

## UNEMPLOYMENT COMPENSATION IN A PANDEMIC: HOW HAS IT CHANGED IN TEXAS?

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Date: July 15, 2020

The Unemployment Insurance system (UI) helps individuals who have lost their jobs, through no fault of their own, by replacing part of their wages while they remain out of work. This is a state system that is monitored by the U.S. Department of Labor. Under this system, created in 1935, the states provide most of the income by collecting taxes from employers, and the federal government pays only the administrative costs. The basic UI program provides up to 26 weeks of benefits, unless extended benefits of 13 or 20 weeks apply (EB). EB is paid in states that have higher unemployment rates, which does not need to be caused by a national recession.

In Texas, UI is administered by the Texas Workforce Commission's (TWC) Wage and Hour Division. Recently enacted federal laws passed to provide monetary assistance during the pandemic are designed to give states significant flexibility to provide UI services to those affected by COVID-19 (the "Virus"). In Texas, the TWC has waived the one-week waiting period and the job search requirements during the pandemic as part of national disaster relief efforts. However, furloughed employees are ordinarily required to report back to work when called unless they can meet specific requirements described in detail below. Employees who do not meet those guidelines and who refuse to return to work when called back can lose their right to receive unemployment benefits.

### BASIC ELIGIBILITY REQUIREMENTS

- Past Wages – The TWC looks at what is called the "Base Period" to calculate the weekly wage rate for an individual who has claimed benefits. The Base Period is the first four completed calendar quarters before the effective date of your initial claim. The TWC does not count the quarter in which the claim is filed nor the quarter immediately before that, but instead, the one-year period prior to those two quarters. Workers generally receive benefits from the state in which they worked, regardless of whether they lived in a different state.
- Job Separation and Eligibility – Job separation must be through no fault of the employee, which means that ordinarily, the employee cannot claim benefits if he or she quits or abandons the job. In addition, a claimant must: make a claim for benefits, be able and available to work and actively seek a position.
- Voluntarily Leaving Work – Section 207.045 of the Act states that an individual who leaves work voluntarily (which would include violating a written No Call, No Show company policy), is disqualified from receiving benefits. In some cases, an employee may claim that he or she left work due to "good cause" connected with work. This includes leaving work due to a medically verifiable illness of the claimant or claimant's minor child if no alternative child care is available.

- **Practice Tip 1** – It is important for employers to have written No Call, No Show policies that state specifically the number of days (generally 2 or 3) before an employee will be considered to have abandoned his or her job. The TWC will ask to see the written policy upon which the company is relying to challenge the employee’s eligibility for benefits on this basis.
- **Misconduct Defined** – is defined as the “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 policy or rule adopted to ensure the orderly work and safety of employees.” Section 201.012. It does not include an act in response to an unconscionable act of an employer or supervisor, and does not include purely poor performance issues, such as attendance or lateness.
  - **Practice Tip 2** – When an employee is terminated, consider whether “misconduct” may apply. If so, use a termination form and describe briefly the reason for the termination and what policy was violated. This will provide evidence if needed later if you wish to challenge a claim for unemployment benefits.
- **Furloughed Employees** – As opposed to being subject to a lay-off, which means that your employment permanently ends due to business reasons such a decrease in sales, a furlough occurs when employees are told not to report to work, subject to recall when business needs resume. Unlike laid-off employees, furloughed employees remain on a company’s active employee list and are generally entitled to retain their benefits, such as health insurance (although they are generally required to continue to pay their portion of insurance premiums). Both types of employees may be eligible to receive unemployment benefits while they are out of work. However, furloughed employees must return to work when, and if, recalled by the company. Unless an employee is able to claim one of the limited reasons to refuse to return to work (explained below), he or she generally cannot refuse to return to work and continue to collect unemployment benefits.
- **Ongoing Eligibility Requirements** – Ordinarily an individual must be available to work and actively seeking job replacement to continue to receive UI benefits. In addition, traditionally, employees had one “waiting week” before benefits would be paid.
  - **What changed during the Pandemic** – There is currently no requirement that employees search for work, and no waiting week before benefits will begin.
- **Disputing Benefits Award and Appeals** – Following an application for benefits, the TWC will issue what is called a Determination. The Determination is the decision to either award or deny benefits with a brief explanation for the decision. Both sides then have 14 days to appeal that decision, and obtain a telephonic hearing at which they can present evidence.
  - **Practice Tip 3** – When challenging an award for the Claimant based on “misconduct,” focus on recent events rather than events that occurred many months or years ago,

but for which the Claimant was not terminated. Performance Improvement Disciplinary plans that later result in termination can be used as long as they are somewhat recent (ex: 60 or 90 days, rather than 6 months or one year old). You will have a telephonic hearing on the appeal during which witnesses may testify and documents that you provide in advance to the TWC Hearing Office and Claimant can be admitted. Evidence that has not been sent to the Hearing Officer and the Claimant prior to the hearing will not be considered on appeal.

- **Chargebacks** – A chargeback occurs when benefits paid to a claimant are charged to an employer’s account, which may ultimately raise unemployment taxes in the future. In some cases, an employee can be awarded benefits without the employer getting a charge-back, for example: when an employee leaves work for a medically verifiable illness; because of a natural disaster (a flood, the pandemic); was required by a state statute or municipal ordinance (Stay-at-Home Order), when an employee being called to active military duty.
  - **Practice Tip 4** – During this pandemic, employers will not be subject to a charge-back when employees file for unemployment benefits based on COVID-19 related reasons. Therefore, if the reasons for an employee’s separation from employment is COVID-19 related, that should be recorded in the employee’s file.

## REGULATIONS DURING THE PANDEMIC

- **The Coronavirus Aid, Relief and Economic Security Act** – effective 3/27/20 – This is part of the Cares Act, and expanded a state’s ability to provide unemployment insurance for workers impacted by the COVID-19 crisis, including for workers who would not otherwise qualify for benefits.
  - Section 2104(f) of the Cares Act provides an extra \$600 to those receiving weekly Extended Unemployment Benefits (EB).
- **Pandemic Emergency Unemployment Assistance (PEUA)** – This program is the primary method by which states are able to extend federally-funded unemployment benefits for an additional 13 weeks (up to 39 weeks instead of just 26). The program begins on 1/27/20 and ends on 12/31/20, after which those additional weeks are not available. The PEUA includes assistance for those who are self-employed and who would not otherwise qualify for benefits. The federal fund boosts weekly benefits for those laid off, terminated or furloughed due to COVID-19 by an additional \$600 per week. Importantly:
  - Paperwork is reduced and claims expedited because employers can file one mass claim on behalf of all employees laid off due to COVID-19.
  - The Chargeback to Texas employers for claims filed due to COVID-19 has been eliminated under this plan.
- **Pandemic Unemployment Assistance (PUA)** – PUA is unemployment assistance for displaced workers who would not otherwise qualify for regular or extended unemployment benefits. This type of assistance has previously been implemented during weather-related disasters. Workers whose hours have been reduced due to the pandemic

may qualify for *Work Share*, a federal Short-Term Compensation program. For workers who do not qualify for Work Share or regular UI benefits, the PUA is the program authorized by the Coronavirus Aid, Relief, and Economic Security Act (“CARES ACT”) that provides unemployment benefits to individuals who do not qualify for UI or who have exhausted their benefits.

- While receiving PUA, claimants must request payment every two weeks and report their work and earnings. Earnings are deducted from weekly benefits.
- The Work Share program – provides Texas employers with an alternative to layoffs. The goal is to help employers withstand a business slow down during this pandemic.
  - The program allows employers to supplement employee wages that are lost due to a slow-down that results in reduced hours by providing partial benefits.
  - Reduced normal weekly work hours for employees in an affected department or unit of at least 10% but no more than 40% if it affects at least 10% of the employees in that department / unit.
  - Employees who qualify (they must have sufficient wages in their base period) may receive wages and unemployment benefits.
  - With PUA, UI benefits are charged back to the employer’s account and used to compute the unemployment tax rate.

## **EXPANDED REASONS FOR UNEMPLOYMENT**

Although all claims for unemployment are reviewed on a case-by-case basis, the Governor of the State of Texas has expanded the reasons for which an individual may refuse to return to work and still file a claim for unemployment benefits. The list below allows certain individuals to refusal to return to work for the following COVID-19 related reasons:

- Individuals at High Risk – people over 65 years of age.
- Household Member is at High Risk – a household member is 65 years or older.
- Diagnosed with COVID-19 – the individual has tested positive for COVID-19 by a source authorized by the State of Texas and has not recovered.
- Family Member Diagnosed with COVID-19 – a household member has tested positive for COVID-19 by a source authorized by the State of Texas and has not recovered, and 14 days have not yet passed.
- Quarantined – the individual is currently in 14-day quarantine due to close contact exposure to COVID-19.
- Child Care – the child’s school or daycare is closed and no alternatives are available.

- **Practice Tip 5** – The TWC will request some type of proof to justify the above reasons for an employee’s refusal to return to work following a furlough, or when teleworking is not possible.

## **Lay-Offs / Reduced Hours**

Employers who have had to lay off employees or reduced their hours due to the COVID-19 pandemic need to tell the TWC that the employee’s job separation is COVID-19-related when responding to a Notice of Application for Unemployment Benefits. One blanket response for all employees can be used if many employees are laid off at once.

## **What to do When an Employee Refuses to Return to Work**

When an employee refuses to return to work for fear of contracting the Virus, he or she may be able to file for unemployment benefits for one of the six reasons stated above. However, fear of contracting COVID-19 without the employee being able to show an expanded reason to obtain unemployment benefits is generally insufficient.

*The information contained in this article is not designed to address specific situations. If you have questions concerning this topic, you should consult with legal counsel for advice on fact specific matters.*



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