



NEW LAWS AFFECTING TEXAS EMPLOYERS

The Texas Legislature passed a number of new employment laws that will soon be effective. This update discusses the new laws and provides employers with practical information to ensure compliance with them. With one exception (House Bill 2249), the new laws are effective September 1, 2009. This update also reminds employers about a recently effective federal minimum-wage increase and a related new posting obligation.

MINIMUM-WAGE INCREASE

The highly publicized federal minimum-wage increase went into effect Friday, July 24, 2009, raising the minimum wage to \$7.25 hour. With employers focused on implementing the payroll aspect of that increase, there is a risk that they will overlook a less publicized requirement of the law. Namely, after July 24, 2009, all employers must post new Fair Labor Standards Act (“FLSA”) posters in a conspicuous place in all their establishments. An updated [federal minimum wage poster](#) reflecting the new federal minimum wage is now available for downloading, printing, and posting from the Department of Labor’s Web site.

DISCRIMINATION

The most significant piece of employment legislation the Texas Legislature passed this session is [House Bill 978](#). The bill expands Texas’ disability-discrimination law, just as the Federal Americans with Disabilities Amendments Act (“ADAAA”) recently expanded the Americans with Disabilities Act, the principal federal disability-discrimination law. The ADAAA became effective on January 1, 2009. Like the ADAAA, House Bill 978 expands the statutory definition of “disability” and instructs courts to interpret the definition broadly such that more employees will be considered disabled and consequently able to sue under the statute. For example, the new law provides that medical conditions that are episodic, such as epilepsy, now qualify as disabilities. Also, when deciding whether an individual is disabled, courts no longer may consider the ameliorative effects of mitigating measures such as medication, hearing aids, or prosthetic limbs.

Opponents of the new law warned that its “unworkably overbroad” definition of disability would substantially burden Texas businesses and overwhelm the courts with an influx of new disability discrimination lawsuits. They insisted that the Texas Labor Code provided adequate protection without adopting the new federal standards. Their protests proved largely unsuccessful. Only one-third of the Texas House voted against the bill, and the Senate passed the bill unanimously.

The passage of House Bill 978 should serve as a reminder to employers who have not yet updated their employment policies or trained their human resources staff about their additional responsibilities under the ADAAA.

WAGE CLAIMS

The Texas Payday Law (“Payday Law”) received two employee-friendly amendments this session. First, the Legislature made it easier for employees to file claims for unpaid wages with the Texas Workforce Commission (“TWC”). Under previous law, employees had to submit wage claims to the TWC either in person or by mail. Thanks to [House Bill 762](#), beginning in September 2009, employees can fax their wage claims. The bill also gives the TWC rulemaking authority to permit other filing methods, which paves the way for on-line filings.

Second, the Legislature re-opened the courthouse doors to employees who fail to file their wage claims with the TWC on time. Under the Payday Law, an employee is allowed 180 days after wages become due for payment to file a wage claim with the TWC. Last year, the Texas Supreme Court ruled that the 180-day deadline was not jurisdictional and consequently, did not bar the TWC from adjudicating untimely claims. That meant that if the TWC considered the claim and ruled that it was untimely the ruling was entitled to preclusive effect and barred the employee from filing a common-law claim in court for unpaid wages. [Senate Bill 741](#) overrules the Supreme Court’s holding. The bill amends the Payday Law to make clear that the 180-day deadline to file a wage claim with the TWC is jurisdictional and that the TWC must dismiss any untimely wage claim for lack of jurisdiction. Although the change seemingly favors employers by directing the dismissal of untimely claims, it actually works to employees’ advantage because the agency’s determination that a claim is untimely now will not be entitled to preclusive effect. Consequently, an employee who has his or her wage claim dismissed by the TWC as untimely will be able to file a common-law claim in court.

PAYROLL

The next time employers distribute W-2 forms, they must include a notice to all employees regarding eligibility for the Federal Earned Income Tax Credit (“EITC”). The EITC is a refundable federal income tax credit for low-to-moderate income working individuals and families. Last year, as many as one in four EITC-eligible Texans failed to claim the credit, which meant that Texans left approximately \$1.6 billion in unclaimed refunds on the table. The Texas Legislature hopes that [House Bill 2360](#), by requiring employers to provide notice of the refund to employees at tax time, will prompt more eligible employees to claim the credit.

To ease the burden on employers, the Texas Legislature has ordered the State Comptroller’s office to publish and make available on its Web site a form that employers can slip into each employee’s W-2 envelope to satisfy the obligation under this new law.

WORKERS’ COMPENSATION

The Texas Workers’ Compensation Act underwent some minor revisions this legislative session. The biggest change came in the form of [House Bill 4545](#), which alters the method of calculating the deadline for a party to appeal the decision of an administrative appeals panel. Beginning September 1, the deadline to appeal will be based on the date the panel’s decision is mailed — not the date the panel’s decision is issued. Proponents of the legislation claimed that the change was necessary because the current method of calculating appeal deadlines gives insurance companies an unfair head start, given that

insurance companies are likely to learn of a decision the day it is issued but employees generally do not learn of the same decision until several days later when the mailed copy arrives.

The Legislature also passed two workers' compensation bills designed to facilitate injured employees' return to work. [Senate Bill 1814](#) makes permanent a return-to-work pilot program that the TWC launched in 2005 to provide financial incentives to small employers that make workplace modifications to enable an injured employee to return to work. [House Bill 2547](#) orders the TWC to develop a one-page form that a treating physician can use to obtain information from the employer about the employee's job duties and thereby identify possible accommodations that might enable the employee to begin working again.

UNEMPLOYMENT BENEFITS

Shift workers whose employers participate in the TWC's Shared Work Unemployment Program are now eligible for increased unemployment benefits. This legislation was designed to correct an inequality in the manner in which shift workers' unemployment benefits are calculated. Shift workers have historically been disadvantaged by the fact that they do not work the typical five-day, 40-hour workweek on which the formula for calculating unemployment benefits is based. [House Bill 1637](#) modifies the manner in which shift workers' workweeks are calculated to recognize the reality of their fluctuating workweek — a change that proponents asserted was necessary to entitle shift workers to the same level of benefits as their retail and office counterparts.

LAWS AFFECTING SPECIFIC TYPES OF EMPLOYERS

- **Nursing Homes**

[House Bill 2191](#) prohibits a newly hired employee of a facility serving the elderly and persons with disabilities from having direct contact with a resident until the facility obtains the employee's criminal history information and verifies his or her employability.

- **In-Home Service Companies**

Under [Senate Bill 627](#), in-home service and residential delivery companies may presume that a prospective employee has no criminal background if he or she holds an occupational license that can be obtained only after the issuing agency runs a background check. The new law may be of limited use, however, because an employer that wants to take advantage of the statute's presumption that it did not negligently hire an employee must still run its own background check through the Department of Public Safety.

- **Contract Carriers**

Companies that contract with railroads to transport their train operating crews to and from trains and between terminals are now subject to greater regulation. [Senate Bill 481](#) requires such contract carriers to perform alcohol and drug testing of their drivers and carry minimum levels of liability insurance.

- **Staff Leasing Services**

Staff leasing services now face tighter financial regulation. [House Bill 2249](#) heightens financial standards for staff leasing services companies, requiring them to demonstrate financial health and pass a more rigorous licensing process. Unlike the other new Texas laws, which become effective September 1, 2009 this law does not go into effect until December 31, 2011. The delay is designed to give these companies adequate time to modify their financial practices.

- **Sexually oriented businesses**

The Legislature sought to crack down on the employment of minors at sexually oriented businesses, in the wake of a scandal in which a Dallas business was found last year to have employed a 12-year-old girl as a nude dancer. [Senate Bill 707](#) now prohibits such businesses from employing anyone under 18, and requires detailed records verifying the age of employees and independent contractors.

QUESTIONS?

Keeping abreast of the latest legislative and judicial developments in the ever-changing field of labor and employment law is a challenge for even the most motivated employers. The attorneys in Thompson & Knight's Labor and Employment Law Section are here to help. We pride ourselves on our understanding of the latest developments in our field and our ability to use our knowledge and experience to our clients' advantage. If you have questions or concerns about how these newly enacted laws will affect your business or if you need help with any other legal matter, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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