

Morgan Lewis

Labor and Employment Summer Webinar Series: State Employment Law Road Trip Across the United States

Texas

July 18 | 1–2 pm ET

presenters

Stefanie Moll - Houston

Ann Marie Painter - Dallas



Frequently Asked Questions About Texas Employment Law

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Frequently Asked Questions About Texas Employment Law

- Chapter 21 of the Texas Labor Code (formerly the TCHRA)
- Noncompete/Nonsolicitation Agreements
- Texas Payday Act
- Wage and Hour Claims
- Effective Releases Under Texas Law
- Unemployment Benefits and Claims
- Workers' Compensation Claims
- Concealed Handguns in the Workplace
- “Quirky” State Court Procedural Issues



Employment Discrimination Claims Under Texas Law

- Statutory framework mirrors Title VII, the ADA, and the ADEA:
 - An employer commits an unlawful employment practice if, because of race, color, disability, religion, sex, national origin, or age, the employer:
 - *Fails or refuses to hire an individual, discharges an individual or discriminates in any other manner ... in connection with compensation or the terms, conditions, or privileges of employment; or*
 - *Limits, segregates, or classifies an employee or application for employment in a manner that would deprive or tend to deprive an individual of an opportunity or adversely affect in any other manner the status of an employee.*
 - **Tex. Lab. Code § 21.051.**

Employment Discrimination Claims Under Texas Law

- Age and disability fall under the same statutory provision and do not have a separate section.
- Sexual orientation discrimination is not prohibited under the Texas Labor Code, but is prohibited by ordinance in Austin, Dallas, and Fort Worth.
- Employers may not retaliate against someone who
 - Opposes a discriminatory practice
 - Makes or files a charge
 - Testifies, assists, or participates in any manner in an investigation, proceeding or hearing.
 - Tex. Lab. Code § 21.055.

Employment Discrimination Claims Under Texas Law

- Damages track those available under Title VII, including the caps. Tex. Lab. Code § 21.2585.
- An aggrieved individual must file his or her charge of discrimination within 180 days of the adverse employment action.
 - A claimant under federal law must file within 300 days.
- An aggrieved individual must file suit within 60 days of receipt of a right-to-sue letter.
 - A claimant under federal law must file suit within 90 days.
- A claimant is not required to have a right-to-sue letter before filing suit.

Employment Discrimination Claims Under Texas Law

- Two-year statute of repose.
 - A claimant may not file a civil action more than two years after the date the charge is filed.
 - A claimant may file suit if the Commission has had the complaint for 180 days.

Noncompete/Nonsolicitation Agreements

- Are noncompete agreements enforceable in Texas?
 - Yes, noncompete agreements are governed by Texas Business & Commerce Code Section 15.50(a).
- What is required for an enforceable noncompete agreement?
 - It must be ancillary to or part of an otherwise enforceable agreement at the time the agreement is made.
 - Time, geographical location, and scope of activity restrictions must be reasonable and not impose greater restraints than necessary to protect the business interest of the promisee.

Noncompete/Nonsolicitation Agreements

- Does the law treat noncompete and nonsolicitation agreements differently in Texas?
 - Noncompete agreements are considered as restrictions on trade and are subject to the requirements listed in Texas Business & Commerce Code Section 15.50(a).
 - Nonsolicitation agreements limiting solicitation of customers are treated as noncompete agreements and are also subject to Section 15.50(a).
 - *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011).

Noncompete/Nonsolicitation Agreements

- Does the law treat noncompete and nonsolicitation agreements differently in Texas? (cont.)
 - Nonsolicitation agreements restricting solicitation of employees of a former employer have generally not been construed as trade restrictions and thus are not subject to Section 15.50(a).
 - See *Beasley v. Hub City Tex., L.P.*, 01-03-00287-CV, 2003 WL 22254692 (Tex. App.—Houston [1st Dist.] Sept. 29, 2003, no pet.).

Noncompete/Nonsolicit Agreements

- Does the law treat noncompete and nonsolicitation agreements differently in Texas? (cont.)
 - However, a recent Texas Supreme Court case has raised questions on this issue by suggesting that both types of agreements may be subject to Section 15.50(a).
 - *Marsh USA Inc.*, 354 S.W.3d at 768 (covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and are governed by the Act).

Noncompete/Nonsolicit Agreements

- Does Texas “blue pencil” overbroad agreements?
 - Yes. Texas Business & Commerce Code Section 15.51(c) (“courts shall reform the covenant to the extent necessary to cause the limitations contained in the covenant ... to be reasonable”).
- May attorneys fees be awarded for attempting to enforce a contract that you knew was overbroad at the time it was entered into?
 - Yes. Tex. Bus. & Com. Code Ann. § 15.51(c).



Texas Payday Act

- When am I required to pay final wages upon termination?

- **Tex. Lab. Code § 61.014:**

- *Pay is due in six days if termination is involuntary.*
- *If voluntary, pay is due at the next regularly scheduled payday.*



Texas Payday Act

- When can I make deductions from an employee's wages?
 - **Tex. Lab. Code § 61.018:**
 - *With signed authorization from the employee*
 - *Pursuant to the law*
 - *Pursuant to a court order*
 - **What about garnishments?**
 - *In Texas, current wages are exempt from garnishment except in the enforcement of court-ordered child support or spousal maintenance. Tex. Const. Art. XVI, § 28; Tex. Civ. Prac. & Rem. Code Ann. § 63.004.*



Texas Payday Act

- When am I required to pay commissions and bonuses?
 - **Tex. Lab. Code § 61.015:**
 - *Payment is required according to the terms of (1) an agreement between the employee and the employer, and (2) a collective bargaining agreement.*
 - *Payment of these wages must be made in a timely manner.*



Texas Payday Act

- Am I required to pay accrued but unused vacation?
 - No. Even though the definition of “wages” includes vacation pay under the statute, an employer is not required to pay accrued but unused vacation time in the absence of a written agreement or policy that expressly provides for it.
 - *Brown v. Sabre, Inc.*, 173 S.W.3d 581, 589 (Tex. App.—Fort Worth 2005, no pet.).
- Can I have a “use it or lose it” policy regarding accrued but unused vacation?
 - Yes, because employers have no obligation to pay accrued but unused vacation time.

Texas Payday Act

- What are the penalties for failure to pay wages at all or failure to pay them in a timely manner?
 - **Tex. Lab. Code § 61.019:**
 - *An employer may be charged with a third-degree felony when it intends to avoid payment to an employee and fails to pay after a demand is made.*
 - **Tex. Lab. Code § 61.020:**
 - *If an employer repeatedly fails to pay wages, the state attorney general may seek injunctive relief.*



Wage and Hour Claims

- Are there any state-specific laws in Texas regarding minimum wage, overtime, and white collar classifications?
 - Texas Minimum Wage Act, Texas Labor Code § 62.001.
 - State law minimum wage tracks the FLSA.
 - Failure to pay wages may be the subject of a Texas Payday Act claim or a contract claim; otherwise, claims may arise under the FLSA.

Effective Releases Under Texas Law

- Is there any “magic” language that must be used for a release to be effective in Texas?
 - No, but it is advisable to specifically identify key claims.
 - *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991) (“to effectively release a claim in Texas, the releasing instrument must ‘mention’ the claim to be released”).
- Are there claims that cannot be released as a matter of law?
 - Yes. Unemployment benefits and workers compensation claims.
 - Tex. Lab. Code § 207.071(a).

Unemployment Benefits and Claims

- Who is eligible for unemployment benefits in Texas?
 - Unemployed individuals, if they . . .
 - did not leave their previous employment voluntarily
 - are capable of working,
 - are available to work,
 - i.e., there are no self-imposed restrictions on their availability to work, which would effectively remove them from the labor market.

Unemployment Benefits and Claims

- are registered with the unemployment office, and
- make a reasonable and diligent effort to obtain new employment.

Tex. Lab. Code §§ 207.021, 207.045.

Unemployment Benefits and Claims

- What could disqualify someone from receiving benefits?
 - “An individual is disqualified for benefits if the individual was discharged for misconduct connected with the individual’s last work.”

Tex. Lab. Code § 207.044.



Unemployment Benefits and Claims

- What is “misconduct” ?
 - “Misconduct” means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees. Tex. Lab. Code § 201.012.
 - There is no requirement that the employer show the violation negatively affected the employee’s work. *Murray v. Tex. Workforce Comm’*, 337 S.W.3d 522, 525 (Tex. App.—Dallas 2011, no pet.).
 - *Appeals Policy & Precedent Manual*, http://www.twc.state.tx.us/ui/appl/app_manual.html.

Unemployment Benefits and Claims

- Other circumstances that will disqualify an applicant from unemployment benefits include . . .
 - An applicant who is employed as an athlete in training for an event or who is in between seasons
 - An applicant who fails to apply for, accept, or return to work
 - An alien to the United States
 - An applicant who is involved in a labor dispute
 - An applicant who leaves work to attend an educational institution
 - An applicant who is receiving a pension or annuity
 - An applicant who is unemployed because he or she sold his or her business, or an applicant was an officer of a corporation that was sold

Tex. Lab. Code § 207.044.

Unemployment Benefits and Claims

- What is the deadline to file an appeal?
 - A party may appeal a decision no later than the 14th day after the date that the decision is final.

Appealing a TWC Unemployment Benefits Decision.

<http://www.twc.state.tx.us/ui/bnfts/appeals.html#attendtribunalhearing>



Unemployment Benefits and Claims

- What are the pros and cons of appealing a determination?
 - Appeal may result in the development of testimony on the record that is not subject to objections, that has not been subject to proper cross-examination, and that has been left unrebutted.
 - May prompt an individual to sue who would not otherwise.

Unemployment Benefits and Claims

- What are the pros and cons of appealing a determination? (cont'd)
 - The process of contesting an unemployment compensation claim can be distracting and a drain on the employer's human resources.
 - Employee witnesses may be taken away from their normal duties to prepare for and testify at the appeal hearing.



Unemployment Benefits and Claims

- If there is a hearing, who should attend?
 - At a minimum, a manager with personal knowledge and a representative of HR. If the claimant is represented by counsel, counsel for the employer should be present if at all possible.
 - The appeal tribunal will make determinations based on the evidence available at the hearing. The statement of the applicant can be critical to the determinations. See 40 Tex. Admin. Code § 815.16.
 - Additionally, if unsatisfied with the determination, a party who did not attend the initial hearing must show good cause for his or her absence in order to be granted a new hearing. See 40 Tex. Admin. Code § 815.16.

Workers' Compensation Claims

- Section 451.001 of the Texas Workers' Compensation Act prohibits retaliation against anyone who . . .
 - (1) filed a workers' compensation claim in good faith;
 - (2) hired a lawyer to represent the employee in a claim;
 - (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or
 - (4) testified or is about to testify in a proceeding under Subtitle A.



Tex. Lab. Code § 451.001.

Workers' Compensation Claims

- Recoverable damages
 - Back pay and punitive damages. *In re Poly-Am., L.P.*, 262 S.W.3d 337, 352 (Tex. 2008).
 - Emotional distress/mental anguish damages. *Metal Indus., Inc. of Cal. v. Farley*, 33 S.W.3d 83, 89 (Tex. App.—Texarkana 2000, no pet.).
- Attorneys fees are not recoverable.
 - *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999) (stating that attorneys fees do not amount to “reasonable damages suffered by an employee” as provided by statute, and thus are not recoverable).

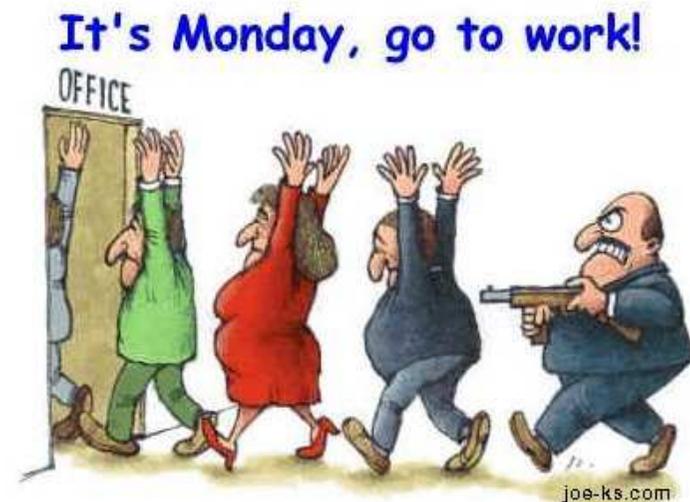
Workers' Compensation Claims

- Punitive damages are capped by the Texas Civil Practice and Remedies Code.
 - (b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
 - (1) (A) two times the amount of economic damages; plus
(B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or
 - (2) \$200,000.

Tex. Civ. Prac. & Rem. Code § 41.008.

Workers' Compensation Claims

- Requirement for return to work
 - Once liability is found, the employee is *entitled* to reinstatement. *Martin v. Tex. Dental Plans, Inc.*, 948 S.W.2d 799, 804 (Tex. App. 1997); see also Tex. Lab. Code § 451.002.
 - Thus, where reinstatement is sought, the only question available to the fact-finder is a determination of liability. Tex. Lab. Code § 451.002.
 - Impact of refusal of a bona fide offer of employment. 28 Tex. Admin. Code § 129.6.



Concealed Handguns in the Workplace

- Are employees permitted to bring concealed handguns to work in Texas?
 - Yes, in part.

2011 Changes Regarding Concealed Handguns in the Workplace

- As of September 1, 2011, employers in Texas may not prohibit an employee who holds a concealed handgun license (CHL), who otherwise lawfully possesses a firearm, or who lawfully possesses ammunition from transporting or storing a firearm or ammunition the employee is authorized by law to possess in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for employees. Tex. Lab. Code § 52.061.
- This does NOT mean such possession is OK in the building! Employers can always prohibit this.



Exceptions to the “Guns at Work” Law



- A person with a CHL or lawfully possessed ammo cannot bring either on any property where the possession of either is prohibited by state or federal law.
- Examples of exceptions: course and scope, schools, nonemployer property with prohibitions.

Special Rules Regarding Concealed Handguns on Premises of Chemical Manufacturers or Refineries

Generally, the new law does not apply to property owned or leased by a chemical manufacturer or oil and gas refiner, and on which the primary business conducted is the manufacture, use, storage, or transportation of hazardous, combustible, or explosive materials.

Concealed Handguns at Work: What Does This Mean for Texas Employers?

- No liability for personal injury, death, property damage, or any other damages resulting from or arising out of an occurrence involving a gun or ammo that the employer is required to allow on its property – except in cases of gross negligence.
- Compliance does not mean a failure by the employer to provide a safe workplace.
- No duty to patrol, inspect, or secure any parking lots, parking garages, other parking areas, or the vehicles in these areas.
- No duty to investigate, confirm, or determine an employee's compliance with laws related to the ownership or possession of a gun or ammo.

“Quirky” Texas State Court Procedural Issues

- How long do I have to file an answer in state court?
 - A defendant must file an answer “[o]n or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof.”

Tex. R. Civ. P. 99.



“Quirky” Texas State Court Procedural Issues

- How can I gather evidence to file suit in a noncompetete action?
 - Prelitigation depositions are permitted in Texas
 - Service must be given to the named party
 - 15 days in the case of personal service
 - A court order is required
 - Must state whether they will be taken on oral examination or in written questions.
 - The order may also state the time and place at which a deposition will be taken.



Tex. R. Civ. P. 202.1.

“Quirky” Texas State Court Procedural Issues

- Can I make an offer of judgment in state court and how does it work?
 - Yes, in accordance with Tex. R. Civ. P. 167.2.
 - Some necessary procedures must be followed:
 - *Certain deadlines for making an offer and the rules about conditions in the offer*
 - *Most important is the provision that if the offer is rejected and the judgment awarded on monetary claims is significantly less favorable than the offer, the court must award the offer or litigation costs from the time the offer was rejected to the time of trial*
 - Litigation costs **INCLUDE** attorneys’ fees!

“Quirky” Texas State Court Procedural Issues

- What is a “Rule 11 Agreement” in Texas (Hint: it’s not the same as Rule 11 under the Federal Rules of Civil Procedure.)
 - A Rule 11 agreement is an agreement between parties or attorneys “touching any pending suit” that, to be enforceable, must be either (1) in writing, signed, and filed as part of the record, or (2) made in open court and entered of record.

Tex. R. Civ. P. 11.

- Whether a Rule 11 agreement is legally enforceable is a question of law. *Ronin v. Lerner*, 7 S.W.3d 883, 886 (Tex. App. — Houston [1st Dist.] 1999, no pet.).

Questions?

What is on your mind about Texas
Employment Law?

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