OIEC

The Office of Injured Employee Counsel (OIEC) recently issued a bulletin reminding employers that are covered by workers' compensation insurance that they need to post a notice, "Employer's Notice of Ombudsman Program," at the workplace. The poster is available in English, Spanish, Vietnamese, and Chinese from the OIEC website at <http://www.oiec.state.tx.us/resources/employernotice.html>. Employers also can call 1-866-EZE-OIEC (1-866-393-6432).

School Districts Facing Unemployment Claims

School districts and other reimbursing employers facing budget-related reductions in force should be ready for more unemployment claims than in past years. There are some things to keep in mind. Reimbursement liability will hit once unemployment benefits are paid out to RIF-ed employees, and billing will be on a quarterly basis. In terms of how many unemployment claims to anticipate, there will be a small number for second quarter 2011, more in the third quarter, and still more in the fourth quarter of 2011. The reasonable assurance provision will not help in cases of those who have lost their jobs through a reduction in force. However, other eligibility requirements such as availability for full-time work and medical ability to work will apply as usual. Finally, if any laid-off district personnel are offered suitable work with the district,

but turn it down, such work refusals should be reported to any TWC office for investigation.

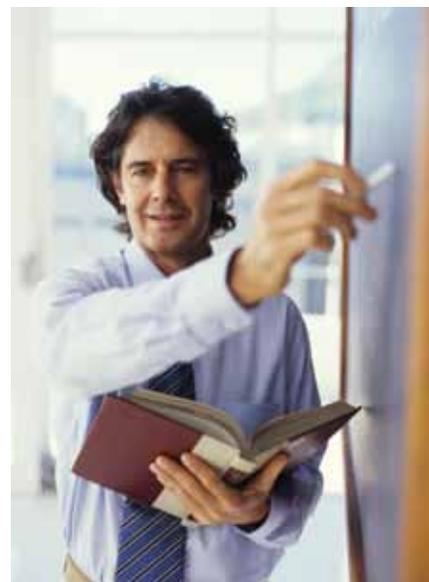
Unemployment and Wage Claims

Unemployment claims

- Use a termination checklist, follow your policies, and be fair.
- In discharge cases, you must show at least two main points:
 - 1.) a specific final incident of misconduct that happened close in time to the discharge;
 - 2.) that the claimant either knew or should have known that discharge would occur for the reason given.
- In voluntary leaving cases, focus on how the claimant left while continued work was still available and how a reasonable employee otherwise interested in remaining employed would not have left for the reason given.

Wage claims

- Have employees sign a clear, written wage agreement (that includes commissions and bonuses) and follow the agreement exactly.
- Paid leave, holidays, and severance pay, if granted, should be handled according to a clear written policy or other form of agreement.
- Keep exact records of all days and hours worked.
- Keep good documentation of all wages paid and deductions made. Never pay wages in cash without a signed receipt.
- Enforce your work schedules, because you have to pay for all time worked, whether it was authorized or not.
- Never take an employee's pay below minimum wage unless the reason for the deduction is one that is allowed under the law. See the list at http://www.twc.state.tx.us/news/efte/allowable_deductions.html.
- Unless a deduction from pay is ordered by a court or required or specifically authorized by



School districts and other reimbursing employers facing budget-related reductions in force should be ready for more unemployment claims than in past years. *George Doyle/ Stockbyte/ Thinkstock*

a law, obtain signed written authorization from the employee before making the deduction.

In all cases:

- Respond on time to any claim notice, ruling, or appeal decision; never file a late response or appeal.
- Be as specific as possible and supply whatever documentation is needed for that type of case, such as wage agreements, policies, deduction authorizations, timesheets, proof of wage payments, and so on.
- Be consistent in your responses, appeals, and testimony.
- Follow the instructions on the hearing notice exactly.
- Have all your evidence organized and firsthand witnesses ready for the hearing.
- Make your testimony brief, factual, and concise. Hearing officers like that! 

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Information regarding the Small Business Healthcare Tax Credit

The Patient Protection and Affordable Care Act, the federal health care reform law, created a tax credit to help certain small businesses offset the cost of providing health insurance to their employees.

Does my business qualify for the tax credit?

Taxable (for profit) and tax-exempt (nonprofit) business are eligible if they meet the following requirements:

- Have fewer than 25 full-time equivalent (FTE) employees.

Note: Because eligibility is based in part on the number of FTEs, not the number of individual employees, employers with more than 25 workers may also qualify if some of their workers are part-time.

- Pay average annual employee wages below \$50,000.
- Pay at least half of the insurance premiums for employees at the single (employee-only) coverage rate.

How much is the tax credit?

The credit is worth up to 35 percent of premium costs for a small business in 2010 (25 percent for tax-exempt employers). On January 1, 2014, this rate increases to 50 percent (35 percent for tax-exempt employers). The credit is paid on a sliding scale, up to a maximum of 35 percent for businesses with 10 or fewer full-time equivalent employees earning annual average wages of \$25,000 or less per year. Small businesses can claim a tax credit for 2010, 2011, 2012, and 2013 and for any two years after that. For tax years 2010 to 2013, the maximum credit is 35 percent of premiums paid by eligible small businesses and 25 percent of premiums paid by eligible tax-exempt organizations.



The Patient Protection and Affordable Care Act (federal health care reform law) created a tax credit to help certain small businesses offset the cost of providing health insurance to their employees *iStockphoto/Thinkstock*

How do I claim the credit?

Businesses can use the new Form 8941 (Credit for Small Employer Health Insurance Premium) and the newly revised Form 990-T (Exempt Organization Business Income Tax Return) to file for the tax credit. For form instructions and more information, visit www.irs.gov.

What other protections does the health care reform law offer consumers?

The health care reform law also:

- Allows consumers to add or keep children on their health policies until age 26.
- Allows certain Texans who have been uninsured for six months and who have pre-existing conditions to enroll in the federal Pre-Existing Condition Insurance Plan (PCIP).
- Stops insurance companies from denying benefits to children younger than 19 because of a pre-existing condition.
- Eliminates annual and lifetime dollar limits on your coverage

unless the plan received a waiver.

- Requires plans to offer some important preventive services to enrollees without charging a copayment, coinsurance, or deductible.
- Ensures the right to appeal to an independent entity when the plan denies payment for a service or treatment.

Source: <http://www.texashealthoptions.com/cp2/documents/chapfssmallbiz.pdf>.

Contact: 1-855-TEX-CHAP (1-855-839-2427) or <http://www.texashealthoptions.com/cp2/cpmchap.html>.

The Texas Consumer Health Assistance Program (CHAP) is operated by the Texas Department of Insurance (TDI) to help Texas consumers with health insurance issues. Texas CHAP is part of a network of state consumer assistance programs funded by a grant from the U.S. Department of Health and Human Services. If you are deaf, hard of hearing, or speech-impaired, you may contact TDI using a relay service. 

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Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Urban Legends of Texas Employment Law and the Basics of Hiring, Texas and Federal Wage and Hour Laws, Employee Policy Handbooks: Creating Your Human Resources Roadmap, Unemployment Insurance Hearings and Appeals, and Independent Contractors. The registration fee is \$85.00 and is non-refundable. Seating is limited, so please make your reservations early if you plan to attend.

For more information, go to www.texasworkforce.org/events.html.

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- Waco Sept. 16, 2011

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