

## Updates from the Office of the Commissioner Representing Employers

# Texas BusinessToday

Aaron S. Demerson  
Commissioner Representing Employers

November 2022

Dear Texas Employers,

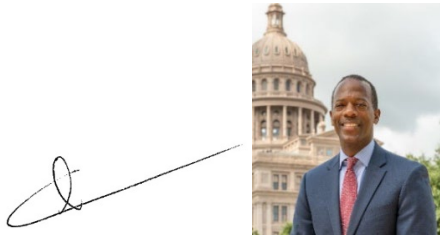
Welcome to your November issue of *Texas Business Today*! For those of you that are new here, welcome! This monthly newsletter is designed to address topics, as well as new issues, that are emerging in employment law. Our office created this newsletter based on the most frequently asked questions we receive. We know it is important to keep you up to date on all information that is beneficial to you and your business.

Texas employment numbers continue to set records and our unemployment rate ticked down to 4.0% in September. Texas added 40,000 jobs, more than doubling the number of jobs added last month. In addition, major private-sector industries have grown faster in Texas than they have nationally over the past year, and this is a direct result of existing and new Texas employers recognizing and taking advantage of the opportunities in the Lone Star State.

In honor of Veterans Day, TWC hosted their 11th annual Hiring Red White & You! (HRWY) Statewide Hiring Fair from November 1<sup>st</sup> through November 18<sup>th</sup>. This event connects veterans and their spouses statewide with employers. I want to express our deepest gratitude for the dedication and commitment of our brave men and women who have served, and that continue to serve, our Armed Forces. It is our honor and duty to ensure they have career opportunities when they transition back into civilian life. If you are interested in participating next year, please visit: <https://twc.texas.gov/hiring-red-white-you>

As we start to close out the year, our office is committed to serving our Texas employers. We will continue to work diligently to listen, strategize, and respond to your workforce needs to help your businesses grow and succeed.

Thank you for all that you do! Let's Continue to Make Progress!



Aaron Demerson  
Commissioner Representing Employers  
Texas Workforce Commission

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## **Independent Contractor Update: Proposed New DOL Independent Contractor Rule**

By Mario Hernandez  
Legal Counsel to Commissioner Aaron Demerson

Some employers have the mistaken belief that it is solely up to them to decide who is an independent contractor and who is an employee. However, this issue is actually a matter of law and is highly regulated. Several government agencies (both federal and state) have independent contractor “tests” that are used to guide investigators to determine whether a worker has been misclassified as an independent contractor. One such government agency is none other than the U.S. Department of Labor (DOL). This article will look at how DOL is proposing to change its independent contractor rule.

### **Current Rule**

The current DOL rule features a test that is highlighted by its focus on two “core factors.” Specifically, the two core factors are (1) the nature and degree of control over the work, and (2) the worker’s opportunity for profit and loss. Generally, the way the test works is that if both core factors are found to be in favor of a particular classification, be it independent contractor or employee, then the worker will have a “substantial likelihood” of being deemed the same.

However, if the core factors are split or are unresolved, the test will explore other factors of the working relationship to determine the status of the worker. These other factors include the amount of skill required for the work, the permanency of the working relationship, whether the worker’s services are integrated into the work of the company, and additional factors.

(See: <https://www.federalregister.gov/d/2020-29274/p-amd-5>.)

### **Proposed New Rule**

The DOL issued a Notice of Proposed Rulemaking in October of this year to rescind the current rule and implement a new rule “that is more consistent with the FLSA as interpreted by longstanding judicial precedent.”



(See: <https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>.)

DOL’s proposed new rule would take a “totality-of-the-circumstances” approach and would use several factors in determining a worker’s status as either an independent contractor or an employee. Those factors include:

- Opportunity for Profit or Loss Depending on Managerial Skill
- Investments by the Worker and the Employer
- Degree of Permanence of the Work Relationship
- Nature and Degree of Control
- Extent to Which the Work Performed is an Integral Part of the Employer's Business
- Skill and Initiative
- Additional Factors

(See: <https://www.federalregister.gov/d/2022-21454/p-313>.)

The big difference between the current rule and the proposed new rule is the departure from focusing on two core factors. The current rule elevates two factors as “core” or most probative, whereas the proposed new rule takes a broader approach.

The proposed new rule is currently in its comment period until December of this year.

### **Conclusion**

DOL has proposed a new rule for analyzing situations that involve the potential misclassification of workers. Since the misclassification of workers is an important issue for DOL, employers should keep an eye on the DOL website for updates to

the proposed new rule. By doing so, employers will be better situated to avoid misclassifying workers.

For more information from DOL about the proposed new rule, please visit the following link: <https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>.



## New UI System Announcement!

By Sergio Lopez  
Texas Workforce Commission Director of Tax

For more than **30 years**, the current unemployment tax system has served the great employers of Texas.

Mid-year 2023 the current unemployment tax system will be replaced with a **NEW** Texas Unemployment System, also known as TxUS. The agency is replacing Unemployment Tax Registration (UTR), Unemployment Tax Services (UTS), QuickFile, GoAnywhere portal, and

Magnetic Media with this new system.

The Texas Unemployment System will provide improved access and self-service options for employers and agents, including the following:

- Account registration and wage reporting will be in one system
- Simplified wage reporting (quarterly reports) and easier wage amendments (adjustment reports)
- Expanded wage data upload features – ability to upload employee wage data in several formats.
- Several file upload formats will be available ICESA (.txt file), Comma Separated File (.csv) and XML (.xml file)
- Enhanced self-service access to account maintenance for employers and agents (for example, correct first wages date, update ownership information, etc.)
- Employers will be able to obtain an account number with a future liability date (one quarter in advance)
- Employers and agents will have separate portals


The new system will be implemented in two phases with UI Tax going live in mid-2023, with UI Benefits and UI Appeals following in 2024.

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## TEXAS EMPLOYER HOTLINE

### 1-800-832-9394

Hiring Issues • Medical Leave-Related Laws • Personnel Policies and Handbooks • Independent Contractors and Unemployment Tax Issues • The Unemployment Claims and Appeals Process • Texas and Federal Wage and Hour Laws



**Employer Hotline Hours: M-F, 8am-5pm**  
*Information provided by employment law attorneys in the Office of the Commissioner Representing Employers at the Texas Workforce Commission*


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