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STATE

Littler on

Texas Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Texas employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In Texas, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1). The Texas Workforce Commission (TWC) has published guidance outlining the various tests summarized here in its manual, *Especially for Texas Employers: Independent Contractors/Contract Labor*.[5]

The TWC also has entered into a partnership with the U.S. Department of Labor, Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[6]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Texas Workforce Commission (TWC)	Hybrid of the "economic realities" and common-law "right to control" tests.[7] The *economic realities component* of the Texas test emphasizes whether the alleged employer: • paid the employee's wages;

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] *See* Texas Workforce Comm'n, *Especially for Texas Employers: Independent Contractors/Contract Labor*, *available at* https://efte.twc.texas.gov/ics_contract_labor.html. The information and views set forth in the manual do not represent the official position, policy, or pronouncement of the TWC.

[6] U.S. Dep't of Labor, Wage & Hour Div. & Texas Workforce Comm'n, *Partnership Agreement* (Feb. 15, 2015), *available at* https://www.dol.gov/whd/workers/MOU/tx.pdf.

[7] *See Hopkins v. Cornerstone Am.*, 545 F.3d 338 (5th Cir. 2008); *University of Tex. at El Paso v. Ochoa*, 410 S.W.3d 327 (Tex. App. 2013); *Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 263 (Tex. App. 2003).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		• withheld taxes; • provided benefits; and • set the terms and conditions of employment.[8] When evaluating the *control component*, courts focus on whether the alleged employer had the right: • to hire and fire the employee; • to supervise the employee; and • to set the employee's work schedule.[9]
Income Taxes	Not applicable	Texas has no state income tax.
Unemployment Insurance	TWC	Common-law "right to control" test. To aid in the application of this test, the TWC has expressly adopted the Internal Revenue Service (IRS) twenty-factor test.[10]
Wage & Hour Laws	TWC	IRS twenty-factor test, expressly adopted by the TWC in statute.[11]

[8] *Johnson*, 124 S.W.3d at 263. The following factors are also examined under the economic realities component: (1) the kind of occupation, including whether the work is typically performed under the direction of a supervisor; (2) the skill required; (3) which party furnishes the necessary equipment used and the worksite; (4) the duration of the work; (5) the method of payment, including whether by time or by the job; (6) how the work relationship is terminated; *i.e.*, by one or both parties, with or without notice, etc.; (7) whether annual leave is offered; (8) "whether the work is an integral part of the business of the 'employer;' (9) whether the worker accumulates retirement benefits;" (10) which party pays Social Security taxes; and (11) the parties' intention. *Culver v. Gulf Coast Window & Energy Prods., Inc.*, 2012 WL 151464 (Tex. App. Jan. 19, 2012) (citing *Guerrero v. Refugio Cnty.*, 946 S.W.2d 558 (Tex. App. 1997)).

[9] *Johnson*, 124 S.W.3d at 263.

[10] *See* 40 TEX. ADMIN. CODE §§ 815.134, 821.5; *see also Critical Health Connection, Inc. v. Texas Workforce Comm'n*, 338 S.W.3d 758, 762 (Tex. App. 2011) (utilizing the test favored by the TWC instead of the common-law test developed by the courts). Under the twenty-factor test, and "[d]epending on the type of operation and the services performed, not all factors may apply. The weight assigned to a specific factor may vary depending on the facts of the case." *Texas Workforce Comm'n v. Harris Cnty. Appraisal Dist.*, 488 S.W.3d 843, 852 (Tex. App. 2016).

[11] The TWC expressly adopted Form C-8 "as its official guideline for use in determining employment status." 40 TEX. ADMIN. CODE § 821.5. Form C-8 adopts the IRS twenty factors, is available at https://www.twc.texas.gov/sites/default/files/ui/docs/form-c-8-employment-status-comparative-approach-twc.pdf.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Workers' Compensation	Texas Department of Insurance	Common-law "right to control" test.[12] For purposes of workers' compensation insurance coverage, the statute defines *independent contractor* as "a person who contracts to perform work or provide a service for the benefit of another and who ordinarily: A. acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship; B. is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee; C. is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and D. possesses the skills required for the specific work or service."[13]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status. Texas does not have an approved state

[12] "The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee's work. This same test applies whether the claim arises at common law or under workers' compensation." *Thompson v. Travelers Indem. Co. of R.I.*, 789 S.W.2d 277, 278 (Tex. 1990) (internal citations omitted); *see also Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308 (Tex. 2002). A state appellate court identified six attributes for the right to control test, and it emphasized the last factor as the most important:

> (1) the independent nature of the workers' business; (2) the right to hire and fire; (3) the obligation to pay wages and withhold taxes and the method of payment, whether by unit of time or by the job; (4) the worker's obligation to furnish necessary tools and supplies; (5) the time for which the worker is employed; and (6) the employer's actual control of the progress of the work and the details of the worker's performance, not just the ends sought or the final results. *Texas Instruments, Inc. v. Udell*, 2016 WL 4485573, at **5-6 (Tex. App. Aug. 25, 2016).

[13] TEX. LAB. CODE ANN. § 406.121(2).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		plan under the federal Occupational Safety and Health Act.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[14]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[15] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[16]

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[14] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[15] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[16] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

Texas does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in Texas should follow federal law requirements regarding employment eligibility and verification.

However, an employer that receives or applies to receive public subsidies from the Texas state or local government cannot knowingly employ undocumented workers, and must certify such within its application for the subsidies.[17] An employer receiving a public subsidy must acknowledge in the application statement that it will be required to repay the public subsidy, with interest, if convicted of an offense relating to the unlawful employment of illegal aliens.[18] Moreover, the law also allows the subsidy-awarding entity to bring a civil action for violations.[19]

The state Railroad Commission requires that contractors and subcontractors register with and participate in the E-verify program to verify employee information. Likewise, the state Department of Transportation may not award a contract for the construction, maintenance, or improvement of a highway unless the contractors and subcontractors register with and participate in the E-verify program to verify employee information. In both cases, the contractors and subcontractors must continue to participate in the program during the term of the contract.[20]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[21] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.

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[17] TEX. GOV'T CODE ANN. §§ 2264.051, 2264.052.

[18] TEX. GOV'T CODE ANN. § 2264.052.

[19] TEX. GOV'T CODE ANN. § 2264.101(a)-(b).

[20] TEX. NAT. RES. CODE ANN. § 81.072; TEX. TRANSP. CODE § 223.051.

[21] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State and Local Guidelines on Employer's Use of Arrest Records*

Texas places no statutory restrictions on a private employer's use of arrest records. In addition, Texas has not implemented a state "ban-the-box" law covering private employers.

Austin's Fair Chance Hiring Ordinance (Ban the Box).[22] The City of Austin has enacted its own law addressing this issue, which is known as the Fair Chance Hiring Ordinance.[23] This ordinance applies to employers with 15 or more individuals whose primary work location is in the City of Austin for each working day in each of twenty or more calendar weeks in the current or preceding calendar years.[24]

The Fair Chance Hiring Ordinance bans employers from asking questions about or considering an individual's criminal history until after making a conditional offer of employment. A *conditional employment offer* is "an oral or written offer by an employer to employ an individual in a job . . . that is conditioned solely on the employer's evaluation of the individual's criminal history," and may also be conditioned on any preemployment medical examinations permitted by the Americans with Disabilities Act.[25]

In addition, covered employers may not:

- "publish or cause to be published information about a job that states or implies that an individual's criminal history automatically disqualifies the individual from consideration for the job;"
- solicit or otherwise inquire about the criminal history of a prospective employee on an application; and

[22] The Texas Regulatory Consistency Act (H.B. 2127 (Tex. 2023)) that was expected to go into effect on September 1, 2023, was found unconstitutional on August 30, 2023 by the Travis County District Court. If the law goes into effect at a later date, it would preempt a municipality from adopting, enforcing, or maintaining an ordinance regulating conduct in a field of regulation occupied by state law unless the local regulation is expressly authorized by another statute. This preemptive effect would likely include local ban-the box ordinances. Litigation with respect to the law is ongoing.

[23] AUSTIN, TEX., CITY CODE §§ 4-15-1 *et seq*.

[24] AUSTIN, TEX., CITY CODE § 4-15-2(F).

[25] AUSTIN, TEX., CITY CODE § 4-15-2(C).

- refuse to consider employing an applicant because the applicant did not provide criminal history information before receiving a conditional employment offer.[26]

The Fair Chance Hiring Ordinance also prohibits an employer from taking adverse action against an applicant based on their criminal history "unless the employer has determined that the individual is unsuitable for the job based on an individualized assessment conducted by the employer."[27] *Adverse action* includes a refusal to hire or to promote, or the revocation of a job offer or promotion.[28] An employer that takes adverse action against an individual because of the individual's criminal history must inform the individual in writing of that decision.[29] Although the ordinance bars employers from soliciting or considering any criminal history information until after a conditional employment offer, an employer may explain to individuals, in writing, the individualized assessment system used to consider criminal history. The ordinance is silent, however, on when employers may provide this written explanation to an individual.

The Austin ordinance does not foreclose an employer's authority to withdraw a conditional offer of employment for any lawful reason, including the employer's conclusion that an applicant is unsuitable for the job based on an individualized assessment of the pertinent criminal history.

1.3(a)(iii) *State and Local Guidelines on Employer's Use of Conviction Records*

Texas places no statutory restrictions on a private employer's use of conviction records.

Austin's Fair Chance Hiring Ordinance (Ban the Box).[30] The restriction on an employer's use of arrest records discussed above applies equally to conviction records, as the Fair Chance Hiring Ordinance does not distinguish between arrest and conviction.[31]

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

In Texas, an applicant whose arrest record has been expunged may deny the occurrence of the arrest and the existence of the expungement order.[32] Moreover, an individual who has been convicted of certain misdemeanors may petition the court for an order of nondisclosure of that criminal history. Upon receiving an order of nondisclosure, the prospective employee is not required in any application for employment or licensing to disclose that the person has been the subject of any criminal proceeding related to the information that is the subject of the nondisclosure order.[33]

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[26] AUSTIN, TEX., CITY CODE § 4-15-4.

[27] AUSTIN, TEX., CITY CODE § 4-15-4(E).

[28] AUSTIN, TEX., CITY CODE § 4-15-2(A).

[29] AUSTIN, TEX., CITY CODE § 4-15-4(F).

[30] The Texas Regulatory Consistency Act (H.B. 2127 (Tex. 2023)) that was expected to go into effect on September 1, 2023, was found unconstitutional on August 30, 2023 by the Travis County District Court. If the law goes into effect at a later date, it would preempt a municipality from adopting, enforcing, or maintaining an ordinance regulating conduct in a field of regulation occupied by state law unless the local regulation is expressly authorized by another statute. This preemptive effect would likely include local ban-the box ordinances. Litigation with respect to the law is ongoing.

[31] AUSTIN, TEX., CITY CODE § 4-15-2(D).

[32] TEX. CODE CRIM. PROC. ANN. art. 55.03(2).

[33] TEX. GOV'T CODE ANN. § 411.0755; *see also* Texas Workforce Comm'n, *Especially for Texas Employers: References and Background Checks*, Questions 7 to 11, *available at*

Juvenile Records. An applicant whose juvenile record has been sealed is not required to disclose in any proceeding, or on any application for employment, that they were subject to a proceeding in juvenile court.[34]

1.3(a)(v) *State and Local Enforcement, Remedies & Penalties*

Austin's Fair Chance Hiring Ordinance (Ban the Box).[35] The Austin Equal Employment Fair Housing Office may impose a civil penalty for violation of the Fair Chance Hiring Ordinance. The Fair Chance Hiring Ordinance does not provide a private right of action or define a criminal offense.[36]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[37] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[38] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

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https://efte.twc.texas.gov/references_background_checks.html#job-relatedness (providing guidance on how to properly phrase questions regarding criminal history).

[34] TEX. FAM. CODE ANN. § 58.261.

[35] The Texas Regulatory Consistency Act (H.B. 2127 (Tex. 2023)) that was expected to go into effect on September 1, 2023, was found unconstitutional on August 30, 2023 by the Travis County District Court. If the law goes into effect at a later date, it would preempt a municipality from adopting, enforcing, or maintaining an ordinance regulating conduct in a field of regulation occupied by state law unless the local regulation is expressly authorized by another statute. This preemptive effect would likely include local ban-the box ordinances. Litigation with respect to the law is ongoing.

[36] AUSTIN, TEX., CITY CODE §§ 4-15-6 to 4-15-8.

[37] 15 U.S.C. §§ 1681 *et seq*.

[38] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[39]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

Texas does not have a mini-FCRA law, and there are no additional state provisions specifically restricting a private employer's use of credit information and history.

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Texas law contains no express provisions regulating employer access to applicants' or employees' social media accounts.

[39] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[40] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

Texas law contains no express provisions regulating polygraph examinations for applicants or employees.

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[41] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-

[40] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

[41] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

free workplace.[42] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

The Texas Workforce Commission provides some general guidance on implementation of drug-testing policies in its employer policy manual.[43] For additional information on drug or alcohol testing of current employees, see 3.2(b)(ii).

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[44] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[45] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that

[42] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[43] *See* Texas Workforce Comm'n, *Especially for Texas Employers: Drug Testing in the Workplace*, *available at* https://efte.twc.texas.gov/drug_testing_in_the_workplace.html.

[44] 26 U.S.C. § 36B.

[45] 42 U.S.C. § 18071.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	all or a portion of such contribution may be excludable from income for federal income tax purposes.[46] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[47]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[48] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[49]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[50] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[51]

[46] 29 U.S.C. § 218b.

[47] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[48] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[49] 29 C.F.R. § 2590.606-1.

[50] 29 C.F.R. § 825.300(a).

[51] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[52]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[53] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[54]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[55]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip

[52] 29 C.F.R. § 825.300(a).

[53] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[54] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[55] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[56]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No notice requirement located.
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	No notice requirement located. Texas does not have a state income tax.
Wage & Hour Documents: Payroll Debit Cards	An employer may elect to pay wages to an employee through a payroll card account plan. An employer that elects to pay wages through a payroll card account must no later than the 60th day before the date of the first electronic funds transfer to the payroll card account of an affected employee or, for an employee hired after the date the employer adopts the plan, no later than the employee's first day of work, notify the employee in writing regarding the employer's adoption of a payroll card account plan. The employer also must provide to the employee a complete list of all fees associated with the employee's payroll card account in English, or, if the employer offers a payroll card account to an employee in a language other than English, in that other language, and a form the employee may use to request an alternate form of payment if the employee elects to opt out of the payroll card account plan. Finally, the employer must obtain from the employee any information required by the payroll card account issuer that is necessary to implement the electronic funds transfer.[57]
Workers' Compensation	Covered employers must notify employees of workers' compensation insurance coverage status, in writing.[58] This additional notice must be provided at the time an employee is hired, meaning when the

[56] 29 C.F.R. § 531.59.

[57] TEX. LAB. CODE ANN. § 61.017(d).

[58] TEX. LAB. CODE ANN. § 406.005; 28 TEX. ADMIN. CODE § 110.101. Notices prepared by the Texas Department of Insurance are available at http://www.tdi.texas.gov/forms/form20employer.html. A general notice about workers' compensation to be posted (Notice 7) is available in English, Spanish, and Vietnamese.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	employee is required by federal law to complete both a W-4 form and an I-9 form or when a break in service has occurred and the employee is required by federal law to complete a W-4 form on the first day the employee reports back to duty. The notice must contain the text required in the workers' compensation poster. If the employer is covered by workers' compensation insurance (subscriber) or becomes covered, whether by commercial insurance or through self-insurance as provided by the Texas Workers' Compensation Act (Act), the notice must include the following statement: You may elect to retain your common law right of action if, no later than five days after you begin employment or within five days after receiving written notice from the employer that the employer has obtained workers' compensation insurance coverage, you notify your employer in writing that you wish to retain your common law right to recover damages for personal injury. If you elect to retain your common law right of action, you cannot obtain workers' compensation income or medical benefits if you are injured.[59] There is one exception for this requirement. An employer that recruits an employee in Texas to perform services outside of Texas, actually hires outside of Texas, and has notices of workers' compensation insurance coverage posted conspicuously at the place of hire and at the business location where the employee will perform services, is not required to provide the notice described above.[60]

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[61] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;

[59] 28 TEX. ADMIN. CODE § 110.101.

[60] 28 TEX. ADMIN. CODE § 110.101.

[61] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[62]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

[62] 42 U.S.C. § 653a.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information	
Contact By Mail or Fax	**Contact Online**
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[63] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of the new hire reporting law in Texas.[64]

Who Must Be Reported. Texas employers must report employees newly hired, rehired, or returning from lay off, furlough, unpaid leave, or termination who are required to complete out a W-4 form.

Report Timeframe. Texas employers must submit new hire information within 20 days after the hiring date. If submitted electronically or magnetically, the information may be submitted twice monthly (if necessary), not less than 12 days nor more than 16 days apart.

Information Required. The report must contain the employee's name, Social Security number, and address, as well as the employer's name, federal employer identification number, and address.

Form & Submission of Report. The new hire report may be included in appropriate spaces added to W-4 forms or in another reporting format. Reports may be sent by mail, phone, fax, diskette, magnetic, or electronic means. A multistate employer may choose to report all new hire information to a single state twice a month by electronic or magnetic means.

Location to Send Information.

Texas Employer New Hire Reporting Operations Center
P.O. Box 149224
Austin, TX 78714-9224
(888) 839-4473
(800) 850-6442
(800)732-5015 (fax)
https://portal.cs.oag.state.tx.us/wps/portal/NewHiresResponsibilities

Multistate Employers. An employer that has employees who are employed in Texas as well as one or more other states may choose to report new hire information to a state other than Texas. To do so, the employer must: (1) designate only one state in which it has employees; (2) transmit the required reports

[63] HHS offers the form online at https://www.acf.hhs.gov/css/resource/multistate-employer-registration-form-instructions.

[64] 1 TEX. ADMIN. CODE §§ 55.301 to 55.308.

using electronic media authorized by the pertinent agency for conveying information; and (3) notify the U.S. Secretary of the Department of Health and Human Services, in writing, prior to reporting.[65]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the employee's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[66] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

The requirements for an enforceable covenant not to compete are defined by statute in Texas.[67] Careful adherence to the statutory guidelines is required to have an enforceable noncompetition agreement. The Texas statute appears simple on its face, but the Texas Supreme Court and Texas courts of appeals have subjected it to notoriously complex and often conflicting interpretations. The result has been an especially

[65] 1 TEX. ADMIN. CODE § 55.305.

[66] 18 U.S.C. §§ 1832 *et seq.*

[67] TEX. BUS. & COM. CODE ANN. §§ 15.50 to 15.52 (statute also contains requirements for noncompetes relating to the practice of medicine).

unsettled area of the law, which made employers' attempts to enforce noncompete agreements a somewhat uncertain endeavor until relatively recently.

Texas law generally prohibits the enforcement of contracts that are in restraint of trade because such contracts contravene public policy favoring the free market. Covenants not to compete are typically considered restraints of trade. On the other hand, businesses have a recognized interest in preserving their goodwill as well as protecting "investments" made in their employees, such as through specialized training and access to confidential information. Thus, although Texas courts have historically viewed them with disfavor, covenants not to compete may be enforced under proper circumstances. Under Texas law, a covenant not to compete is enforceable under the following conditions:

> [The noncompete agreement] is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.[68]

Traditionally, an agreement prohibiting solicitation of customers by a former employee was enforceable if reasonable under the circumstances.[69] More recent Texas Supreme Court authority, however, has undermined this interpretation. Indeed, the court has clarified that customer nonsolicitation agreements are restraints on trade and subject to the requirements of the Texas statute governing covenants not to compete.[70] To meet those statutory requirements, the customers that the former employee is prohibited from soliciting usually must be limited to those with which the employee had material contact during his employment or about which the employee learned confidential information while working for the employer.[71] Nonsolicitation agreements that cover a greater universe of customers or prospects generally will not be enforceable as written.[72]

Enforceability Following Employee Discharge. In Texas, the enforceability of noncompetes following employee discharge has not been definitively decided, but enforceability likely hinges on adhering to the statutory requirements in section 15.50(a). An older state case supports the general contract principle that equity might deny enforcement of a noncompete if an employer acts arbitrarily and unreasonably in discharging an employee.[73]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving

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[68] TEX. BUS. & COM. CODE ANN. § 15.50.

[69] *See Drummond Am., L.L.C. v. Share Corp.*, 692 F. Supp. 2d 650, 655 (E.D. Tex. 2010) (upholding restriction on calling on any of former employer's customers, whom the employees solicited on behalf of former employer during the last year of their employment, for a period of two years following their termination of employment).

[70] *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011) ("Covenants that place limits on former employees' . . . solicitation of the former employers' customers . . . are restraints on trade and governed by the Act.").

[71] *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990).

[72] *See, e.g.*, *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991) (holding that customer nonsolicitation covenant was overbroad because it prevented departing partner from soliciting customers that he never did business with while employed by former employer).

[73] *Security Servs., Inc. v. Priest*, 507 S.W.2d 592 (Tex. Civ. App. 1974).

up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

Because Texas's noncompete statute requires that noncompetes must be "ancillary to or a part of" an "otherwise enforceable agreement" (*e.g.*, a contract where other mutually binding promises exist), issues of consideration are evaluated under this rubric. Consideration for a noncompete must be "reasonably related" to an interest worthy of protection.[74] Consideration found to be reasonably related to an interest worthy of protection include the promise to give the employee portions of the employer's confidential information, access to goodwill, specialized training, and/or equity grants (stock options).[75] Until the employee receives one or more of these benefits (either at the outset of employment or mid-employment), the noncompete is subject to attack as lacking consideration.

Over the last 10 years or so, the Texas Supreme Court has issued three decisions that have resolved some of the uncertainties surrounding adequate consideration in noncompete agreements. All three decisions represent employer-friendly interpretations:

- In *Alex Sheshunoff Management Services v. Johnson*, the Texas Supreme Court dramatically loosened its interpretation of the law's requirements regarding the timing and adequacy of consideration, holding that a noncompete that is ancillary to a unilateral contract may be enforced even if the performance (and acceptance) of the unilateral contract would depend on the perpetuation of an at-will employment relationship.[76]
- In *Mann Frankfort Stein & Lipp Advisors v. Fielding*, the Texas Supreme Court provided additional guidance on the forms of consideration that may support a noncompete agreement, clarifying that a noncompete may be supported by implied, as well as express, return promises from the employer to provide confidential information.[77]
- In *Marsh USA Inc. v. Cook*, the Texas Supreme Court further expanded the forms of consideration available to support a noncompete, doing away with certain of its own former restrictive interpretations of the law and holding that a stock options award to a valuable employee can have a sufficient "nexus" to the company's goodwill to warrant a noncompete.[78]

When evaluated in the context of different stages in the employment life cycle, a noncompete signed at the inception of employment does not carry sufficient consideration at the moment when it is signed. However, if an employer "makes an illusory promise of consideration and, later, performs in accord with the promise, the consideration is no longer illusory."[79] A change in the terms or conditions of employment

[74] *Marsh USA Inc.*, 354 S.W.3d at 775.

[75] 354 S.W.3d at 775.

[76] 209 S.W.3d 644 (Tex. 2006).

[77] 289 S.W.3d 844 (Tex. 2009).

[78] 354 S.W.3d 764 (Tex. 2011).

[79] 354 S.W.3d at 775; *see also Neurodiagnostic Tex, L.L.C. v. Pierce*, 506 S.W.3d 153, 164 (Tex. App. 2016); *C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584 (Tex. App. 2003) (noncompete signed four days prior to the employee's employment

may be sufficient consideration if—again—it is "reasonably related" to an interest worthy of protection.[80] While case law has not definitively answered the question, it appears that continued employment alone will probably not constitute sufficient consideration in the at-will employment context.[81]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

The applicable Texas statute specifically requires a court to reform, or blue pencil, restrictions that are too broad if reformation is necessary to make the restrictions enforceable.[82] Reformation must be "timely requested" and may limit available damages.[83]

2.3(b)(iv) *State Trade Secret Law*

Even without a written nondisclosure agreement, an employer may protect a trade secret and prohibit the former employee from disclosing or using it. Historically, the prohibition on use or disclosure of an employer's trade secrets was rooted in the employee's common-law duty not to do so.[84] In 2013, however, Texas adopted a modified version of the UTSA—the Texas Uniform Trade Secrets Act (TUTSA).[85]

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agreement was not "ancillary to or a part of" the later agreement as required by Texas Business and Commerce Code section 15.50(a)).

[80] *Marsh USA Inc.*, 354 S.W.3d at 775; *Neurodiagnostic Tex, L.L.C.*, 506 S.W.3d 153 (clear nexus between covenant's effect of preventing defendant from competing by utilizing specialized training and knowledge in a specialized field he received to benefit a future employer).

[81] *Compare Sawyer v. E.I. du Pont de Nemours & Co.*, 430 S.W.3d 396, 400-01 (Tex. 2014) (using example of a noncompete and noting, "At-will employment does not preclude employers and employees from forming subsequent contracts, 'so long as neither party relies on continued employment as consideration for the contract.'"), *and Eurecat US, Inc. v. Marklund*, 527 S.W.3d 367, 389-90 (Tex. App. 2017) (only consideration stated in the agreements was continued employment and court held that because employees were at-will, "a promise of continued employment is illusory and does not constitute consideration"), *with Alex Sheshunoff Mgmt. Servs.*, 209 S.W.3d at 651 ("The covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer... But if, as in the pending case, the employer's consideration is provided by performance and becomes nonillusory at that point, and the agreement in issue is otherwise enforceable under the Act, we see no reason to hold that the covenant fails.").

[82] TEX. BUS. & COM. CODE ANN. § 15.51(c).

[83] *Neurodiagnostic Tex, L.L.C.*, 506 S.W.3d at 166.

[84] *Texas Shop Towel v. Haire*, 246 S.W.2d 482, 485 (Tex. Civ. App. 1952).

[85] TEX. CIV. PRAC. & REM. CODE ANN. §§ 134A.001 *et seq*.

The TUTSA applies only to misappropriations that occur after September 1, 2013, the date of the TUTSA's enactment.[86]

Definition of a Trade Secret. Under the TUTSA, a *trade secret* is defined as:

> all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers of suppliers whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:
>
> > (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
> >
> > (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another persons who can obtain economic value from the disclosure or use of the information.[87]

Texas courts have held that customer lists, pricing information, client information, customer preferences, and buyer contacts may be trade secrets.[88]

Misappropriation of a Trade Secret. The TUTSA imposes liability for misappropriation, which can occur in two ways: (1) "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;" or (2) disclosure of a trade secret or use of a trade secret of another without express or implied consent.[89] As for the latter scenario, the UTSA defines misappropriation to include disclosure or use of another's trade secret, without express or implied permission, by a person who:

1. used improper means to acquire the knowledge;90
2. knew or had reason to know that the knowledge passed on to them was obtained improperly, under various circumstances;[91] or

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[86] *See* Act of May 2, 2013, 83d Leg., Reg. Sess., ch. 10, §§ 3-4 ("The change in law made by this Act applies to the misappropriation of a trade secret made on or after the effective date of this Act. A misappropriation of a trade secret made before and a continuing misappropriation beginning before the effective date of this Act are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.").

[87] TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6).

[88] *His Co., Inc. v. Stover*, 202 F.Supp.3d 685 (S.D. Tex. 2016).

[89] TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3).

[90] TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3)(B)(i).

[91] TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3)(B)(ii) (describing three ways in which trade secrets could be passed on improperly so as to constitute misappropriation).

3. before a material change of the person's position, knew, or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[92]

In 2016, the Texas Supreme Court determined that a cause of action for misappropriation of trade secrets does not accrue until the trade secret is actually used.[93]

Whether non-trade-secret information can be protected in light of TUTSA is a bit unclear due to the lack of case law since the TUTSA became effective. Notwithstanding TUTSA protection, employers that want to ensure protection of trade secrets should consider nondisclosure agreements. The TUTSA allows for contractual remedies for misappropriation.[94]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Texas does not have statutory guidelines on employee inventions or ideas.

Nonetheless, Texas common law supports employer rights in employee inventions where a duty is owed by the employee. In *Davis v. Alwac International*, for example, an action by an employee for past due salary, the employer filed a counterclaim to recover certain improvements made to the company's equipment that were appropriated by the former employee.[95] The court held that if an employee is employed to invent or devise improvements, the resulting patents belong to the employer. The court also observed that the employee who applied for a patent on his invention was an officer and director of the company. This gave rise to a fiduciary relationship in which he "should have exercised the utmost good faith in all transactions touching his duties to [the company]."[96] The fiduciary duty imposed on the officer and director created an obligation to assign any inventions developed during and relating to the relationship to the corporation for its benefit.

In another case, *Elcor Chemical Corp. v. Agri-Sul, Inc.*, the employer sought to enjoin former employees from utilizing trade secrets the employees had developed during the employment relationship.[97] The former employees had developed a process for manufacturing sulfur fertilizer while employed and under express contractual obligations with their employer not to disclose such trade secrets. They secreted this development from their employer and started a competing corporation to exploit their new process. The court of appeals found ample evidence to uphold the trial court's finding that the employees' invention constituted a trade secret belonging to the employer. The court rejected the employees' argument that the information they utilized could have been obtained from other sources, noting that it had not been so obtained. The court enjoined all of the former employees from using the process and from imparting any information concerning the process to any person or company.

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92 TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3)(B)(iii).

93 *Southwestern Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699 (Tex. 2016).

94 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007.

95 *Davis v. Alwac Int'l, Inc.*, 369 S.W.2d 797 (Tex. Civ. App. 1963).

96 369 S.W.2d at 802.

97 494 S.W.2d 204 (Tex. Civ. App. 1973).

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 53 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[98]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[99]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[100]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[101]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language

[98] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[99] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[100] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[101] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	common to migrant or seasonal agricultural workers who are not fluent or literate in English.[102]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[103]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[104]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[105]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[106] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[107]

[102] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[103] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[104] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[105] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[106] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[107] 41 C.F.R. §§ 60-300.44, 60-741.44.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[108]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[109]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[110]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[111]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[112]

[108] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[109] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[110] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[111] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[112] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[113]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[114] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[115]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[116]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where

[113] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[114] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[115] 29 C.F.R. § 13.5.

[116] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
(contracts entered into on or after January 30, 2022)	accessible to employees, summarizing the applicable minimum wage rate and other required information.[117]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements.[118] While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Federal Earned Income Tax Credit	Texas employers, with at least one employee, are required to inform employees annually about the general eligibility requirements for the federal earned income tax credit. The posting of a notice at the worksite is not adequate. Employers must satisfy this requirement by providing the information to the employee in person, by email, through a flyer included as a payroll stuffer, or by mailing it to the employee's last known address by U.S. first-class mail. Notice must be delivered by March 1 of each year. Employers may rely on materials provided by the Internal Revenue Service (IRS) or a substantially similar notice.[119]
Human Trafficking Hotline	Certain Texas employers are obligated to post a notice with the following language: WARNING: Obtaining forced labor or services is a crime under Texas law. Call the national human trafficking hotline: 1-888-373-7888. You may remain anonymous. This requirement applies to holders of various types of liquor permits or licenses, other than the holder of a food and beverage certificate (*i.e.*, holders of a Wine and Beer Retailer's Permit, Wine and Beer Retailer's Off-Premise Permit, Mixed Beverage Permit, Private Club Registration

[117] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

[118] In Texas, employers may also voluntarily post notices concerning: (1) equal opportunity laws, available at https://www.twc.texas.gov/programs/unemployment-tax/posters-workplace; and (2) child labor laws, available at https://www.twc.texas.gov/programs/unemployment-tax/posters-workplace. It is available in English and Spanish

[119] TEX. LAB. CODE ANN. §§ 104.001 *et seq.*; 40 TEX. ADMIN. CODE § 815.136 (authorizing use of IRS Notice 797). The IRS notice is available at https://www.irs.gov/pub/irs-pdf/n797.pdf. Additional materials for employers are available at https://www.eitc.irs.gov/Partner-Toolkit/employer.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	Permit, Retail Dealer's On-Premise License, or Retail Dealer's Off-Premise License). The sign must be at least 8-1/2 inches high and 11 inches wide, clearly visible to the public and employees.[120]
Food Services Establishments: Food Allergen Poster	Food service establishments must display a poster relating to food allergen awareness in an area of the establishment that is readily accessible to the food service employees. The poster must include information regarding the risk of allergic reaction to a food allergen, the symptoms of an allergic reaction, the major food allergens, and procedures for preventing or assisting with an allergic reaction. [121]
Restaurants & Bars: Identity Theft	Restaurant and bar owners that accept credit or debit cards from customers in the ordinary course of business must display in a prominent place on the premises of the restaurant or bar a sign stating in letters at least one-half inch high: UNDER SECTION 32.51, PENAL CODE, IT IS A STATE JAIL FELONY (PUNISHABLE BY CONFINEMENT IN A STATE JAIL FOR NOT MORE THAN TWO YEARS) TO OBTAIN, POSSESS, TRANSFER, OR USE A CUSTOMER'S DEBIT CARD OR CREDIT CARD NUMBER WITHOUT THE CUSTOMER'S CONSENT OR EFFECTIVE CONSENT. The owner must display the sign in English and in another language spoken by a substantial portion of the employees of the restaurant or bar as their familiar language.[122]
Unemployment Compensation	Covered Texas employers (*i.e.*, those that either (1) paid wages of $1500 during a quarter of the current or preceding calendar year; or (2) employed at least 1 worker for a portion of at least 1 day during 20 or more weeks of the current or preceding calendar year) must post notices with general information about filing claims for unemployment benefits. This notice, prepared by the state agency, must be posted where accessible to employees.[123]

[120] TEX. ALCO. BEV. CODE ANN. § 104.07. This poster is available at https://www.tabc.state.tx.us/publications/brochures/humanTrafficking.pdf. This mandatory sign includes the required language in both English and Spanish.

[121] TEX. HEALTH & SAFETY CODE § 437.027. The poster is available at https://www.dshs.texas.gov/sites/default/files/foodestablishments/pdf/GuidanceDocs/SB%20812--DSHS-Food%20Service%20Employee%20Allergen%20Awareness-SamplePoster_FINAL.pdf.

[122] TEX. BUS. & COM. CODE § 502.001.

[123] TEX. LAB. CODE ANN. §§ 201.021, 208.001(b). This poster is available at https://www.twc.texas.gov/programs/unemployment-tax/posters-workplace. It is available in English and Spanish.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Wages, Hours & Payroll: Texas Payday Law	Under the Texas payday law, all Texas businesses regardless of their size (except for public employers) must post a notice of paydays, and any changes in paydays, in a conspicuous area in the workplace. This poster also provides employees with contact information for the Texas Workforce Commission.[124]
Workers' Compensation	All employers, with at least 1 employee, must post a notice concerning the employer's workers' compensation insurance coverage at conspicuous locations, including in a personnel office (if any) as well as visibly at the workplace where likely to be regularly seen by employees. One of several notices may apply, however, depending on whether the employer: (1) has elected not to be covered by workers' compensation; (2) has workers' compensation insurance through a commercial insurance company; or (3) employs emergency medical service employees, paramedics, firefighters, law enforcement officers, or correctional officers. The pertinent notice must be posted in English, Spanish, and any other language common to the employer's employee population[125]
Workers' Compensation: Employer Notification of Ombudsman Program	All employers participating in the workers' compensation system must post notice of the Office of Injured Employee Counsel (OIEC) Ombudsman Program. The notice must be posted in the personnel office (if any), as well as visibly at the workplace where likely to be regularly seen by employees. The notice must be posted in English, Spanish, and any other language that is common to the employer's workers.[126]
Workplace Safety: Hazardous Chemical Notice & Employee Rights	For employers not required to comply with federal OSHA communication standards, Texas requires notice to employees of hazardous chemicals in the workplace. Employees who may be exposed to hazardous chemicals must be informed and have access to a list of chemicals in the workplace and, upon request, to any Material Safety Data Sheets (MSDS). Employers must also provide training on protection

[124] TEX. LAB. CODE ANN. §§ 61.001(4), 61.012. This poster is available at https://www.twc.texas.gov/programs/unemployment-tax/posters-workplace.

[125] TEX. LAB. CODE ANN. §§ 406.001, 406.005(c); 28 TEX. ADMIN. CODE § 110.101(e). Workers' compensation forms and notices are available at http://www.tdi.texas.gov/forms/form20employer.html. Forms and notices for self-insured employers are available at https://www.tdi.texas.gov/wc/si/index.html.

[126] 28 TEX. ADMIN. CODE § 276.5. This poster is available at https://www.twc.texas.gov/programs/unemployment-tax/posters-workplace. It is available in English and Spanish.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	from any hazards and any appropriate personal protective equipment.[127]
Workplace Safety: Workplace Violence Hotline Poster	Employers must post a notice regarding the workplace violence hotline established by the Texas Department of Public Safety. The notice must be posted in a conspicuous place in the employer's place of business in a location convenient to all employees. The poster must be in English and Spanish. The notice must include: (1) the contact information for reporting instances of workplace violence or suspicious activity to the Department of Public Safety; and (2) information on an employee's right to make a report to the Department of Public Safety anonymously.[128] A notice complies with Texas law if, at a minimum, it provides the following information: Reporting Workplace Violence Employees can report instances of workplace violence or suspicious activity by contacting the Department of Public Safety (DPS) through the iWatchTexas Community Reporting System at www.iwatchtx.org (link is external), or by calling 844-643-2251. Employees have the right to make a report to DPS anonymously. Reportando La Violencia en el Trabajo Los empleados pueden denunciar casos de violencia en el trabajo o actividades sospechosas comunicándose con el Departamento de Seguridad Pública (DPS) a través del Sistema de Informes Comunitarios iWatchTexas en www.iwatchtx.org (link is external), o llamando al 844-643-2251. Los empleados tienen derecho a presentarle una queja al DPS de forma anónima.[129]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

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[127] TEX. HEALTH & SAFETY CODE ANN. § 502.017; 25 TEX. ADMIN. CODE § 295.12. The "Worker Right to Know Notice" is available at https://www.dshs.texas.gov/hazard-communication-worker-right-to-know-program/publications-hazard-communication-worker-right-to-know-program.

[128] TEX. LAB. CODE §§ 104A.001, 104A.003. This poster is available at https://www.twc.texas.gov/programs/unemployment-tax/posters-workplace. It is available in English and Spanish.

[129] 40 TEX. ADMIN. CODE § 800.600.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[130]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[131]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[132]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants;	At least 1 year from the date the records were made, or

[130] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[131] 29 C.F.R. § 1627.3(b).

[132] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(ADA): Personnel Records	• other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[133]	from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[134]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[135]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity	At least 3 years following the date on which the polygraph examination was conducted.

[133] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[134] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[135] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[136]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[137]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[138]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[139]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code;	3 years from the last day of entry.

[136] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[137] 29 U.S.C. § 1027.

[138] 29 C.F.R. § 1620.32(a).

[139] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[140] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070);	

[140] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[141]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees, and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[142]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j);	At least 3 years from the last effective date.

[141] 29 C.F.R. § 516.28.

[142] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[143]	
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[144]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement.	At least 3 years.

[143] 29 C.F.R. § 516.5.

[144] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Covered employers with no eligible employees must only maintain the following records: • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[145]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[146]	At least 4 years after the date the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[147]	3 years after the date of hire or 1 year following the termination

[145] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[146] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[147] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[148]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[149]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[150]	As long as it is in effect and at least 4 years thereafter.

[148] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[149] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[150] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[151]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results,	At least 30 years.

[151] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[152]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[153]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual	At least 30 years.

[152] 29 C.F.R. § 1910.1020(d).

[153] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[154]	
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[155]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[156]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not

[154] 29 C.F.R. § 1910.1020(d).

[155] 29 C.F.R. §§ 1904.33, 1904.44.

[156] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[157]	have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[158]	Until final disposition of the complaint, compliance review or action.

[157] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[158] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[159]	3 years.
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee	During the course of the covered contract as well as after the end of the contract.

[159] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[160]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[161]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage;	At least 3 years from the completion of the work records

[160] 29 C.F.R. § 13.25.

[161] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[162]	containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[163]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices: Apprenticeship & Training	*An employer must keep all records necessary to carry out the purposes of the antidiscrimination statute, including:* • a list of applicants for participation in the program; and • the chronological order in which applications were received.	None specified.

[162] 29 C.F.R. § 4.6.

[163] 41 C.F.R. § 50-201.501.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Upon request, employers must also provide a detailed description of how the individuals were selected to participate.[164]	
Fair Employment Practices: Records Related to Charge	If a charge of discrimination has been filed, an employer must keep all records relevant to the determination of whether unlawful employment practices have been or are being committed.[165]	For the period required by a commission rule, if any (none located), or court order.
Public Works Contracts	*Each contractor and subcontractor must keep:* • the name and occupation of each worker employed in construction of the public work; and • the actual per diem wages paid to each worker.[166]	The law does not specify how long records must be kept but they must be available during reasonable hours for inspection.
Tax Records	An employer that employees an individual who is a recipient of Aid to Families with Dependent Children may file for a tax refund and must maintain records supporting the refund request.[167]	Records must be kept for a minimum of 4 years from the date which the record was made, unless the comptroller authorizes a shorter retention period in writing.

[164] TEX. LAB. CODE ANN. § 21.302; 40 TEX. ADMIN. CODE § 819.91.

[165] TEX. LAB. CODE ANN. § 21.301; 40 TEX. ADMIN. CODE § 819.91.

[166] TEX. GOV'T CODE ANN. § 2258.024; *see also* TEX. GOV'T CODE ANN. § 2258.058 (providing that a violation of § 2258.024 is punishable by a fine not to exceed $500, confinement in jail for up to 6 months, or both).

[167] 34 TEX. ADMIN. CODE § 3.4(d); *see also* 34 TEX. ADMIN. CODE § 3.281.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Unemployment Compensation	*Each employing unit must keep true and accurate employment and payroll records. Such records must include:* • the name and correct address of the employing unit; and • the name and address of each branch, division, or establishment operated, owned, or maintained by the employing unit in Texas. *With respect to each worker, such records must include:* • the individual's name, address, and Social Security number; • dates on which the individual performed services and state(s) in which services were performed; • the amount of wages paid to the individual for each separate payroll period, date of payment, and amounts paid to the individual for each pay period other than "wages;" and • whether, during any payroll period, the individual worked less than full-time and, if so, the hours and dates worked. *Records must also be kept that reflect the ownership and changes of ownership of the "employing unit," including:* • the address of employing unit's headquarters; • the mailing address of the employing unit; • the address where records are available for inspection; and • the addresses of owners of the employing unit. If the employing unit is a corporation, include the addresses of directors, officers, and any individuals who may accept service of process. If the employing unit is a member of a group account, include the address of the group representative. *In pay periods where excluded work is performed, records should also include the following details:* • wages paid for excluded services should be reflected separately from taxable wages; • hours spent in excluded service and hours spent in employment; and	Records must be kept for 4 years.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the total amount of cash wages and cash value of other remuneration.[168]	
Workers' Compensation: Injury Reports	*Employers must maintain records of all injuries and fatal injuries to employees including:* • the name, address, date of birth, sex, wage, length of service, Social Security number, and occupation of the employee; • the reported cause and nature of the injury, body part affected, and description of equipment involved; • the date, time, and location of injury; • the name of the employee's immediate supervisor; • the name of known witnesses; • the name and address of the treating health care provider; and • any voluntary benefits paid by the employer under the Texas Workers' Compensation Act.[169] *Records must also be kept relating to when reports were filed, including:* • the date the report of injury was filed with the insurance company; • the date the report of injury and summary of rights were provided to the employee; and • the date the Supplemental Report of Injury was filed with the carrier and provided to the employee.[170]	Records must be kept for 5 years from the last day of the year in which the injury occurred, or the time required by OSHA standards, whichever is greater.
Workers' Compensation: Employer's Wage Statement	*Employers are required to file a written wage statement with the Commission whenever an employee becomes entitled to benefits or dies as a result of a compensable injury, and should maintain a record of:* • the information provided; • the date filed; and • the means of filing with each recipient required to receive the report. *The wage statement must also include:* • the employee's name, address, and Social Security number;	None specified.

[168] 40 TEX. ADMIN. CODE § 815.106.

[169] TEX. LAB. CODE ANN. § 409.006; 28 TEX. ADMIN. CODE § 120.1.

[170] 28 TEX. ADMIN. CODE §§ 120.2, 102.3.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the date of hire; • the date of injury; • the employer's name, address, and federal tax identification number; • an identification of the employment status (*e.g.*, full-time, part-time, etc.); • the name of the person submitting the report; • a certification that the wage information is complete and accurate; and • the following wage information— ▪ Employers (other than school districts) must report the employee's wages, the amount earned by the employee during the 13 weeks immediately preceding the date of the injury, and the number of hours the employee worked to earn the wages being reported. ▪ If an employee is paid on a monthly or semi-monthly basis, the employer may provide the wages earned in the 3 months preceding the injury. If paid on a biweekly basis, the employer may provide the wages earned in the 14 weeks preceding the injury. Otherwise, the employer should provide the wages earned in the 13 weeks immediately preceding the injury. ▪ Special information must be reported by school districts.[171]	
Workplace Safety: Hazardous Communication	*An employer must develop, implement, and maintain at the workplace a written hazard communication program.* *An education and training program must include:* • information on interpreting labels and MSDSs and the relationship between those two methods of hazard communication; • the location of the chemicals by work area, their acute and chronic effects, and the safe handling of hazardous chemicals known to be present in the employees' work area and to which the employees may be exposed;	Records must be kept for at least 5 years.

[171] 28 TEX. ADMIN. CODE § 120.4.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the proper use of protective equipment and first aid treatment to be used with respect to the chemicals to which the employees may be exposed; and • general safety instructions on the handling, cleanup procedures, and disposal of hazardous chemicals. *An employer must maintain the written hazard communication program and a record of each training session given to employees, including:* • the date of the training; • a roster of employees who attended; • the subjects covered in the training; and • the names of the instructors.[172]	

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

Texas law does not address access to personnel files for private-sector employees.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see 1.3.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

Texas law contains no statutory provisions regulating criminal background checks or credit checks for current employees. Additionally, Texas does not have a statute on employer access to social media for current employees.

As discussed earlier, however, Austin has enacted its own ban-the-box ordinance, which prohibits certain adverse action (*i.e.*, denial of a promotion) against current employees. For information on the Austin Fair Chance Hiring Ordinance and other guidance related to background screening, see 1.3.

[172] TEX. HEALTH & SAFETY CODE ANN. § 502.009.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

While Texas does not have statutory guidelines regarding drug and alcohol testing of current employees, drug testing of private-sector employees does not violate an employee's privacy rights, provided that the employee has the opportunity to refuse such testing.[173] In *Jennings v. Minco Technology Labs*, for example, a Texas appellate court upheld the employer's right to terminate an "at-will" employee for her refusal to submit to a drug test. The court held that an at-will employee who continues to work after receiving notice of the employer's drug testing policy implicitly consents to the drug testing policy. If such an employee later refuses a drug test, the employee can be terminated. The *Jennings* court rejected the plaintiff's argument that she was poor and needed her job and, therefore, any "consent" she would give would be illusory and not real, holding that a "person's legal rights and obligations . . . cannot vary according to his economic circumstances."[174]

In Texas, therefore, if an employee refuses to take a random drug test, pursuant to a reasonable drug testing policy, the employee can be terminated for misconduct and will be disqualified from receiving unemployment compensation.[175] Moreover, an employer cannot be liable to its at-will employees under a theory of negligent drug testing, and a laboratory does not owe a duty of reasonable care to the employee who is being tested for drugs at the request of the employer.[176]

A Texas employer should protect itself from litigation by publicizing the requirement of a drug or alcohol test prior to administering such test, and by receiving the employee's written consent to drug testing at the inception of employment. Although it is true that written consent after adequate notice of a drug testing policy is not required for at-will employees, such written consent is helpful as a practical matter.[177]

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[178]

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[173] *Farrington v. Sysco Food Servs.*, 865 S.W.2d 247, 253 (Tex. App. 1993); *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497 (Tex. App. 1989).

[174] 765 S.W.2d at 502.

[175] *Kaminski v. Texas Emp't Comm'n*, 848 S.W.2d 811 (Tex. App. 1993) (holding random drug test reasonable when all employees were required to submit to test, employer had found marijuana cigarette in company truck, customer requested drug testing of all company employees on its premises, and employees operated heavy machinery).

[176] *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 715-16 (Tex. 2003).

[177] Additionally, the Texas Workforce Commission's employer policy manual provides some general guidance as to the implementation of drug testing policies. *See* Texas Workforce Comm'n, *Especially for Texas Employers: Drug Testing in the Workplace*, *available at* https://efte.twc.texas.gov/drug_testing_in_the_workplace.html.

[178] 21 U.S.C. §§ 811-12, 841 *et seq*.

3.2(c)(ii) *State Guidelines on Marijuana*

Texas has a limited medical marijuana law, but it does not contain any private-employer-related provisions. Under the Texas Compassionate-Use Act, a physician may prescribe low-THC cannabis to individuals diagnosed with certain medical conditions.[179]

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[180]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[181]

3.2(d)(ii) *State Data Security Breach Guidelines*

The Texas Identity Theft Enforcement and Protection Act provides that when a covered entity discovers or is notified of the breach where sensitive personal information was, or is reasonably believed to have been, acquired by an unauthorized person, notice is required.[182] A *security breach* is the "unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of sensitive personal information" of a resident of Texas maintained by any covered entity, "including data that is encrypted if the person accessing the data has the key required to decrypt the data."[183] The statute

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[179] *See* TEX. OCC. CODE ANN. §§ 169.001 *et seq*. *See also* TEX. HEALTH & SAFETY CODE ANN. § 481.111 (Texas Controlled Substances Act – Offenses & Penalties – Exemptions).

[180] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[181] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[182] TEX. BUS. & COM. CODE ANN. §§ 521.002 *et seq*.

[183] TEX. BUS. & COM. CODE ANN. § 521.053.

defines *sensitive personal information* as an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- driver's license number or similar identification number; or
- account number, or credit or debit card number, in combination with the required security code, access code, or other type of password that would permit access to the financial account.[184]

Such personal information is also protected if it identifies an individual and relates to:

- the individual's physical or mental health or condition;
- the provision of health care to the individual; or
- payment for the provision of health care to the individual.[185]

Personal information does not include data that is encrypted or information that is lawfully available publicly from federal, state, or local government records.[186]

Coverage & Exceptions. A covered entity is any person that conducts business in this state and owns or licenses computerized data that includes sensitive personal information.[187]

Content & Form of Notice. Notice may be in one of the following formats:

- written notice;
- electronic notice, if it is consistent with the federal e-sign act; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $250,000;
  - the affected class of persons to be notified exceeds 500,000; or
  - the covered entity does not have sufficient contact information.[188]

Substitute notice may be satisfied by the following:

- electronic mail notice, when the covered entity has an electronic mail address for the affected individuals;
- conspicuous posting of the notice on the website of the covered entity, if the covered entity maintains a website; or
- notification through statewide media.

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[184] TEX. BUS. & COM. CODE ANN. § 521.002(a).

[185] TEX. BUS. & COM. CODE ANN. § 521.002(a).

[186] *See* TEX. BUS. & COM. CODE ANN. § 521.002(b).

[187] TEX. BUS. & COM. CODE ANN. § 521.053(b).

[188] TEX. BUS. & COM. CODE ANN. § 521.053(b)-(f).

Nonetheless, a covered entity that maintains and complies with a notification procedure as part of its own information security policy for the treatment of personal information is compliant with this statute. The policy must afford the same or greater protection to the affected individuals as this statute.[189]

Timing of Notice. Notice must be given as quickly as possible. Notification must be made without unreasonable delay and in each case no later than 60 days after determining a breach occurred. However, notification may be delayed if:

- A law enforcement agency determines and requests the notification will impede a criminal investigation.
- A covered entity needs time to determine the scope of the breach.
- A covered entity needs time to restore the reasonable integrity of the data system.[190]

Additional Provisions. If more than 10,000 persons at a single time will be notified of a security breach, the covered entity must also notify all nationwide consumer reporting agencies of the timing, distribution, and content of the notices.[191]

Any person who is required to provide notification of a breach must notify the attorney general of that breach not later than the 60th day after the date on which the person determines that the breach occurred if the breach involves at least 250 residents of this state. Beginning September 1, 2023, notice to the attorney general must be given as soon as practicable and not later than the 30th day after the date on which the person determines a breach has occurred. The notification under this subsection must include:

- a detailed description of the nature and circumstances of the breach or the use of sensitive personal information acquired as a result of the breach;
- the number of residents of this state affected by the breach at the time of notification;
- the measures taken by the person regarding the breach;
- any measures the person intends to take regarding the breach after the notification under this subsection;
- information regarding whether law enforcement is engaged in investigating the breach; and
- the number of affected residents that have been sent a disclosure of the breach either by mail or another method of communication.[192]

[189] TEX. BUS. & COM. CODE ANN. § 521.053(f)-(g).

[190] *See* TEX. BUS. & COM. CODE ANN. § 521.053(d).

[191] TEX. BUS. & COM. CODE ANN. § 521.053(h).

[192] TEX. BUS. & COM. CODE ANN. § 521.053(i). Beginning September 1, 2023, the notification to the attorney general must be submitted electronically through the attorney general's website. S.B. 768 (amending TEX. BUS. & COM. CODE ANN. § 521.053(i)).

3.2(e) *Additional State Privacy Protections*

3.2(e)(i) *State Guidelines on Biometric Privacy*

Texas has a biometric privacy law that applies to *biometric identifiers*—defined to include retina or iris scans, fingerprints, voiceprints, or a "record of hand or face geometry."[193] The law is restricted to biometric identifiers that are "captured" for a "commercial purpose." However, this term is not defined in Texas law, or any attendant regulations.

The biometric privacy law requires that employers notify employees about the collection of their biometric information and that employees give consent to the collection.

Enforcement, Remedies & Penalties. The law does not provide employees with a private right of action to file a lawsuit based on a violation, but it permits the Texas attorney general to bring suit, and to seek up to $25,000 in damages for each violation.

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[194] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[195]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[196]

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[193] TEX. BUS. & COM. CODE ANN. § 503.001.

[194] 29 U.S.C. § 218(a).

[195] 29 U.S.C. § 206.

[196] 29 U.S.C. §§ 203, 206.

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[197]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[198] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

Texas wage and hour law sets less stringent requirements than those under the FLSA; thus, compliance with the minimum wage and overtime requirements under federal law satisfies the requirements of state law.

3.3(b)(i) *State Minimum Wage*

The Texas Minimum Wage Act (TMWA) is very similar to the minimum wage provisions of the FLSA. The TMWA requires payment of the federal minimum wage rate, which is currently $7.25 per hour.[199] The TMWA's coverage is limited, however, to employees not covered by the FLSA.[200] Thus, Texas employers subject to the FLSA's minimum wage provisions are not required to comply with the TMWA.

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, an employer may take the maximum tip credit permitted by the FLSA, which is currently $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is currently $2.13 per hour. Note that if an employee does not currently make $5.12 in tips per hour, an employer must make up the difference between the wage actually made, and the minimum wage, which is currently $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee. The tip credit provisions do not apply to employers covered by the FLSA.[201]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

As discussed above, employees of FLSA-covered employers are not subject to the TMWA. Other TMWA minimum wage exemptions include:

- executives, administrative employees, and professionals;[202]
- outside sales employees or collectors paid a commission;[203]
- employees or volunteers of certain religious or charitable organizations;[204]

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197 29 U.S.C. § 3(m)(2)(B).

198 29 U.S.C. § 207.

199 TEX. LAB. CODE ANN. § 62.051; 29 U.S.C. § 206.

200 TEX. LAB. CODE ANN. § 62.151.

201 TEX. LAB. CODE ANN. §§ 62.051, 62.052, and 62.151.

202 TEX. LAB. CODE ANN. § 62.153(1).

203 TEX. LAB. CODE ANN. § 62.153(2).

204 TEX. LAB. CODE ANN. §§ 62.152, 62.161.

- elected officials;[205]
- certain providers of domestic services, including babysitters;[206]
- certain youths under 18 years of age and students under 20 years of age;[207]
- inmates of the Texas Department of Criminal Justice or local jails;[208]
- certain family members of the employer;[209]
- employees of certain amusement or recreational establishments;[210]
- nonagricultural employers not required to contribute to the unemployment compensation fund;[211] and
- dairy farm or livestock production employees.[212]

Special rules apply for on-call employees,[213] and employees receiving wage credits for food or lodging.[214] Of importance to agricultural employers, agricultural workers must earn the minimum wage, either at an hourly or a piece rate. For agricultural workers paid per piece, the piece rate must be at least the amount of the minimum piece rate established by the Texas Commissioner of Agriculture.

3.3(c) *State Guidelines on Overtime Obligations*

Texas does not have a separate overtime provision. Therefore, the payment of overtime in Texas is regulated by the FLSA, which establishes a 40-hour overtime standard for covered employees.

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[215] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they

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[205] TEX. LAB. CODE ANN. § 62.153(3).

[206] TEX. LAB. CODE ANN. § 62.154.

[207] TEX. LAB. CODE ANN. § 62.155.

[208] TEX. LAB. CODE ANN. § 62.156.

[209] TEX. LAB. CODE ANN. § 62.157. An employer is exempt with respect to employment of the employer's brother, sister, brother-in-law, sister-in-law, child, spouse, parent, son-in-law, daughter-in-law, ward, or person *in loco parentis* to the employee.

[210] TEX. LAB. CODE ANN. § 62.158.

[211] TEX. LAB. CODE ANN. § 62.159.

[212] TEX. LAB. CODE ANN. § 62.160.

[213] TEX. LAB. CODE ANN. § 62.054 (providing that pay may not be required for employees who live on their worksite, and who are assigned working hours plus on-call hours, in set circumstances).

[214] TEX. LAB. CODE ANN. § 62.053 (providing that the reasonable costs of meals, lodging, or both may be included as part of the wages paid to employees under certain circumstances).

[215] 29 C.F.R. § 785.19.

are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[216]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[217] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[218] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[219] Exemptions apply for smaller employers and air carriers.[220]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[221] Lactation is considered a related medical condition.[222] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[223] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[216] 29 C.F.R. § 785.18.

[217] 29 U.S.C. § 218d.

[218] 29 U.S.C. § 218d(b)(2).

[219] 29 U.S.C. § 218d(a).

[220] 29 U.S.C. § 218d(c), (d).

[221] 42 U.S.C. § 2000gg–1.

[222] 29 C.F.R. § 1636.3.

[223] 29 C.F.R. § 1636.3.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

There are no generally applicable meal or rest period requirements for adults in Texas.

3.4(b)(ii) *State Meal & Rest Periods for Minors*

There are no generally applicable meal or rest period requirements for minors in Texas.

3.4(b)(iii) *Lactation Accommodation Under State Law*

In Texas, an individual may not be denied the right to breast feed their baby in any location where the individual is authorized to be. Additionally, an individual is entitled to breast feed their baby or express breast milk in any location in which the individual's presence is otherwise authorized.[224] Although the law does not specifically mention employers, it can be interpreted to include places of employment. Texas does not otherwise require an employer to provide lactation accommodations to employees.

Texas also has an optional program for businesses that want to be designated as "mother-friendly" in their promotional materials. The business must develop a policy supporting the practice of worksite breast feeding that addresses all of the following:

- work schedule flexibility, including scheduling breaks and work patterns to provide time for expression of milk;
- providing accessible locations allowing privacy;
- access nearby to a clean, safe water source and a sink for washing hands and rinsing out any needed breast-pumping equipment; and
- access to hygienic alternatives in the workplace for the mother's breast milk.

The business must submit its breast-feeding policy to the state health department, which will maintain a list of "mother-friendly" businesses covered under the law and make the list publicly available.[225]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[226] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[227]

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[224] TEX. HEALTH & SAFETY CODE ANN. § 165.002.

[225] TEX. HEALTH & SAFETY CODE ANN. §§ 165.002, 165.003.

[226] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[227] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

Employees in Texas can be required to work hours as required by the employer, except where otherwise limited by contract or law. Texas does not have general provisions addressing the compensability of various activities such as reporting time, on-call pay,[228] split shifts, or travel time. However, the state does have provisions specific to certain retail employers concerning days of rest and religious accommodation (see **3.8(b)(ii)**).[229]

3.5(b)(i) *Euless Fair Overtime and Scheduling Standards Ordinance*

Voters in the city of Euless passed a fair overtime and scheduling standards ordinance in November 2020, which required written work schedules and other notices for covered employees. The ordinance was repealed in September 2024.

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks *minors*, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[230] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[231] For more information on the FLSA's child labor restrictions, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

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[228] Employees that live on the employer's premises must only be paid for hours actually worked; accordingly, on-call time need *not* be compensated. TEX. LAB. CODE ANN. § 62.054.

[229] *See* TEX. LAB. CODE ANN. §§ 52.001 *et seq*. (mandating days of rest and religious accommodation for employees of merchandising retailers).

[230] 29 C.F.R. §§ 570.36, 570.50.

[231] 29 C.F.R. § 570.6.

3.6(b) *State Guidelines on Child Labor*

The Texas Child Labor Law places restrictions on the types of jobs children may lawfully work.[232] The general purpose of the statute is to ensure that children are not employed in an occupation or manner detrimental to their health, safety, or well-being. Under the Child Labor Law, *child* means an individual under the age of 18, and except as provided in the statute as discussed in **3.6(b)(iii)**, a person commits an offense if the person employs a child under 14 years of age.[233]

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

Texas has adopted the FLSA's regulations governing hazardous occupations for minors ages 14 to 18.[234] In addition, the Texas Child Labor Law includes the following restrictions.

Solicitation. The employment of minors to solicit is considered a hazardous activity. However, minors may be employed in solicitation if all the following requirements are met:

- the state labor department receives a signed parental consent form;
- the consenting individual receives a map of the route the minor will follow during each solicitation trip and the name of the individual supervising the activity;
- one adult supervisor for every three minors employed is provided on the trips;
- the trip goes no later than 7:00 P.M. on a day a minor is legally required to attend school, or between 10:00 A.M. and 7:00 P.M. on all other days; and
- the trip is limited to a radius of no greater than 30 miles from the minor's home (unless parental consent is received for a greater distance).[235]

Driving. An occupation that involves the operation of a motor vehicle by a minor for a commercial purpose is not a hazardous occupation if the minor:

- has a driver's license;
- is not required to obtain a commercial driver's license to perform job duties;
- performs job duties under the direct supervision of the minor's parent or guardian at a business owned or operated by the parent or guardian; and
- operates a vehicle that has no more than two axles and does not exceed a gross vehicle weight of 15,000 pounds.[236]

Restrictions on Selling or Serving Alcohol. In Texas, minors under age 18 cannot be employed to sell, prepare, serve, or otherwise handle liquor, or to assist in doing so. A holder of a wine-only package store permit may employ a minor age 16 or older to work in any capacity. Additionally, a holder of a permit or license providing for the on-premises consumption of alcoholic beverages may employ a person under age 18 to work in any capacity other than the actual selling, preparing, or serving of alcoholic beverages.

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[232] TEX. LAB. CODE ANN. §§ 51.001 to 51.032.

[233] TEX. LAB. CODE ANN. §§ 51.002, 51.011.

[234] 40 TEX. ADMIN. CODE §§ 817.21, 817.23 (adopting federal regulations, and the FLSA, concerning limitations on the employment of minors).

[235] TEX. LAB. CODE ANN. § 51.0145; 40 TEX. ADMIN. CODE § 817.24.

[236] TEX. LAB. CODE ANN. § 51.015.

Moreover, if it also holds a food and beverage certificate, it may employ a person under age 18 to work as a cashier for transactions involving the sale of alcoholic beverages if the alcoholic beverages are served by a person age 18 or older.[237]

3.6(b)(ii) *State Limits on Hours of Work*

The Child Labor Law also restricts the hours that minors may work in Texas. Specifically, minors age 14 and 15 cannot work:

- more than eight hours in one day;
- more than 48 hours in one week;
- between 10:00 P.M. and 5:00 A.M. on a day that is followed by a school day;
- between midnight and 5:00 A.M. on a day that is not followed by a school day; and
- between midnight and 5:00 A.M. during summer recess if not enrolled in summer school classes.

Special rules apply, as noted above, to minors engaged in solicitation positions.[238]

3.6(b)(iii) *State Child Labor Exceptions*

The child labor law restrictions do not apply to minors aged 15, 16, or 17 who are:

- employed in a nonhazardous occupation, under the direct supervision of their parent or guardian;
- employed in agriculture during a period they are not legally required to be attending school;
- engaged in nonhazardous casual employment that will not endanger the safety, health, or well-being of minors and to which a parent or guardian adult has consented;
- participating in a school-supervised and school administered work-study program approved by the state labor department; or
- employed through a rehabilitation program supervised by a county judge.[239]

Additionally, minors aged 16 or older may be engaged in the direct sale of newspapers to the general public, and minors aged 11 or older may be engaged in the delivery of newspapers to consumers.[240] The Texas Workforce Commission may also authorize the employment of a child under 14 years of age as an

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[237] TEX. ALCO. BEV. CODE ANN. § 106.09.

[238] TEX. LAB. CODE ANN. §§ 51.011, 51.013, and 51.0145.

[239] TEX. LAB. CODE ANN. §§ 51.011, 51.003.

[240] TEX. LAB. CODE ANN. § 51.003. The exemption allowing employment of a child to deliver newspapers to consumers is construed as not allowing the employment of minors to solicit newspaper subscriptions unless: (1) the child concurrently attempts to sell a newspaper while soliciting the subscription; and (2) the same child will be the person delivering the newspaper based on the new subscription. Office of the Att'y Gen., State of Tex., *Opinion No. JC-0309* (Nov. 20, 2000), *available at* https://www.texasattorneygeneral.gov/opinions/john-cornyn/jc-0309.

actor or performer in a motion picture or a theatrical, radio, or television production,[241] or soliciting or selling items or services for an exempt organization.[242]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

There is no work permit requirement in Texas, although the law sets forth procedures for obtaining age certificates. Age certificates are required for minors to obtain hardship waivers from the limitations on hours worked for minors age 14 and 15. Minors under age 14 may be employed as child actors only if an application is submitted to the state labor department, signed by the minor's parent or guardian, along with proof of the minor's age and a photograph.[243]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The Texas Workforce Commission enforces the Child Labor Law and has the authority to assess civil penalties of up to $10,000 against employers that violate the law.[244] In addition, employers may be convicted of a Class B misdemeanor.[245] Violations of Texas Labor Code section 51.014(d) (relating to employment of children younger than 14, except in authorized circumstances) and violations of section 51.0145 (prohibiting the use of children for sales and solicitation) are Class A misdemeanors.[246]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[247]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's

[241] TEX. LAB. CODE ANN. § 51.012.

[242] TEX. LAB. CODE ANN. § 51.0145.

[243] 40 TEX. ADMIN. CODE §§ 817.22, 817.31, and 817.5.

[244] TEX. LAB. CODE ANN. § 51.033.

[245] TEX. LAB. CODE ANN. § 51.031.

[246] TEX. LAB. CODE ANN. § 51.031.

[247] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

> payroll deposit account, if it is at a place convenient to their employment and without charge to them.[248]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[249]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[250] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[251]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[252] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited

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[248] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[249] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[250] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[251] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[252] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[253]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[254]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[255]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[256] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must

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[253] 12 C.F.R. § 1005.18.

[254] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[255] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[256] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[257] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[258] tools and equipment,[259] and business transportation and travel.[260] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[261]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[262]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[263]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[264]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[265]

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[257] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[258] 29 U.S.C. § 203(m); 29 C.F.R. §§531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[259] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage &Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[260] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[261] 29 C.F.R. § 778.217.

[262] 29 C.F.R. § 531.38.

[263] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[264] 29 C.F.R. § 531.40.

[265] 29 C.F.R. § 531.40.

- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[266] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[267]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[268]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[269] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[270]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[271]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying

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[266] 29 U.S.C. § 203.However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[267] 29 C.F.R. § 825.213.

[268] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[269] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[270] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[271] 29 C.F.R. § 531.36.

deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[272]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[273]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Under Texas law, *wages* means compensation owed by an employer for:

- labor or services rendered by an employee, whether computed on a time, task, piece, commission, or other basis; and
- vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement with the employer or under an employer's written policy.[274]

Authorized Instruments. Wages may be paid by cash, negotiable written instrument, or electronic transfer of funds to either a financial institution that the employee designates or a payroll card account the employer establishes. An employee may agree in writing to receive part or all of the wages in kind or in another form. Provided certain conditions are met, direct deposit may be mandatory for employees who have bank accounts. Paychecks must be negotiable on demand at full face value. An employee may agree in writing to receive part or all of their wages in kind or in another form.[275]

Direct Deposit. Mandatory direct deposit is permitted if certain criteria are met. An employer may elect to pay wages to an employee through a direct deposit plan so long as the employee maintains an account at a financial institution that qualifies for electronic funds transfer. An employer that elects to pay employees through direct deposit must:

- notify affected employees of the plan at least 60 days before the plan is scheduled to begin; and
- obtain from the employee any information required by the financial institution to implement the electronic funds transfer.

An employer has not paid an employee's wages for purposes of Texas wage payment provisions if the employee receives wages subject to a third-party claim because the employer caused a direct deposit of wages to be reversed or took other similar action to undo the wage payment.

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[272] 29 C.F.R. § 531.37.

[273] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[274] TEX. LAB. CODE ANN. § 61.001; *see, e.g.*, TEX. LAB. CODE ANN. § 61.015 (payment of commissions and bonuses); 40 TEX. ADMIN. CODE § 821.26 (commissions or bonuses).

[275] TEX. LAB. CODE ANN. §§ 61.016, 61.017; 40 TEX. ADMIN. CODE § 821.21.

Employers should also be aware that the Texas Workforce Commission has stated that it remains unclear whether an employer can require direct deposit for an employee without a bank account.[276]

Payroll Debit Card. An employer may elect to pay wages to an employee through a payroll card account plan that is linked to a federally insured financial institution and uses electronic funds transfer to deposit wages in the employee's payroll card account. An employer that elects to pay wages through a payroll card account must:

- No later than the 60th day before the date of the first electronic funds transfer to the payroll card account of an affected employee or, for an employee hired after the date the employer adopts the plan, no later than the employee's first day of work: notify the employee in writing regarding the employer's adoption of a payroll card account plan; and, provide to the employee: a complete list of all fees associated with the employee's payroll card account in English, or, if the employer offers a payroll card account to an employee in a language other than English, in that other language; and, a form the employee may use to request an alternate form of payment if the employee elects to opt out of the payroll card account plan; and
- Obtain from the employee any information required by the payroll card account issuer that is necessary to implement the electronic funds transfer.

If an employee requests to be paid by an alternate form of payment, the employer must pay the employee's wages in the alternate form as soon as practicable, but at minimum, no later than the first payday occurring after the 30th day after the employee requests the alternate form of payment.

Payroll card account means an account that is directly or indirectly established by an employer into which each participating employee's wages, salary, or other form of compensation is deposited on a recurring basis and for which the employee receives a payroll card to access the funds in the account.[277]

3.7(b)(ii) *Frequency of Payment Under State Law*

Texas law requires the regular payment of employees, with the timing of paydays depending on the type of employee at issue. The available options are summarized below.

Regular Payment. Generally, an employer must pay FLSA-exempt employees at least once per month. All other employees must be paid at least twice a month, and each pay period must have—as nearly as possible—an equal number of days. If an employer fails to designate paydays, its paydays are the 1st and 15th day of each month.

An employee who is absent on payday must be paid on another regular business day upon request. Commissions must be paid, in a timely manner, according to the terms specified in an agreement between an employer and employee. The terms should specify the time intervals or circumstances that would

[276] TEX. LAB. CODE ANN. § 61.017; 40 TEX. ADMIN. CODE § 821.21; Texas Workforce Comm'n, *Especially for Texas Employers: Electronic Fund Transfer of Wages*, *available at* https://efte.twc.texas.gov/electronic_fund_transfer_wages.html.

[277] TEX. LAB. CODE ANN. § 61.017(d)-(e).

cause commissions to become payable, *e.g.*, weekly, monthly, quarterly, when sales transactions are recorded, upon buyer's remittance, etc.[278]

Semi-Monthly. All nonexempt employees must be paid at least twice per month. Exempt employees may be paid semi-monthly.[279]

Monthly. An employer may pay FLSA-exempt employees once a month. The state labor department has taken the position that anyone who fits the FLSA section 213(a) exemption qualifies to be paid on a monthly basis—this category includes *bona fide* executive, administrative, and professional employees, as well as outside salespersons.[280]

3.7(b)(iii) *Final Payment Under State Law*

Discharge. Upon discharge, including layoffs, an employer must pay employees in full no later than six days after the discharge date. Commissions must be paid in accordance with the agreement between the employer and the employee. Vacation and sick leave pay are not due at separation unless there is a written agreement or an employer's written policy that provides for payout at termination.

Moreover, paid time off (PTO) or paid days off (PDO), if defined as something other than a combination of vacation, holiday, sick leave, parental leave, or severance pay, are *not* considered wages and are *not* due at separation unless there is a written agreement or an employer's written policy that provides for payout at termination.[281]

Resignation. When employees leave for any reason other than discharge, an employer must pay them in full no later than the next regularly scheduled payday. Commissions must be paid in accordance with the agreement between the employer and the employee. Vacation and sick leave pay are not due at separation unless there is a written agreement or an employer's written policy that provides for payout at termination. And, as noted earlier, PTO or PDO if defined as something other than a combination of vacation, holiday, sick leave, parental leave, or severance pay, are not considered wages and are not due at separation absent a written agreement or written policy to the contrary.[282]

Severance Pay. Severance pay is payment by an employer to an employee beyond the employee's wages when employment ends, based on the employee's prior service. It does not include payments for liquidated damages, payments in exchange for a release of claims, or payments made because of a lack of notice of separation.[283]

Business Restructuring. The sale of an employer's business is a termination of employment with all of the employer's employees. At the time of termination, the employer becomes liable for the payment of

[278] TEX. LAB. CODE ANN. §§ 61.011, 61.012, and 61.013; 40 TEX. ADMIN. CODE § 821.26.

[279] TEX. LAB. CODE ANN. § 61.011.

[280] TEX. LAB. CODE ANN. § 61.011.

[281] TEX. LAB. CODE ANN. § 61.014; 40 TEX. ADMIN. CODE §§ 821.22, 821.25, and 821.26.

[282] TEX. LAB. CODE ANN. § 61.014; 40 TEX. ADMIN. CODE §§ 821.22, 821.25, and 821.26.

[283] 40 TEX. ADMIN. CODE § 821.25(b).

vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay, *if* owed pursuant to a written agreement or written policy between the employer and its employees.[284]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

At the end of each pay period, an employer must give each employee a written earnings statement covering the pay period. The earnings statement must be signed by the employer or its agent and must show:

- employee's name;
- rate of pay;
- total amount of pay earned by the employee during the pay period;
- any deduction made from the employee's pay and the purpose of the deduction;
- amount of pay after all deductions are made; and
- total number of: (1) hours worked by the employee, if the employee's pay is computed by the hour; or (2) units produced by the employee during the pay period, if the employee's pay is computed on a piece rate.

An earnings statement may be in any form determined by the employer. The information required may be stated on a check voucher or bank draft given to an employee for the employee's wages. Notably, wage statements are not required for employees covered by the FLSA.[285]

Moreover, for employees that are not covered by the FLSA, a wage statement may be in any form determined by the employer. As the Texas Workforce Commission has explained, "[t]he statement of earnings may be in either written or electronic form."[286] The commission cautions, however, that paystubs sent via email should be protected by passwords and/or encryption to ensure privacy and avoid identity theft.

3.7(b)(v) *Wage Transparency*

Texas law does not address whether an employer may prohibit employees from disclosing their wages or from discussing and inquiring about the wages of other employees.

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

Changing Regular Paydays. There are no general notice requirements, should an employer seek to change employee paydays. That being said, the Texas Workforce Commission advises that "it would be best to give employees advance written notice [of any such change] setting out the next three paydays—1) the last old payday; 2) the first new payday; and 3) the next-following new payday."[287] As a reminder, Texas employers also must conspicuously post in the workplace notices indicating paydays.[288] Additionally, the

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[284] 40 TEX. ADMIN. CODE § 821.25(c).

[285] TEX. LAB. CODE ANN. § 62.003.

[286] TEX. LAB. CODE ANN. § 62.003; Texas Workforce Comm'n, *Especially for Texas Employers: Delivery of Wages*, *available at* https://efte.twc.texas.gov/delivery_of_wages.html.

[287] Texas Workforce Comm'n, *Especially for Texas Employers: Frequency of Pay*, *available at* https://efte.twc.texas.gov/frequency_of_pay.html.

[288] TEX. LAB. CODE ANN. § 61.012.

state supreme court has held that advance notice is required to prove modification of an at will employment contract.[289]

Changing Pay Rate. Similarly, there are no general notice requirements, should an employee's pay rate change. Again, however, the Texas Workforce Commission recommends that pay rate changes be documented in writing "for the company's own protection, in order to minimize disputes over the rate of pay."[290] Also, per the commission, pay rate decreases are legal but *cannot* be implemented retroactively. In the event of a violation of an agreement or policy, an employee's wages during the final pay period may be paid at a lower rate under certain conditions, if the employee receives at least the minimum wage.[291] Additionally, the state supreme court has held that advance notice is required to prove modification of an at will employment contract.[292]Texas law does not include a general indemnification obligation for employers. To the extent that employers elect to reimburse employees for work expenses, state law provides that expense reimbursements paid to employees are *not* wages. Such reimbursements are considered payments to the employee for costs expended by the employee directly related to the employer's business.[293]

3.7(b)(vii) *Paying for Expenses Under State Law*

Texas law does not include a general indemnification obligation. However, licensed employers of *common workers*, defined as individuals who perform physical tasks that do not require "particular skill . . . training . . . [or] practical knowledge," cannot charge such workers for:

- clothing or accessories required by the nature of the work, either by law, custom, or the requirements of the user of common workers; or
- uniforms, special clothing, or other items required as a condition of employment by the user of common workers.[294]

3.7(b)(viii) *Wage Deductions Under State Law*

Permissible Deductions. In Texas, no written authorization is needed to withhold or deduct wages when such deductions are authorized by federal or state law or by court order (*e.g.*, federal income tax, Social Security, wage garnishment).[295] An employer may also deduct employee wages for a lawful purpose where the employee has so authorized in writing.[296] A *lawful purpose* is one that is authorized, sanctioned, or not forbidden, by law.

Written authorization for deductions must specify the lawful purpose for which the employee has accepted the responsibility or liability, and must be:

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289 *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227 (Tex. 1986).

290 Texas Workforce Comm'n, *Especially for Texas Employers: Pay Agreements*, *available at* https://efte.twc.texas.gov/pay_agreements.html.

291 Texas Workforce Comm'n, *Especially for Texas Employers: Pay Agreements*, *available at* https://efte.twc.texas.gov/pay_agreements.html.

292 *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227 (Tex. 1986).

293 40 TEX. ADMIN. CODE § 821.25(d).

294 TEX. LAB. CODE ANN. § 92.025.

295 TEX. LAB. CODE ANN. § 61.018.

296 TEX. LAB. CODE ANN. § 61.018.

- sufficient to give the employee a reasonable expectation of the amount to be withheld from pay; and
- a clear indication that the deduction is to be withheld from wages.[297]

The signed acknowledgment of receipt must also include language that states that the employee agrees to abide by or be bound to the authorization for deduction.

If an employer uses a handbook, policy manual, or other similar document instead of a separate writing, the employee's signed acknowledgment of receipt of company policies can be authorization to withhold wages—if the above requirements are met and the document specifically informs the employee of the deduction. An employer must ensure that properly withheld wages are applied toward their authorized purpose. Properly withheld wages not applied toward their authorized purpose are unlawful deductions.

Texas permits the following deductions:

- the amount of a wage advance, if the employer provides the employee with notice that the amount is an advance that will be recovered from the next paycheck and the employee agrees to the amount to be recouped;[298]
- union dues, with the employee's written consent;[299]
- the reasonable cost of providing meals and/or lodging, if customarily furnished by the employer to employees, and the cost is separately stated and identified in the earnings statements provided to an employee;[300]
- misappropriated cash;[301] or
- any other deduction for a lawful purpose with the employee's written consent, such as:
  - store inventory sold to employees on credit;
  - personal use of company equipment or accounts;
  - damage or losses caused by the employee;
  - employee physicals and drug screens, if the deduction does not cause the employee's pay to fall below the minimum wage or overtime rate;
  - non-work-related training, education loans, and relocation costs paid for by the company;
  - employee traffic tickets, bail, and court costs paid by the employer; or
  - credit card service charges from an employee's tips.

Prohibited Deductions. In most other circumstances, an employer may not deduct amounts owed by an employee from the employee's paycheck unless the employee has authorized the deductions in writing.[302]

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[297] 40 TEX. ADMIN. CODE § 821.28.

[298] 40 TEX. ADMIN. CODE § 821.29.

[299] TEX. LAB. CODE ANN. § 101.004.

[300] TEX. LAB. CODE ANN. § 62.053.

[301] Texas Workforce Comm'n, *Especially for Texas Employers: Texas Payday Law Deduction Summary*, *available at* https://efte.twc.texas.gov/texas_payday_law_deduction_summary.html.

[302] TEX. LAB. CODE ANN. § 61.018.

Authorizations for deductions for insurance premiums, parking, lost or damaged property, and other items must be in writing. In accordance with federal law, any deductions pursuant to a nonexempt employee's written authorization may not be in an amount that reduces the employee's hourly pay rate below the minimum wage established by the FLSA.[303] FLSA-covered employers must also comply with the conditions under which an employer may make pay deductions without compromising an employee's exempt status from the overtime requirements.[304]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Texas law permits garnishment of an employee's wages in only three circumstances: failure to pay child support, failure to pay spousal maintenance, and for a default on student loans.

Child Support. Texas law authorizes the garnishment of wages pursuant to a court order for the payment of child support.[305] An employer may withhold a maximum of 50% of the employee's disposable earnings.[306] An employer receiving a court order of garnishment for child support payments must comply with the court order or it may be liable to the person seeking to enforce the order for the amount not paid in compliance with the order, plus applicable interest, as well as reasonable costs and attorneys' fees.[307] In addition, an employer may be fined up to $200 for each occurrence in which the employer knowingly fails to withhold or fails to remit withheld income to the payee in a timely manner.[308] The employer may charge an administrative fee of not more than $10 per month, which may be deducted from the employee's disposable earnings in addition to the amount to be withheld as child support.[309]

Employers may not discharge or otherwise discriminate against an employee because that employee is subject to a court order to withhold income for payment of child support.[310] Further, an employer may not refuse to hire an individual because of a court order to withhold income.[311] Employees intentionally discharged in violation of the statute may sue to recover lost wages and benefits, plus costs and reasonable attorneys' fees.[312]

Spousal Maintenance. Texas law also authorizes the garnishment of wages pursuant to a court order for spousal maintenance.[313] An employer may withhold a maximum amount that, when added to the amount being withheld by the employer for child support, is equal to 50% of the employee's disposable earnings.[314] As in the case of child support payments, an employer receiving a court order of garnishment for spousal maintenance payments must comply with the court order. Noncompliance with such court orders may result in liability to the person seeking to enforce the order for the amount not paid in

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303 29 U.S.C. § 203(m).

304 *See* 29 C.F.R. § 541.602(b).

305 TEX. FAM. CODE ANN. §§ 158.001 *et seq*.

306 TEX. FAM. CODE ANN. § 158.009.

307 TEX. FAM. CODE ANN. § 158.206.

308 TEX. FAM. CODE ANN. § 158.210.

309 TEX. FAM. CODE ANN. § 158.204.

310 TEX. FAM. CODE ANN. § 158.209.

311 TEX. FAM. CODE ANN. § 158.209.

312 TEX. FAM. CODE ANN. § 158.209.

313 TEX. FAM. CODE ANN. § 8.101.

314 TEX. FAM. CODE ANN. § 8.106.

compliance with the order plus reasonable costs and attorneys' fees.[315] In addition, an employer may be fined up to $200 for each occurrence in which the employer knowingly fails to withhold or fails to remit withheld income to the payee in a timely manner.[316] The employer may charge an administrative fee of not more than $5 per month, which may be deducted from the employee's disposable earnings in addition to the amount to be withheld as spousal maintenance.[317]

Employers may not discharge or otherwise discriminate against an employee because that employee is subject to a court order to withhold for payment of spousal maintenance.[318] Further, an employer may not refuse to hire an individual because of a withholding order.[319] Employees intentionally discharged in violation of the statute may sue to recover lost wages and benefits, plus costs and reasonable attorneys' fees.[320]

Garnishment Orders from Other Jurisdictions. Other than in the circumstances set forth above, Texas law generally prohibits garnishing an employee's current wages.[321] Nonetheless, the state is required to recognize and give full credit to a valid court order—including a garnishment order—from another state if the creditor (garnishor) establishes personal jurisdiction over the employer (who is then the garnishee) in the state that issued the garnishment order. If the creditor cannot establish personal jurisdiction in the state that issued the garnishment order or fails to establish personal jurisdiction over the employer (often for improper service), then the judgment must be domesticated by a Texas court in order to be enforceable against an employer.[322] In other words, although statutory provisions of the Texas constitution prohibit a Texas court from entering a writ of garnishment against employee wages, a Texas court will not interfere with the enforcement of a valid sister state order that garnishes wages.[323]

Of particular relevance to nationwide employers with employees in Texas, a valid garnishment order from another state may not simply be ignored because of Texas' constitutional prohibitions and may be enforceable under the laws of the state where the order originated. Employers that do not do business in the jurisdiction where the order originates may nevertheless ultimately have to garnish wages according to that order. In that situation, the creditor must take additional procedural steps to enforce the judgment in Texas.

3.7(b)(x) *State Enforcement, Remedies & Penalties*

Texas Payday Law. An employee is not required to exhaust administrative remedies prior to initiating a lawsuit for violations of the Texas Payday Law. At least one Texas court has held that an individual has a constitutional right under Texas law to have a jury hear a claim for recovery of a debt.[324] The effect of this holding is to provide two bites at the apple for an individual seeking unpaid wages or commissions. For example, an employee who claims that their employer failed to pay a commission may file a wage claim

[315] TEX. FAM. CODE ANN. § 8.206.

[316] TEX. FAM. CODE ANN. § 8.209.

[317] TEX. FAM. CODE ANN. § 8.204.

[318] TEX. FAM. CODE ANN. § 8.208.

[319] TEX. FAM. CODE ANN. § 8.208.

[320] TEX. FAM. CODE ANN. § 158.209.

[321] TEX. CONST. art. XVI, § 28; *see also* TEX. PROP. CODE ANN. § 42.001; TEX. CIV. PRAC. & REM. CODE ANN. § 63.004.

[322] TEX. CIV. PRAC. & REM. CODE ANN. § 35.003.

[323] *See, e.g.*, *Knighton v. IBM*, 856 S.W.2d 206, 209-10 (Tex. App. 1993).

[324] *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 194 (Tex. App. 1995).

with the Texas Workforce Commission (TWC). If the TWC rules against the employee, the employee may withdraw the wage claim (before it becomes final) and file a lawsuit in state court to try to obtain a better result. The TWC Texas Payday Rules specifically allow claimants to withdraw wage claims before they become final.[325] However, if the claimant does not withdraw the claim before it becomes final, the Supreme Court of Texas has held that *res judicata* bars the employee from pursuing a subsequent civil lawsuit for the same claims.[326] If an employee files a claim with the TWC, and fails to appeal a negative decision to the tribunal, the employee has failed to exhaust their administrative remedies, forgoing the opportunity for judicial review.[327]

An employee who is not paid as provided under the Texas Payday Law must file a complaint with the TWC within 180 days of the date the wages were due.[328] The 180-day deadline is a matter of jurisdiction.[329] In fact, if the wage claim is filed later, the wage claim must be dismissed.[330] The wage claim must be filed in a manner and on a form prescribed by the TWC and must be verified by the employee.[331] The TWC will investigate the claim and issue a preliminary wage determination order that either: (1) dismisses the claim; or (2) orders payment of the wages due plus any other appropriate administrative penalty.[332] If the TWC determines that the employer acted in bad faith in not paying the wages, an administrative penalty equal to the wages owed (but not more than $1,000) may be assessed against the employer. Conversely, if the TWC determines that the wage claim was brought in bad faith, an administrative penalty may be assessed against the employee in an amount not greater than the wages claimed or $1,000.[333]

Either party may request a hearing before a wage claim tribunal to appeal a preliminary wage determination by making a written request for a hearing no later than 21 days after the commission examiner mails notice of the preliminary wage determination order.[334] If no hearing request is made within that time, the preliminary order becomes final, and neither party is entitled to review.[335] The wage claim appeal tribunal must mail notice of an administrative hearing no later than 21 days after it receives the request for the hearing.[336] The hearing must be conducted no later than 45 days after the tribunal mails its notice of hearing.[337] If the tribunal determines that wages are due or penalties are to be assessed, it must enter a written order to that effect.[338] The tribunal must then mail notice of its decision to each

[325] 40 TEX. ADMIN. CODE § 821.43(a).

[326] *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78 (Tex. 2008).

[327] *Hull v. Davis*, 211 S.W.3d 461, 465-66 (Tex. App. 2007). *But cf. Haddix v. American Zurich Ins. Co.*, 253 S.W.3d 339, 351 (Tex. App. 2008) (holding trial court had jurisdiction over wage claim even though employee's pleading was defective in that he failed to affirmatively plead he had appealed a negative decision to the tribunal).

[328] TEX. LAB. CODE ANN. § 61.051(c).

[329] TEX. LAB. CODE ANN. § 61.051(c).

[330] TEX. LAB. CODE ANN. § 61.052(b-1).

[331] TEX. LAB. CODE ANN. § 61.051(b).

[332] TEX. LAB. CODE ANN. § 61.052(a).

[333] TEX. LAB. CODE ANN. § 61.053.

[334] TEX. LAB. CODE ANN. § 61.054.

[335] TEX. LAB. CODE ANN. § 61.055.

[336] TEX. LAB. CODE ANN. § 61.057.

[337] TEX. LAB. CODE ANN. § 61.057.

[338] TEX. LAB. CODE ANN. § 61.060.

party's last known address.[339] The order becomes final 14 days after it is mailed unless, before the end of the 14-day period, a further appeal to the commission is initiated (notably, a claimant may withdraw their claim to avoid the order becoming final).[340] The commission may, on its own motion, affirm, modify, or set aside an order of the tribunal by reviewing evidence already submitted or by taking new evidence.[341] The commission may also permit the parties to initiate a further appeal before the commission.[342] The commission should mail each party a copy of the commission's decision, which becomes final 14 days after the order is mailed (unless the commission, by order, reopens the appeal or a party files a motion for rehearing).[343]

A party may bring an action in a court of competent jurisdiction to appeal the TWC's final order only if the party has exhausted the administrative remedies under the statute. Such an action must be filed no later than 30 days from the date the order was mailed.[344] The action must be brought in the county where the claimant resides.[345] If, however, the claimant is not a resident of the State of Texas, the action must be brought in the county in which the employer has its principal place of business.[346] A judicial appeal is by trial *de novo* with the substantial evidence rule being the standard of review.[347] Notably, the Fort Worth Court of Appeals has held that the administrative procedure under the Texas Payday Law is neither the mandatory, nor the exclusive, remedy for wage claims.[348] Instead, it exists independently of common-law remedies. Thus, a party can still pursue a common-law remedy (*i.e.*, sue for breach of contract) without exhaustion of administrative procedures. A party seeking judicial review of the TWC's final order must join the TWC as a defendant in the action.[349] Defendants in such suits sometimes seek to remove the litigation to federal court on the grounds of diversity or the existence of a federal question, such as ERISA preemption.[350] The TWC is a nominal defendant that need not join in the removal. Therefore, failure of the TWC to join in the removal petition does not render the petition defective.[351]

The party required to pay wages due, or administrative penalties, or both, must do so no later than 30 days from the date the TWC's order becomes final.[352] If the party files a petition for judicial review, that party must forward the full amount assessed to the TWC for deposit in escrow in an interest-bearing account.[353] If the party fails to send the amount within the 30-day period, the party's right to judicial review will be

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339 TEX. LAB. CODE ANN. § 61.061(a)-(b).

340 TEX. LAB. CODE ANN. § 61.061(c).

341 TEX. LAB. CODE ANN. § 61.0612(1).

342 TEX. LAB. CODE ANN. § 61.0612(2).

343 TEX. LAB. CODE ANN. §§ 61.0613, 61.0614.

344 TEX. LAB. CODE ANN. § 61.062.

345 TEX. LAB. CODE ANN. § 61.062.

346 TEX. LAB. CODE ANN. § 61.062.

347 TEX. LAB. CODE ANN. § 61.062.

348 *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 193-94 (Tex. App. 1995).

349 TEX. LAB. CODE ANN. § 61.062(c).

350 *See, e.g.*, *Johns v. Texas Workforce Comm'n*, 114 F. Supp. 2d 590 (S.D. Tex. 2000); *Watts v. Texas Workforce Comm'n*, 1999 WL 812795 (N.D. Tex. Oct. 7, 1999).

351 *See, e.g.*, *Johns*, 114 F. Supp. 2d 590; *Watts*, 1999 WL 812795.

352 TEX. LAB. CODE ANN. § 61.063(a).

353 TEX. LAB. CODE ANN. § 61.063(a).

forfeited.[354] One Texas court has found this provision is unconstitutional, as it conditions the employer's right of access to judicial review on the payment of the disputed amount into escrow.[355] However, the TWC may require the employer to pay the disputed amount during the pendency of the appeal, as long as the right to judicial review is not hindered.[356] If, after review, the court decides that some or all of the payment is not due, the TWC must remit the appropriate amount to the party assessed the wage payment, or penalty, or both, plus interest accrued on the escrowed amount.[357] If payment is not made as required by the final order, the TWC, in the name of the Texas Attorney General, may: (1) bring a civil action in Travis County District Court to enforce a final order from which an appeal has not been taken; or (2) serve on the defaulting party a notice of assessment stating the amount due.[358] If a notice of assessment is not challenged in Travis County District Court within 30 days of service, it is then treated as a final judgment of a district court.[359]

The Attorney General may recover attorneys' fees, including investigation costs and other costs of court.[360] If the employer intends to avoid payment of wages at the time the employer hires the employee, and fails to pay wages owed on demand, the employer may be convicted of a third-degree felony.[361] The entry of a final order of the TWC against an employer, unless appealed to a court, becomes a lien on all of the property belonging to the employer.[362] The lien attaches immediately upon the administrative order becoming final.[363]

Texas Minimum Wage Act. An employee has two years from the date the wages were due for payment to file a lawsuit to recover the unpaid wages.[364] A violation of the TMWA can result in liability for unpaid wages, plus an additional equal amount as liquidated damages and reasonable attorneys' fees and costs.[365]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[366] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare

[354] TEX. LAB. CODE ANN. § 61.063(b).

[355] *Hawk Leasing Co. v. Texas Workforce Comm'n*, 971 S.W.2d 598, 601 (Tex. App. 1998).

[356] 971 S.W.2d at 601.

[357] TEX. LAB. CODE ANN. § 61.063(c).

[358] TEX. LAB. CODE ANN. § 61.066(a).

[359] TEX. LAB. CODE ANN. § 61.066(e).

[360] TEX. LAB. CODE ANN. § 61.066(f).

[361] TEX. LAB. CODE ANN. § 61.019.

[362] TEX. LAB. CODE ANN. § 61.081.

[363] TEX. LAB. CODE ANN. § 61.081.

[364] TEX. LAB. CODE ANN. § 62.202.

[365] TEX. LAB. CODE ANN. §§ 62.201, 62.205.

[366] 29 U.S.C. § 1002.

benefit plan.[367] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[368]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

Vacation time is a matter of contract or policy under Texas law.[369] As such, employers may enforce "use-it-or-lose it" provisions[370] or establish caps on accrual of an employee's vacation time.[371] Accrued leave time of an employee must carry over to subsequent years only if a written agreement with the employer or a written policy of the employer specifically provides for it.[372]

Similarly, vacation pay is payable to an employee upon separation from employment if a written agreement with the employer, or a written policy of the employer, specifically provides for payment. As discussed in **3.7(b)(iii)**, at the time of termination, the employer becomes liable for the payment of vacation pay, holiday pay, sick leave pay, or parental leave pay—*if* owed pursuant to a written agreement or written policy. Relatedly, employers should note that the sale of an employer's business constitutes a termination of employment with all of the employer's employees.

However, even in the absence of an express written promise to pay out, courts might interpret policy language and employer actions to create such an obligation. For example, a state appellate court held that a former employee was entitled to payout of unused vacation and sick days when employment ended. The employment agreement expressly provided the employee was entitled to "5 paid sick days per year and 1-week paid vacation after one full year of service." The employee testified that the company president told her that her vacation and sick days accrued, and that she would be paid or compensated for those days if she did not use them. Together, this was legally and factually sufficient evidence to support the jury's finding that the employee was entitled to unused vacation or sick time.[373]

Additionally, paid time off (PTO) or paid days off (PDO) are wages unless the employer's written policy defines PTO or PDO as something other than a combination of vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay. PTO or PDO is payable to an employee upon separation from

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[367] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[368] 490 U.S. 107, 119 (1989).

[369] *Interstate Hosts, Inc. v. Thompson*, 435 S.W.2d 957 (Tex. App. 1968).

[370] 40 TEX. ADMIN. CODE § 821.25(f).

[371] Texas Workforce Comm'n, *Especially for Texas Employers: Vacation, Sick, and Parental Leave Policies*, *available at* https://efte.twc.texas.gov/vacation_sick_and_parental_leave_policies.html.

[372] 40 TEX. ADMIN. CODE § 821.25.

[373] *Jetall Cos. v. Plummer*, 2020 WL 5900577 (Tex. App. Oct. 6, 2020).

employment only if a written agreement with the employer or a written policy of the employer specifically provides for payment.[374]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Retail employees in Texas must be provided at least one period of 24 consecutive hours of time off for rest or worship in each seven-day period. An employer must reasonably accommodate an employee's religious practices unless doing so would constitute an undue hardship on conducting the employer's business. An employer must accommodate an employee's request to attend one regular worship of their religion once per week. This restriction does not apply to part-time employees who work 30 hours or less per calendar week.[375]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[376] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[377] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[378] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

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[374] 40 TEX. ADMIN. CODE § 821.25.

[375] TEX. LAB. CODE ANN. §§ 52.001, 52.002.

[376] 29 U.S.C. § 1144.

[377] 29 U.S.C. § 1161.

[378] 29 U.S.C. § 1167(3).

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

In Texas, couples may register as domestic partners in Travis County. However, state law does not address whether an employee's domestic partner is required to be considered an eligible beneficiary or dependent for purposes of employee benefit plans.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[379]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[380]
- to take medical leave when the employee is unable to work because of a serious health condition;[381]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[382] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[383] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

Texas law does not address family and medical leave for private-sector employees.

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[379] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[380] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[381] 29 C.F.R. §§ 825.112, 825.113.

[382] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[383] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

3.9(a)(iii) *State Guidelines on Kin Care Leave*

While Texas has no statewide kin care leave requirement, it is an unlawful employment practice for an employer to have a leave policy that permits an employee to use personal leave to care for or otherwise assist their sick child, but does not permit an employee to use personal leave to care for or assist their foster child. An employer's personal leave policy must treat an employee's biological or adopted minor child in the same manner as an employee's foster child who resides in the same household as the employee and is under the conservatorship of the Department of Family and Protective Services. The law does not include any provisions requiring an employer to create a personal leave policy or to modify a personal leave policy to permit employees to use leave to care for a sick child.[384]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[385] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

Texas has no statewide paid sick and safe time law. Although Austin, Dallas, and San Antonio enacted local ordinances, the Dallas ordinance was permanently enjoined, and the Austin and San Antonio laws, which never took effect, have been temporarily enjoined.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[386] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

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[384] TEX. LAB. CODE ANN. § 21.0595.

[385] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[386] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[387] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[388] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

For all purposes related to employment, a person affected by pregnancy, childbirth, or a related medical condition must be treated the same as employees who are not pregnant but are similar in their ability or inability to work. Accordingly, employers should treat employees with pregnancy-related disabilities the same as they treat other temporarily disabled employees for leave of absence purposes.[389]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[387] 29 C.F.R. § 825.202.

[388] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

[389] TEX. LAB. CODE ANN. § 21.106(b).

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

Texas law does not address adoptive parents leave for private-sector employees.

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Texas law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Texas law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

Under Texas law, employers are obligated to grant leave time for employees to vote under certain circumstances.[390] Moreover, this time off to vote must be paid.[391]

An employee that does not have two consecutive hours before or after work to vote is eligible for time off to vote. An employer need not provide employees time off to vote if they have sufficient time to vote during nonworking hours. The law does not specify how much time off must be provided. However, the state attorney general has taken the position that, if employees are entitled to take time off during work hours (*i.e.*, they do not have two consecutive hours before or after work to vote), "reasonable time" to vote must be provided—enough time to enable them to attend the polls while they are open.[392] Sufficient time to vote is fact-specific and will differ depending on the circumstances. Consistent with the relevant statute, the Texas Workforce Commission asserts that employers should allow employees at least two hours' time off to vote. Employees are not required to provide notice to employers to take time off to vote.[393]

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[390] TEX. ELEC. CODE ANN. § 276.004.

[391] TEX. ELEC. CODE ANN. § 276.004(c).

[392] *See* Office of the Att'y Gen., State of Tex., *Opinion No. M-53* (Apr. 7, 1967), *available at* https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/1967/cm0053.pdf; Office of the Att'y Gen., State of Tex., *Opinion No. V-1532* (Oct. 27, 1952), *available at* https://texashistory.unt.edu/ark:/67531/metapth266348/.

[393] Texas Workforce Comm'n, *Especially for Texas Employers: Voting–Time Off*, available at https://efte.twc.texas.gov/voting_time_off.html.

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Convention Delegate. An employer may not terminate or otherwise discriminate against an employee who takes a leave from work in order to attend a precinct convention or attend a county, district, or state convention as a delegate. Unlike leave for voting purposes, however, leave to attend such conventions may be unpaid.[394]

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[395] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[396] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. An employer must not terminate the employment of a permanent employee because of the employee's service as a juror or as a grand juror. Employees returning from leave must be reinstated, unless a change in the employer's circumstances makes reemployment impossible or unreasonable. The employer must be able to show that the termination was because of circumstances other than the employee's service as a juror or grand juror. An employer may not discharge, threaten to discharge, intimidate, or coerce an employee because of his or her service as a juror or grand juror. Case law has held that an employee's appearance at court in response to a jury subpoena in order to voice their exemption to jury service, and then failure to be added to the jury panel because of that exemption, is entitled to job protection by the state's jury duty leave law. An employer is not required to compensate an employee for time spent on jury service.[397]

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394 TEX. ELEC. CODE ANN. § 161.007.

395 28 U.S.C. § 1875.

396 *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

397 TEX. CIV. PRAC. & REM. CODE ANN. §§ 122.001 to 122.003; *see Wright v. Faggan*, 773 S.W.2d 352 (Tex. App. 1989).

Leave to Comply with a Subpoena. An employer may not discharge, discipline, or penalize in any manner an employee because the employee complies with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding.[398]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Texas law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[399]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2)

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[398] TEX. LAB. CODE ANN. § 52.051.

[399] USERRA provides that:(1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[400] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[401] Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Leave. Employers may not terminate employees who are members of any state's military forces and ordered to training or active duty. Such employees are entitled to reinstatement to the same job, without loss of time, efficiency rating, vacation, or any benefit of employment. To return, the employee must give written or actual notice of their intent as soon as practicable after release from duty. Failure to allow a covered employee to return to work is an unlawful employment practice.[402]

Other Military-Related Protections: Spousal Unemployment. A worker's voluntary leave from work will not disqualify them from unemployment benefits if the worker's spouse is a member of the U.S. armed forces, and the leave resulted from the spouse's permanent change of station which was longer than 120 days, or a tour of duty longer than one year.[403] Likewise, an employer's account will not be charged for a separation if the worker's spouse is a member of the U.S. armed forces, and the leave resulted from the spouse's permanent change of station which was longer than 120 days, or a tour of duty longer than one year.[404]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

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[400] 29 C.F.R. § 825.126(a).

[401] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

[402] TEX. GOV'T CODE ANN. § 437.204; *see* TEX. GOV'T CODE ANN. § 431.001.

[403] TEX. LAB. CODE ANN. § 207.045(d)(6).

[404] TEX. LAB. CODE ANN. § 204.022(a)(12).

3.9(l)(ii) *State Guidelines on Other Leaves*

Emergency Evacuation Order Leave. Texas has enacted a leave protection that can apply in emergency situations. An employer may not discharge or otherwise discriminate against an employee who leaves work to participate in an evacuation order.[405]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[406] Employers are also required to comply with all applicable occupational safety and health standards.[407] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see **LITTLER ON WORKPLACE SAFETY**.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[408] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Texas does not have an approved state plan under the Fed-OSH Act that covers public or private-sector employees.

For the most part, Texas has elected not to promulgate its own workplace safety and health standards. Under the Texas Hazard Communication Act, however, employers are required to inform employees about hazardous chemicals present in the workplace and about the potential risks of exposure to each hazardous substance.[409] The Hazard Communication Act applies only to employers that are not required to comply with the hazard communication standards under the Fed-OSH Act, the Federal Coal Mine Health and Safety Act of 1969, or the Federal Mine Safety and Health Amendments Act of 1977.[410] Employers covered by the Hazard Communication Act are required to compile and maintain a list, updated annually by December 31st, of chemicals used or stored in the workplace in excess of 55 gallons or 500 pounds, or

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[405] TEX. LAB. CODE ANN. §§ 22.001 *et seq*.

[406] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[407] 29 U.S.C. § 654(a)(2).

[408] 29 U.S.C. § 667(c)(2).

[409] TEX. HEALTH & SAFETY CODE ANN. §§ 502.001 *et seq*.

[410] TEX. HEALTH & SAFETY CODE ANN. § 502.004.

in an amount determined by the Texas Board of Health for certain highly toxic or dangerous chemicals. The list must be readily available to employees and their representatives and must be maintained for at least 30 years. All employees must be made aware of the workplace chemical list before working with or in a work area containing hazardous chemicals.[411]

In addition, employers are required to provide an education and training program for employees who use or handle hazardous chemicals.[412] Employees may not be discharged or otherwise discriminated against for filing a complaint, instituting, or participating in any proceeding under the statute, or otherwise exercising their rights under the Hazard Communication Act.[413] Employers violating this law may be subject to civil penalties of as much as $2,000 per day, up to a maximum of $20,000 per violation, or criminal penalties up to $100,000 per offense.[414]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

In Texas, a driver commits an offense if the driver uses a portable wireless communication device to read, write, or send an electronic message while the vehicle is in motion. It is not an offense to do so when the vehicle is stopped. An *electronic message* means data that is read from or entered into a wireless communication device for the purpose of communicating with another person. A *wireless communication device* is a device that uses a commercial mobile service.

While still an offense, it is an affirmative defense to prosecution if the operator is using a wireless communication device:

- in a hands-free manner to navigate using GPS;
- to report illegal activity;
- to summon emergency help;
- to enter information into an application that provides information relating to traffic and road conditions;
- to read an electronic message that the person reasonably believes concerns an emergency;
- that is affixed to the vehicle to relay information between the operator and a dispatcher; or
- to activate a function that plays music.

Importantly, this law preempts all local ordinances, rules, or other regulations adopted by a political subdivision relating to the use of a portable wireless communication device by the operator of a motor

[411] TEX. HEALTH & SAFETY CODE ANN. § 502.005.

[412] TEX. HEALTH & SAFETY CODE ANN. § 502.009.

[413] TEX. HEALTH & SAFETY CODE ANN. § 502.017(c).

[414] TEX. HEALTH & SAFETY CODE ANN. §§ 502.015, 502.016.

vehicle to read, write, or send an electronic message. The preemption was not retroactive and only applies following the law's effective date of September 1, 2017.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Firearms in the Workplace. An employer in Texas may prohibit license holders from carrying open and concealed handguns on the premises of the business.[415]

Firearms in Company Parking Lots. Employers may not prohibit an employee from transporting or storing a firearm or ammunition in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for employees, as long as the employee: (1) holds a license to carry a handgun; (2) otherwise lawfully possesses a firearm; or (3) lawfully possesses ammunition. However, this provision does not apply to a vehicle owned or leased by a public or private employer and used by an employee in the course and scope of the employee's employment, unless the employee is required to transport or store a firearm in the official discharge of the employee's duties. Further, an employer shall not be liable for civil damages resulting from firearms or ammunition allowed in company parking lots.[416]

Signage Requirements. To prohibit *concealed carry* on a property, the property owner must display a sign in a conspicuous manner clearly visible to the public that states the following:

> Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun.

The language must appear in both English and Spanish in contrasting colors with block letters at least one inch in height.[417]

To prohibit *open carry* on a property, the property owner must display a second sign in a conspicuous manner clearly visible to the public that says the following:

> Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly.

The language must appear in both English and Spanish in contrasting colors with block letters at least one inch in height.[418]

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[415] TEX. GOV'T CODE ANN. § 411.203; TEX. PENAL CODE ANN. §§ 30.06, 30.07.

[416] TEX. LAB. CODE ANN. §§ 52.061 to 52.063.

[417] TEX. PENAL CODE ANN. § 30.06.

[418] TEX. PENAL CODE ANN. § 30.07.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

The Texas ban on smoking does not extend to all workplaces; however, smoking is prohibited in some public places (*i.e.*, hospitals, public schools, museums).[419]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Texas law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Texas law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[420] (2) the Americans with Disabilities Act (ADA);[421] (3) the Age Discrimination in Employment Act (ADEA);[422] (4) the Equal Pay Act;[423] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[424] (6) the Civil Rights Acts of 1866 and 1871;[425] and (7) the Civil

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[419] TEX. PENAL CODE ANN. § 48.01.

[420] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[421] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[422] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[423] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[424] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[425] 42 U.S.C. §§ 1981, 1983.

Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[426]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[427] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[428]

3.11(a)(ii) *State FEP Protections*

Chapter 21 of the Texas Labor Code ("Chapter 21") prohibits discrimination on the basis of the following:

- race;
- color;
- disability;
- religion;
- sex (including pregnancy, childbirth, or related medical conditions);
- national origin;
- genetic information; or
- age (40+).[429]

[426] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[427] The EEOC's website is available at http://www.eeoc.gov/.

[428] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

[429] TEX. LAB. CODE ANN. §§ 21.002, 21.051, 21.106, and 21.401.

Effective September 1, 2023, it is an unlawful employment practice for an employer to adopt or enforce a dress or grooming policy that discriminates against hair texture or protective hairstyles commonly or historically associated with race. *Protective hairstyles* include braids, locks, and twists.[430]

Employers with 15 or more employees are covered under Chapter 21. A religious corporation, association, society, or educational institution may give preference to members of the same religion.[431] Otherwise, an employer commits an unlawful employment practice if—because of race, color, disability, religion, sex, national origin, or age—the employer: (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.[432]

The law also prohibits discrimination or retaliation against a person who opposes a discriminatory practice, who makes or files a charge or complaint, or who testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.[433]

Additional unlawful employment practices under Chapter 21 include:

- aiding, abetting, inciting, or coercing a person to engage in a discriminatory practice;[434]
- willfully obstructing or preventing a person from complying with Chapter 21 or associated regulations or orders;[435]
- printing or publishing a notice or advertisement relating to employment that, unless a *bona fide* occupational qualification:
  - indicates a preference, limitation, specification, or discrimination based on any protected characteristic; or
  - concerns an employee's status, employment, or admission to membership or participation in a labor union or training or retraining program;[436]
- violating a conciliation agreement;[437] and
- using a qualification standard, employment test, or other selection criterion based on an individual's uncorrected vision unless the standard, test, or criterion is consistent with business necessity and job-related for the position to which the standard, test, or criterion applies.[438]

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[430] TEX. LAB. CODE ANN. § 21.1095.

[431] TEX. LAB. CODE ANN. §§ 21.002, 21.109.

[432] TEX. LAB. CODE ANN. §§ 21.051 to 21.054.

[433] TEX. LAB. CODE ANN. § 21.055.

[434] TEX. LAB. CODE ANN. § 21.056.

[435] TEX. LAB. CODE ANN. § 21.058.

[436] TEX. LAB. CODE ANN. § 21.059. The exception for a *bona fide* occupational qualification applies only to qualifications that relate to disability, religion, sex, national origin, or age.

[437] TEX. LAB. CODE ANN. § 21.060.

[438] TEX. LAB. CODE ANN. § 21.115(b); *see also* TEX. LAB. CODE ANN. § 21.124.

Additional FEP Protections. Texas offers additional protections for "unpaid interns."[439] Under Chapter 21, unpaid interns, as well as all employees, are protected from sexual harassment if the employer or its agents or supervisors knew or should have known that the conduct constituting sexual harassment was occurring and failed to take immediate and appropriate corrective action.[440]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

A person claiming a violation of Chapter 21 may file a complaint with the Texas Workforce Commission (TWC). Chapter 21 requires exhaustion of the administrative process and remedies prior to filing a civil suit.[441] The complaint must be filed with the TWC's Civil Rights Division within 180 days after the date the alleged unlawful employment practice occurred. Sexual harassment claims must be filed no later than 300 days after the date the alleged harassment occurred.[442]

If the TWC concludes, on the basis of a preliminary investigation of the complaint, that prompt judicial action is necessary to carry out the purposes of the law, the TWC may seek temporary injunctive relief against the employer pending a final determination of the proceedings.[443] If the TWC determines that reasonable cause exists to believe that the employer violated the law, the executive director or the director's designee shall review the evidence in the record with a panel of three commissioners. If at least two of the three commissioners concur, the executive director shall issue a written determination that incorporates the reasonable cause determination and serve a copy on the complainant, respondent, and other agencies as required by law.[444] Thereafter, the TWC must try to eliminate such practice by "informal methods of conference, conciliation and persuasion."[445] Should the TWC determine that there is reasonable cause to believe an unlawful employment practice has occurred, and should the TWC's efforts to resolve the discriminatory practice through conciliation fail, then the TWC may bring a civil action against the employer.[446]

If, however, the TWC determines after investigation that no reasonable cause exists to believe the employer violated the law, it must issue a written determination that incorporates that finding, and serve a copy on the employee, employer, and any other agency as required by law.[447] If the TWC dismisses a complaint or fails to resolve it before the 181st day after the employee filed the complaint, the statute requires the TWC to inform the employee, by certified mail, that it dismissed or could not resolve the

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[439] An individual is considered to be an employer's *unpaid intern* if: (1) the individual's internship is similar to training that would be given in an educational environment, despite engagement in the employer's operations or performance of productive work; (2) the internship experience is for the individual's benefit; (3) the individual does not displace the employer's regular employees but works under close supervision of existing staff; (4) the employer does not derive immediate advantage from the 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 internship's conclusion; and (6) the individual is not entitled to wages during the internship. TEX. LAB. CODE ANN. § 21.1065(c).

[440] TEX. LAB. CODE ANN. §§ 21.1065, 21.141, 21.142.

[441] *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 929 & n.3 (Tex. 1996).

[442] TEX. LAB. CODE ANN. §§ 21.201, 21.202.

[443] TEX. LAB. CODE ANN. § 21.210.

[444] TEX. LAB. CODE ANN. § 21.206.

[445] TEX. LAB. CODE ANN. § 21.207.

[446] TEX. LAB. CODE ANN. § 21.251.

[447] TEX. LAB. CODE ANN. § 21.205.

complaint.[448] When the employee receives this notice, the employee "is entitled to request from the TWC a written notice of the complainant's right to file a civil action."[449] If the employee requests or receives a right to file a civil action notice, the employee must file suit within 60 days of receipt of the notice to preserve claims under Chapter 21.[450]

Failure to issue the notice to file a civil action does not affect the employee's right to bring a claim under Chapter 21.[451] If no notice is issued, the employee must file a civil lawsuit within two years after the date the original complaint was filed with the TWC or the civil lawsuit is barred by the statute of limitations.[452]

3.11(a)(iv) *Additional Discrimination Protections*

HIV/AIDS. HIV and AIDS are not considered disabilities within the meaning of Chapter 21. However, a separate statute prohibits discrimination in requiring testing for HIV/AIDS.[453]

3.11(a)(v) *Local FEP Protections*[454]

In addition to the federal and state laws, employers with operations in several jurisdictions are subject to local fair employment practices ordinances. It should be noted, the Texas Regulatory Consistency Act (HB 2127, Tex. 2023) that was expected to go into effect on September 1, 2023, was found unconstitutional on August 30, 2023, by the Travis County District Court. Litigation with respect to the law is ongoing. If the law goes into effect at a later date, it would preempt a municipality from adopting, enforcing, or maintaining an ordinance regulating conduct in a field of regulation occupied by state law unless the local regulation is expressly authorized by another statute. This preemptive effect would likely include Local FEP protections.

- **Arlington.** Employers that employ 15 or more employees for each working day in the previous 20 calendar weeks must extend antidiscrimination protected on the basis of: race; color; national origin; age; religion; sex; disability; sexual orientation; and gender identity.[455] *Employer* does not include a bona fide private membership club that is exempt from taxation.[456] Any person who claims to have been injured by discrimination may file a complaint with the City Manager. A complaint may also be filed by the City Manager if they have reasonable cause to believe that a person has committed an unlawful practice. A

[448] TEX. LAB. CODE ANN. § 21.208.

[449] TEX. LAB. CODE ANN. § 21.252.

[450] TEX. LAB. CODE ANN. § 21.254; *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991), *overruled on other grounds by In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 306-10 (Tex. 2010).

[451] TEX. LAB. CODE ANN. § 21.252.

[452] TEX. LAB. CODE ANN. § 21.256.

[453] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.101 *et seq*.

[454] The Texas Regulatory Consistency Act (H.B. 2127 (Tex. 2023)) that was expected to go into effect on September 1, 2023, was found unconstitutional on August 30, 2023 by the Travis County District Court. If the law goes into effect at a later date, it would preempt a municipality from adopting, enforcing, or maintaining an ordinance regulating conduct in a field of regulation occupied by state law unless the local regulation is expressly authorized by another statute. This preemptive effect would likely include local fair employment practices ordinances. Litigation with respect to the law is ongoing.

[455] ARLINGTON, TEX, CITY CODE § 1.02.

[456] ARLINGTON, TEX, CITY CODE § 1.02.

complaint must be filed within 90 calendar days after an alleged unlawful practice has occurred.[457]

- **Austin.** Private employers (and their agents) that employ 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must extend antidiscrimination protections on the basis of: race; color; religion; sex (including gender, pregnancy, childbirth, or related medical conditions); sexual orientation; gender identity; national origin; age (at least 40 years); protective hairstyle (including afros, bantu knots, braids, cornrows, curls, locs, twists) disability; and reproductive health action (including family planning; fertility-related procedures; and sexually transmitted disease treatment).[458] Employers engaged in an industry affecting commerce that employed 16 or more employees at the time the alleged discrimination occurred additionally are subject to the following antidiscrimination protections: AIDS and HIV status.[459] An individual alleging a violation of either ordinance may file a charge with the Austin Human Resources Department, Equal Employment/Fair Housing Office no later than the 180th day after the date the violation occurred.[460]
- **Dallas.** Protected classifications include: sexual orientation and gender identity or expression. The antidiscrimination protections apply to employers that employ 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.[461] An individual alleging a violation of the ordinance may file a complaint with the Dallas City Manager within 180 calendar days after an alleged unlawful practice has occurred.[462]
- **Denton.** Any employer that employs 15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding year must extend antidiscrimination protections on the basis of race; color; national origin; age; religion; disability; sex; sexual orientation; and gender identity. An individual who claims to have been subject to employment discrimination in violation of this law may file a complaint with the City Manager's office. The complaint must be filed within 90 calendar days after the alleged unlawful practice occurred.[463]
- **Fort Worth.** Employers engaged in an industry affecting commerce and employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person are subject to the following antidiscrimination protections: age (40 years or older); race; color; religion; sex; disability;

[457] ARLINGTON, TEX, CITY CODE § 1.08.

[458] AUSTIN, TEX., CITY CODE §§ 5-3-2 (exceptions, including a *bona fide* private membership club other than a labor organization, which is exempt from taxation under the Internal Revenue Code), 5-3-4, and 5-3-15 (exemptions, including *bona fide* occupational qualifications and certain educational institution practices).

[459] AUSTIN, TEX., CITY CODE §§ 5-5-2, 5-5-3 (*bona fide* occupational qualification exception).

[460] AUSTIN, TEX., CITY CODE §§ 5-3-6, 5-5-9 (AIDS), 5-5-10 (AIDS), and 5-5-11 (AIDS).

[461] DALLAS, TEX., CITY CODE §§ 46-4 (exceptions, including *bona fide* private membership clubs exempt from taxation), 46-5 (religious organizations exemption), and 46-6.

[462] DALLAS, TEX., CITY CODE § 46-9.

[463] DENTON, TEX., CITY CODE §§ 14-203-5, 14-203-11.

national origin; sexual orientation; transgender; and gender identity or gender expression.[464] An aggrieved person, or any authorized representative of an aggrieved person, may file a complaint with the Fort Worth Human Relations Commission no later than 180 days after the alleged unlawful employment practice occurred.[465]

- **Wichita Falls.** Any employer that employs 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person must extend antidiscrimination protections on the basis of: race; color; religion; sex; national origin; age (40 to 65 years); and physical or mental handicap.[466] An aggrieved party may file a charge with the Wichita Falls Commission on Human Needs no more than 180 days after the alleged unlawful employment practice occurred.[467]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[468] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[469]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

Under Chapter 21, covered employers are prohibited from discriminating against an individual in connection with compensation on the basis of a protected classification.[470] An employer does not commit an unlawful employment practice by applying different standards of compensation under: (1) a *bona fide*

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[464] FORT WORTH, TEX., CODE OF ORDINANCES §§ 17-66 (exceptions, including a *bona fide* private membership club other than a labor organization that is exempt from taxation under section 501(c) of Title 26 of the United States Code), 17-67 (exceptions, including qualification standards and religious entities), and 17-70 (lawful practices).

[465] FORT WORTH, TEX., CODE OF ORDINANCES §§ 17-90, 17-91.

[466] WICHITA FALLS, TEX., CODE OF ORDINANCES §§ 66-161, 66-163, and 66-164 (exceptions, including *bona fide* occupational qualifications and certain religious education institutions and religious institutions).

[467] WICHITA FALLS, TEX., CODE OF ORDINANCES § 66-165.

[468] 29 U.S.C. § 206(d)(1).

[469] 42 U.S.C. § 2000e-5.

[470] TEX. LAB. CODE ANN. §§ 21.002, 21.051.

seniority system, merit system, or an employee benefit plan, such as a retirement, pension, or insurance plan, that is not a subterfuge to evade the requirements of the statute; or (2) a system that measures earnings by quantity or quality of production.[471]

An employer does not commit an unlawful employment practice by applying different standards of compensation to employees who work in different locations so long as the standards are not discriminatory on the basis of a protected classification.[472]

As discussed in **3.11(a)(iii)**, an employee alleging a violation of Chapter 21 must first exhaust administrative remedies by filing a complaint with the Texas Workforce Commission within 180 days of the alleged violation. The employee may then file a civil action within 60 days of receiving a right-to-sue notice from the Commission or within two years of filing the administrative complaint.[473]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[474]

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[471] TEX. LAB. CODE ANN. § 21.102.

[472] TEX. LAB. CODE ANN. § 21.112.

[473] TEX. LAB. CODE ANN. §§ 21.201, 21.202, and 21.252.

[474] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[475]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[476] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[477] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[478]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and

[475] 29 C.F.R. § 1636.3.

[476] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[477] 29 C.F.R. § 1636.3.

[478] 29 C.F.R. § 1636.4.

- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[479]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[480]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

Other than the protection for pregnancy, childbirth, or a related medical condition noted in **3.9(c)(ii)**, Texas law does not address pregnancy accommodations for private-sector employees. A district court in Texas enjoined enforcement of the Pregnant Workers' Fairness Act against the state of Texas as the act was passed during the COVID-19 pandemic when United States Congress rules permitted vote by proxy. However, this ruling does not affect private employers in the state.[481]

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[482] Multiple decisions of the U.S. Supreme Court[483] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will

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[479] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[480] 29 C.F.R. § 1636.3.

[481] *Texas v. Garland*, 2024 WL 967838 (N.D. Tex. Feb. 27, 2024).

[482] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[483] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[484] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in Texas. However, the Texas Workforce Commission encourages all employers to take steps necessary to prevent sexual harassment from occurring. The agency's guidance suggests clearly communicating to employees that sexual harassment will not be tolerated. Training is specifically identified as an important step for minimizing liability.[485]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

There is no general whistleblower law addressing protections for private-sector whistleblowers in Texas. Nonetheless, numerous laws protect whistleblowing employees working in various settings. Some of these laws are discussed below.

Nursing Homes & Health Care Facilities. Hospitals, mental health facilities, or treatment facilities for chemically dependent persons are prohibited from terminating, suspending, disciplining, or otherwise discriminating against employees for reporting to the employee's supervisor, an administrator of the facility, a state regulatory agency or a law enforcement agency, a violation of law including a violation of the Texas Health and Safety Code. Under this statute, employees may recover lost wages, mental anguish damages, punitive damages, injunctive relief, costs and attorneys' fees.[486] Employers must publicly post a

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[484] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[485] Texas Workforce Comm'n, *Especially for Texas Employers: Harassment–Minimizing Liability*, *available at* https://efte.twc.texas.gov/harassment_minimizing_liability.html.

[486] TEX. HEALTH & SAFETY CODE ANN. § 161.134.

display describing the duty to report such conduct.[487] Another nearly identical statute protects employees of intermediate care facilities for the mentally retarded.[488]

Reporting of Child Abuse. Under Texas law, certain individuals having cause to believe that a child has been or may have been abused have a duty to report such suspicions to the authorities.[489] Individuals with a duty include those, by virtue of their position or profession, that have frequent contact with children, including health care professionals, protective agency employees, teachers, nurses, day care employees and juvenile probation officers. Employer retaliation against those individuals who report child abuse is explicitly prohibited. Specifically, an employer may not suspend or terminate the employment of, or discriminate against, a person who in good faith reported the abuse. An employer may not terminate the employment of, discriminate against, or take any other adverse employment action against a person who in good faith reported the abuse.[490]

Agricultural Employees. An agricultural laborer may not be discharged, disciplined, or discriminated against for making an inquiry, filing a complaint, assisting an inspector, instituting or causing to be instituted a proceeding, or testifying at a proceeding or otherwise exercising their rights under the Agricultural Hazard Communication Act. The protections afforded by this statute cannot be waived, and a request by an employer that a laborer waive such protections as a condition of employment constitutes a violation of the statute.[491]

Abortions. Hospitals or health care facilities may not discharge or otherwise discriminate against an employee for refusing to perform or participate in an abortion procedure. Additionally, a hospital or health care facility may not discriminate against an employee for their willingness to participate in abortion procedures at other facilities. Further, an educational institution may not discriminate against an applicant for employment as a student, intern, or resident because of the applicant's attitude concerning abortion.[492] A person whose rights under this statute have been violated may sue for injunctive relief to prohibit further violations, as well as for appropriate affirmative relief, including admission or reinstatement of employment with back pay plus 10% interest.[493]

Medicaid Fraud Prevention Act (Effective September 1, 2023, the Health Care Program Fraud Prevention Act). An employer may not discharge, suspend, threaten, harass, or in any other manner discriminate against a person, including an employee, contractor, or agent, in the terms and conditions of employment because of a lawful act taken by the person in furtherance of Texas's Medicaid Fraud Prevention Act (effective September 1, 2023, the Health Care Program Fraud Prevention Act) (codified at section 36.002 of the Texas Human Resources Code). A *lawful act* includes "investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under" the Medicaid (Effective September 1, 2023, Health Care Program) Fraud Prevention Act "or other efforts taken by the person to stop one or more violations of" the statute.[494] A person whose rights under this statute have been violated may bring an action in the

[487] TEX. HEALTH & SAFETY CODE ANN. § 161.134.

[488] TEX. HEALTH & SAFETY CODE ANN. § 252.132.

[489] TEX. FAM. CODE ANN. § 261.101.

[490] TEX. FAM. CODE ANN. § 261.110.

[491] TEX. AGRIC. CODE ANN. § 125.013.

[492] TEX. OCC. CODE ANN. § 103.002.

[493] TEX. OCC. CODE ANN. § 103.003.

[494] TEX. HUM. RES. CODE ANN. § 36.115(a), as amended by S.B. 745 (Tex. 2023).

appropriate Texas district court for: "(1) reinstatement with the same seniority status the person would have had but for the discrimination; and (2) not less than two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."[495] The statute provides for a three-year statute of limitations period, with the cause of action accruing on the date the retaliation occurs.[496]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[497] and the Railway Labor Act (RLA)[498] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Texas is a right-to-work state. Accordingly, no person may be denied employment because of the person's membership or nonmembership in a labor union. Any contract that requires that employees or applicants must, or may not, be or remain members of a labor union to work for an employer is void.[499]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or

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[495] TEX. HUM. RES. CODE ANN. § 36.115(a)-(b).

[496] TEX. HUM. RES. CODE ANN. § 36.115(c).

[497] 29 U.S.C. §§ 151 to 169.

[498] 45 U.S.C. §§ 151 *et seq*.

[499] TEX. LAB. CODE ANN. §§ 101.051 to 101.053.

(2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[500] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[501] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

Texas does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

Texas does not require employers to notify the state unemployment insurance department or another department in the event of a mass layoff.

However, unemployment regulations permit an employer to submit a mass filing connected to a mass layoff, which may be considered an initial claim for those included on the list. The Texas Workforce Commission has instituted a process for such a mass filing:

> In case of a mass layoff by an employer, if the last employing unit involved makes an appropriate request, the Agency may accept, in lieu of an initial claim from each individual, a list furnished by the last employer of the individuals to be laid off and who wish to file initial claims for benefits. The list shall reflect, with respect to each individual, all information normally required on the initial claim by the Agency, except the reason for separation. If the Agency approves the request, the listing then may be used by the Agency as an initial claim for each individual on the list.[502]

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 9 lists the documents that must be provided when employment ends under federal law.

Table 9. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided

[500] 29 U.S.C. § 2101(1)-(3).Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[501] 20 C.F.R. §§ 639.4, 639.6.

[502] 40 TEX. ADMIN. CODE § 815.20.

Table 9. Federal Documents to Provide at End of Employment	
Category	**Notes**
	under the plan.[503] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[504]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under state law.

Table 10. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	An employer that provides to its employees group accident and health insurance coverage, which includes a group continuation or conversion privilege on termination of coverage, must give written notice of the continuation or conversion privileges under the policy to each employee and each dependent insured under the group and affected by the termination.[505] The notice must include the following information regarding continuation: • the time period available for making the election; • the premium amount that the employee, member, or dependent electing continuation of coverage must pay to the employer/group policyholder on a monthly basis;

[503] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[504] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[505] TEX. INS. CODE ANN. § 1251.260; *see also* 28 TEX. ADMIN. CODE § 21.5311.

Table 10. State Documents to Provide at End of Employment	
Category	**Notes**
	• the date on which the employer/group policyholder must receive the written election to continue as well as the first premium contribution; and • the length of time the individual may continue coverage.[506] Additionally, the notice must include: • other conversion options available, if any, including a description of the actual benefits and required premium; • an enrollment/election form and signature line; and • the following English/Spanish statement at the end of the notice: If you have questions regarding your rights for conversion or continuation of your health insurance, contact (insert name of insurance company) at (insert company toll-free telephone number, or other telephone number if no toll-free number is available). If you have additional questions, you may contact the Texas Department of Insurance, toll-free, at (800) 252-3439. Si usted tiene una pregunta sobre sus derechos bajo el proceso de convertir o de continuar el seguro de salud, hable (insert name of insurance company) por el numero (insert company toll-free telephone number, or other telephone number if no toll-free number is available). Si usted necesita más información, se puede comunicar con el Departamento de Seguros de Tejas por el numero gratis (800) 252-3439. Se habla espanol.[507] To eliminate duplicate information requirements and insure adequate notification to each eligible employee, member, or dependent, delivery of the mandatory notification to each individual within the specified time period by either the insurer or the employer/group policyholder will satisfy the notification requirements of both the insurer and the employer/group policyholder.[508]
Unemployment Notice	**Generally.** Upon separation from employment, an employer must provide an employee individual notice of general information about filing a claim for unemployment benefits as set forth in the Unemployment & Payday Law Poster (detailed in **3.1(a)(ii)** (Table 6)). The information may be provided: (1) in a paper format, including by mail or with separation

[506] 28 TEX. ADMIN. CODE § 21.5311(b)(3).

[507] 28 TEX. ADMIN. CODE § 21.5311(b)(3)(G).

[508] 28 TEX. ADMIN. CODE § 21.5311(c)-(d).

Table 10. State Documents to Provide at End of Employment	
Category	**Notes**
	paperwork; (2) by email; (3) by text; or (4) by other means reasonably calculated to ensure the individual receives the required notification.[509] **Multistate Workers.** When an employee is separated from an employer that has workers in multiple states, the employer must again notify the departing employee as to which state's unemployment compensation law applies. If, at the time of termination, the employee is not located in that elected jurisdiction, the employer must inform the individual as to the procedure for filing interstate benefit claims. In addition to these notice requirements, employers must comply with the covered jurisdiction's general notice requirement, if applicable.[510]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

An employer is not required to provide an employee with an employment reference.[511]

Nonetheless, an employer may disclose information about an employee's job performance to a prospective employer if the former employee or the prospective employer requests.[512] *Job performance* refers to "the manner in which an employee performs a position of employment and includes an analysis of the employee's attendance at work, attitudes, effort, knowledge, behaviors, and skills."[513] Employers that provide information about current or former employees are immune from civil liability from any ensuing damages "unless it is proven by clear and convincing evidence that the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed."[514]

Employers must use care, however, when disclosing job performance information. Texas law provides that an employer commits a discriminatory act if it directly or indirectly blacklists, prevents, or attempts to prevent any former employee from securing employment, "except by truthfully stating in writing," upon request, the reason for the separation.[515] Moreover, employers that disclose reference information to

[509] 40 TEX. ADMIN. CODE § 815.1.

[510] 40 TEX. ADMIN. CODE § 815.114.

[511] TEX. LAB. CODE ANN. § 103.005.

[512] TEX. LAB. CODE ANN. § 103.003.

[513] TEX. LAB. CODE ANN. § 103.002(3).

[514] TEX. LAB. CODE ANN. § 103.004(a).

[515] TEX. REV. CIV. STAT. ANN. art. 5196, § 1. It is also unlawful for an employer to discriminate against an individual seeking employment on the grounds that they participated in a strike. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5196, §§ 6-7.

prospective employers are obligated to share certain information with former employees—including, among other things, true and complete copies of all written communications or summaries of any oral communications—within 10 days.[516] Employers that blacklist an employee are subject to fines of not less than $50 or more than $250, imprisonment for not less than 30 days or more than 90 days, or both.[517]

Additional types of discrimination prohibited in Texas include, but are not limited to:

- in response to a fired employee's written demand for a statement in writing of the cause of discharge, failure to furnish a true statement of the cause of discharge within 10 days after such demand;
- in response to a written request from an employee who voluntarily left employment, failure within 10 days after the demand, to furnish the employee a statement in writing that the employee did leave such service voluntarily; or
- failure to show in any statement:
  - the number of years and months during which the employee was employed; or
  - each and every separate capacity or position in which they were employed, and whether services were satisfactory in each such capacity or not.[518]

According to the relevant statute, a written statement of the reasons for a discharge, *if true*, cannot be used to support a claim for libel (civil or criminal) against the agent or employer that provided it.[519]

Texas courts have not determined whether there is a private right of action for a violation of the blacklisting provisions.[520]

[516] TEX. REV. CIV. STAT. ANN. art. 5196, § 2 (requiring employer to also disclose to the employee the names and addresses of the recipients of such information).

[517] TEX. LAB. CODE ANN. § 52.031(c). Under the penalties statute, *blacklisting* means placing on a book or list or publishing the name of an employee that was discharged or who voluntarily left, with the intent to prevent the employee from securing employment of any kind with another employer. TEX. LAB. CODE ANN. § 52.031.

[518] TEX. REV. CIV. STAT. ANN. art. 5196, § 3. Replacement copies must also be provided upon request to employees who have lost or are otherwise deprived of the original statements. Additional discriminatory conduct is described in the statute at sections 4 and 5. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5196, §§ 4-5.

[519] TEX. REV. CIV. STAT. ANN. art. 5206; TEX. LAB. CODE ANN. § 52.031(d).

[520] *See Phillips v. United Parcel Serv.*, 2012 WL 4892972, at *4 (N.D. Tex. Oct. 2, 2012).

