



Texas Payday Act

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Introduction

The objective of the Texas Payday Act (“TPA”) is to deter employers from withholding wages by providing wage claimants an avenue for the enforcement of wage claims, many of which would be too small to justify the expense of a civil lawsuit. *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 561 (Tex. App.-Houston [14th Dist.] 2002, no pet.).



Coverage

The TPA applies only to employees, not to independent contractors (section 61.001(3)(B)). But be careful, plaintiffs' lawyers often challenge classification as "independent contractor."

It covers only private employers; it does not cover governmental employers, i.e., a public employee who has a wage complaint may not file a wage claim under the TPA (see Section 61.003).

The TPA has no limitations on business size, nature of the business, or number of employees (section 61.001(4)).



Frequency of Pay and Designation and Posting of Paydays

TPA requires employers to pay non-exempt employees at least twice per month, and exempt employees at least once per month (section 61.011).

Common exemptions: Professional, Executive, Administrative, and Outside Sales. Note: The FLSA has strict requirements for these exemptions, so be sure an employee fits the requirements before making them “exempt.” Otherwise, your company will be a target for a lawsuit.



Frequency of Pay and Designation and Posting of Paydays (cont.)

An employer shall designate paydays in accordance with section 61.011. If an employer fails to designate paydays, the employer's paydays are the first and 15th day of each month. (section 61.012).

An employer shall post, in conspicuous places in the workplace, notices indicating the paydays.



Final Pay

Under TPA section 61.014, an employer shall pay in full an employee who is discharged from employment not later than the sixth day after the date the employee is discharged.

An employer shall pay in full an employee who leaves employment other than by discharge not later than the next regularly scheduled payday.



Commissions and Bonuses

General Rule – Follow The Terms. Make the terms clear.

Modification – How does an employer effectively change its compensation plans?

- Must be crystal clear and unequivocal.
- Otherwise, employer may remain bound by original compensation plan. *See Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986) (finding that no unequivocal notice was given because employee was told different things by different representatives of the employer).



Commissions and Bonuses (cont.)

Discretionary versus Nondiscretionary bonuses.

- Discretionary – don't have to pay it ever.
- Nondiscretionary – if employee fulfills terms, you have to pay it.
- Be very clear in this area.
- Otherwise, lawsuits abound.



Commissions and Bonuses (cont.)

Be careful what you say, even just verbally.

See Vanegas v. American Energy Services, 302 S.W.3d 299 (Tex. 2009) (Texas Supreme Court decision permitting lawsuit where VP of company allegedly verbally told eight employees that “in the event of sale or merger of AES, the original . . . employees remaining with AES at that time would get 5% of the value of any sale or merger of AES.”).



Commissions and Bonuses (cont.)

- Post-termination right to bonuses:

Termination For Cause

Shanklin v. Columbia Management Advisors, L.L.C., NO. CIV.A. H-07-2690, 2008 WL 4899631, at *15 (S.D. Tex. Nov 12, 2008), Judge Lee Rosenthal stated that “Texas cases make clear that the specific facts of each case must be analyzed to determine whether the employee was informed that termination, including termination for cause, would forfeit any bonus or commission payments that were earned but not paid before the employment ended.”



Commissions and Bonuses (cont.)

Termination Without Cause

One line of cases says employee may be entitled to bonus even if contracts says they are not, if they are terminated without cause. *Enstar Corp. v. Bass*, 737 S.W.2d 890 (Tex. App.- El Paso 1987, no writ).

Another line of cases says that if the contract says they are not entitled to the bonus, then they are not, even if they were terminated without cause, and even if the employer fired the employee just so they would not be eligible for the bonus. *Mitsubishi Aircraft Int'l, Inc. v. Maurer*, 675 S.W.2d 286 (Tex. App.- Dallas 1984, no writ).



Methods of Pay

Under TPA, employers may pay any of their employees an hourly wage, a periodic salary, a commission or bonus, a day rate, a book rate, a flag rate, a piece rate, or on a per job basis.

Since Texas follows the “at-will” employment doctrine, the method of pay may be changed at any time, with or without advance notice, as long as there is no express contract or collective bargaining agreement to the contrary.



Delivery of Wages

Wages can be given in person to an employee, mailed to a designated address (in time to be received on the payday), deposited electronically into an account, or given to a third party who has been authorized by the employee in writing to receive the employee's paycheck.

Payment of wages by EFT (electronic funds transfer) must be authorized by the employee in writing.



Definition of “Wages”

Under section 61.001(7) of the TPA, “Wages” means compensation owed by an employer for:

- (A) labor or services rendered by an employee, whether computed on a time, task, piece, commission, or other basis; and
- (B) 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 a written policy of the employer.



Deductions from Pay

Under section 61.018 of the TPA, all deductions, other than payroll taxes, court-ordered garnishments, and other deductions required by law, must be both lawful and specifically authorized in writing by the employee.

Post-termination problems – i.e., terminated employee who owes company money or refuses to return company property.



Deductions from Pay for Damage to or Loss of Company Equipment or Funds

Even if okay under TPA, cannot do them for “exempt” employees under FLSA or else you may blow their exempt status. See W&H Opinion Letter FLSA2006-7.

Even if okay under TPA, be aware that an employer may not lawfully require an employee to pay for an expense of the employer’s business if doing so reduces the employee’s pay below any statutorily-required minimum wage or overtime premium that is due, because employers must pay all statutorily-required minimum wage and overtime premium finally and unconditionally, or “free and clear.” 29 C.F.R. § 531.35.



TPA Procedures

- 180 day SOLs.
- Employer response.
- TWC Issues Preliminary Wage Determination Order.
- 21 days to appeal to Special Hearings Department.
- Hearing and decision.
- Appeal to TWC itself.
- Commission decisions.
- Penalties
- Rehearing request or lawsuit to seek review of TWC decision.



Court Litigation

Standard of Review – substantial evidence review. High standard.

Whether the TWC's decision is supported by substantial evidence is strictly a question of law. *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986).

Substantial evidence is more than a mere scintilla of evidence but less than a preponderance of evidence. *City of Houston v. Tippy*, 991 S.W.2d 330, 334 (Tex. App.-Houston [1st Dist.] 1999, no pet.).

Consequently, the evidence may preponderate against the TWC's decision but still amount to substantial evidence. *Id.*



Court Litigation (cont.)

TPA does not preempt other common law claims for wages, such as breach of contract.

But, if employee pursues TPA to conclusion and loses, he may not thereafter pursue a common law claim for the same wages.



Court Litigation (cont.)

And, if the TWC rules against the employee even on procedural grounds (like the SOLs), that is *res judicata* against the employee's claim under any other theory. *See Igal v. Brightstar Info. Tech. Group*, 250 S.W.3d 78 (Tex. 2008) (TWC's denial of former employee's wage claim as not filed within 180 days of due date for wages was *res judicata* bar to employee's breach of contract suit in district court).



Conclusion

- Focus on compliance now.
- Small investment now beats big lawsuit later.
- Plaintiffs' lawyers are on the prowl for these types of cases.
- Might as well get ahead of them.



Q & A