

## 6.0 EMPLOYER/EMPLOYEE ISSUES

### 6.1 Overview

This section provides practical advice for assisting persons who have temporarily or permanently lost employment or are facing other employment-related issues as a result of a disaster.

### 6.2 Most Common Questions

Common employment-related questions arising from a disaster are:

- What unemployment benefits are available if my employment is interrupted or lost due to a disaster (or if my family income is affected by a disaster)?
- How can the laws passed in response to Covid-19 help me?
- Can my health benefits be continued if I lose my job due to a disaster?
- Can my employer fire me because a natural disaster has occurred?
- If I cannot work because of a disaster, does my employer have to pay me anyway?
- Am I entitled to leave if a family member or I become ill as a result of the disaster or its aftermath?
- How do I get my pay?

### 6.3 Summary of the Law

#### A. *Unemployment Compensation*

##### 1. Non-disaster Unemployment Compensation

To be eligible for regular (non-disaster) unemployment compensation under the Texas Unemployment Compensation Act ([Texas Labor Code Title 4](#)), an individual must meet all of the following requirements:

- a. The individual must have earned sufficient wages to qualify for benefits in the “base period” (The base period is defined as the first four calendar quarters of the five calendar quarters immediately preceding the date the individual files a claim for unemployment benefits), see the Texas Workforce Commission (TWC) page on Eligibility and Benefit Amounts: <https://www.twc.texas.gov/jobseekers/eligibility-benefit-amounts>;
- b. the individual must be unemployed or partially unemployed;
- c. the individual cannot have been fired for misconduct or voluntarily quit without good cause, see TWC page on Eligibility and Benefit Amounts: <https://www.twc.texas.gov/jobseekers/eligibility-benefit-amounts>;
- d. the individual must be able and available to work; and
- e. the individual must be actively seeking work, see TWC page regarding Ongoing Eligibility Requirements at <https://www.twc.texas.gov/jobseekers/ongoing-eligibility-requirements-receiving-unemployment-benefits> for Receiving Unemployment Benefits.

For more information regarding these requirements, see the TWC page on Eligibility and Benefit Amounts at <https://twc.texas.gov/jobseekers/eligibility-benefit-amounts>.

## 2. Federal Disaster Unemployment Assistance (DUA)

Federal Disaster Unemployment Assistance (DUA) provides unemployment benefits for people who lost their jobs or self-employment livelihoods, or who cannot work as a direct result of a major disaster. To be eligible, the individual must have applied for regular TWC unemployment benefits and been rejected, or exhausted regular unemployment benefits through the TWC. To access federal DUA, the individual therefore must have applied to the TWC first. DUA availability is triggered by a major disaster declaration. It is available only during a Disaster Assistance Period, which runs from the first Sunday following the declaration and ends on a later date as determined by DUA and the Federal Emergency Management Agency (FEMA). Benefits paid under DUA are counted as taxable income to the recipient.

In addition to ineligibility for regular TWC unemployment benefits, the DUA applicant must establish one or more of the following:

- The job lost represented more than 50% of the applicant's income.
- The applicant lives, works, or travels through the disaster area.
- The applicant's place of employment was damaged or closed.
- The applicant was hired to start a job, but the job no longer exists or the place of employment can no longer be reached.
- The applicant suffered injury or incapacitation.
- The applicant became the breadwinner or major support of the household due to the death of the head of household.

In the event of a disaster, the TWC will publish announcements about the availability of DUA benefits and the deadline to apply for benefits. Workers whose jobs were affected by COVID-19 do not always qualify for DUA. Visit the [Applying for DUA](#) page on the TWC website.

See the FFRCA and CARES Act sections below.

## 3. Unemployment Benefits During COVID-19

Under normal circumstances, TWC cannot pay you for the first week of your claim (the waiting week: [https://apps.twc.state.tx.us/UBS/glossary.do#waiting\\_week](https://apps.twc.state.tx.us/UBS/glossary.do#waiting_week)) until you have received two full weekly payments and return to full-time work, or until you exhaust your benefits. Due to the COVID-19 pandemic, TWC has waived the waiting week for claimants affected by COVID-19.

TWC has [reinstated the work search requirements](#) that were suspended in March of 2020 for all claimants (not only those affected by COVID-19). See Required Number of Work Search Activities by County at <https://www.twc.texas.gov/jobseekers/required-number-work-search-activities-county>.

See the FFRCA and CARES Act sections below for further detail.

### ***B. Continuation of Group Health Coverage under COBRA***

After a disaster, some individuals may lose their employer-provided group health plan coverage as a result of either a voluntary or an involuntary termination or a reduction in work hours that renders them unable

to continue coverage. An employer may be required to extend COBRA continuation coverage to such an individual and his dependents (Qualified Beneficiaries) previously covered under the employer's group health plan. The death of the covered employee would also be a qualifying event that would trigger an employer's obligations under COBRA. [26 U.S.C. § 4980B\(f\)\(3\)](#).

COBRA continuation coverage is not available in all situations. COBRA generally only applies to private sector employers with at least twenty employees, governmental employers, and certain employee organizations. [26 C.F.R. § 54.4980b-2](#), Q&A-4. Also, COBRA coverage is not available if the termination was for gross misconduct.

If applicable, COBRA requires an employer to extend to Qualified Beneficiaries the right to continue their health coverage under the same group health plan under which the beneficiaries were covered prior to their coverage loss. [26 U.S.C. § 4980B\(f\)\(2\)\(A\)](#). If the employer no longer offers the same health plan, the Qualified Beneficiary may elect coverage under another group health plan maintained by the employer. Group health plans include, but are not limited to, medical, dental, and vision plans. [26 C.F.R. § 54.4980b-2](#), Q&A-1. Each Qualified Beneficiary may make a separate election with respect to coverage. [26 C.F.R. § 54.4980b-6](#), Q&A-6. For example, if an employee previously covered a spouse and a dependent child through family coverage under an employer-provided group health plan, either the spouse or the dependent child could separately elect COBRA continuation coverage under a single, rather than family, plan while the remaining family members waived coverage.

Generally, a Qualified Beneficiary may continue his or her coverage for up to eighteen months. [26 U.S.C. § 4980B\(f\)\(2\)\(B\)\(i\)](#). However, COBRA coverage can be very costly. An employer may charge up to 102 percent of the actual cost of providing the coverage to a similarly situated active employee (not just the contribution for coverage that the employee paid while actively employed). [26 U.S.C. § 4980B\(f\)\(2\)\(C\)](#). Under the American Rescue Plan ("ARP"), certain COBRA qualified beneficiaries are eligible for premium assistance during the period from April 1, 2021, through September 30, 2021. During this period Assistance Eligible Individuals are not required to pay their COBRA continuation coverage premiums and employers or plans to whom the premiums are payable are entitled to a tax credit for the amount of the premium assistance. For more information on premium assistance eligibility and how ARP has modified COBRA benefits, please visit: COBRA Premium Subsidy at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy> or FAQs About COBRA Premium Assistance Under the American Rescue Plan Act of 2021 at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-premium-assistance-under-arp.pdf>.

Further, an employer is not required to offer COBRA coverage if it ceases providing any group health plan to its active employees. [26 U.S.C. § 4980B\(f\)\(2\)\(B\)\(ii\)](#). For example, if an employer closes operations entirely and no longer offers any group health plans, a Qualified Beneficiary has no rights under COBRA to continued coverage.

An individual who is eligible and wishes to elect COBRA coverage should contact the employer providing the group health plan coverage. Employers are generally required to send a notice regarding COBRA rights to the last known mailing address of the Qualified Beneficiary. Therefore, those who have been dislocated by the disaster may not promptly receive notice from their employers regarding COBRA continuation coverage. Qualified Beneficiaries only have sixty days to elect COBRA coverage from the later of the date of the COBRA notice or the date of loss of coverage. [26 U.S.C. § 4980B\(f\)\(5\)](#). For further information, see the Department of Labor publication, [An Employee's Guide to Health Benefits Under COBRA](#).

### **C. *Affordable Care Act***

In declared disaster situations, the Affordable Care Act (ACA) requires insurers to provide coverage for out-of-network care for individuals displaced by disaster and prohibits insurers from charging higher coinsurance or copayment amounts for out-of-network care than for in-network care. It does not prohibit medical providers from billing consumers the remaining balance after the insurer-paid portion.

Each health plan will have different policies regarding out-of-network reimbursement. Individuals should contact the health insurer directly by calling the number listed on the back of the insurance card or by visiting the insurer's website. If the individual does not have access to their card, they can contact the Marketplace Call Center (<https://www.healthcare.gov/>) at 1-800-318-2596 (TTY: 1-855-889-4325). The Texas Department of Insurance (TDI) may issue disaster bulletins that affect health and other insurance providers in Texas. During Hurricane Harvey, for example, the TDI issued a bulletin: <https://tdi.texas.gov/bulletins/2017/b-0012-17.html> recommending that Texas health insurers waive restrictions or penalties on members going out-of-network for health and dental services during the disaster period declared by the governor.

### **D. *CARES Act***

In response to the COVID-19 pandemic, on March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act. It expanded states' ability to provide unemployment insurance for many workers impacted by the COVID-19 pandemic, including for workers not ordinarily eligible for unemployment benefits. Temporary programs created under the CARES Act include the Pandemic Emergency Unemployment Compensation (PEUC), the Pandemic Unemployment Assistance (PUA) and the Federal Pandemic Unemployment Compensation program (FPUC).

The State of Texas ended its participation in these federal pandemic unemployment benefit programs (PEUC, PUA and FPUC) as of June 26, 2021. If you live outside of Texas, please consult resources applicable to your state to find out what programs might be available.

### **E. *American Rescue Plan Act (ARPA)***

In March 2021, President Biden signed into law the [American Rescue Plan Act](#) (ARPA). This was the third piece of legislation (after the CARES Act and Families First Coronavirus Response Act) providing comprehensive relief to Americans for COVID-19 related issues. The ARPA builds upon previously enacted aid measures.

The ARPA allows covered employers to voluntarily continue providing FFCRA paid leave to employees until September 20, 2021, while receiving tax credits in return. Providing paid leave is optional. Employers who elect to do so must adhere closely to the requirements of the FFCRA, as supplemented by ARPA, to avoid disqualification.

To better understand how the ARPA revised and expanded existing law, the following is a brief summary of the legislation that preceded it.

### FFCRA before ARPA

The Families First Coronavirus Response Act provided paid leave for qualifying employees unable to work due to COVID-related issues. FFCRA's paid leave provisions are set forth in two sections of the law: the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family Medical Leave Expansion Act (EFMLEA).

#### 1. Emergency Paid Sick Leave Act (EPSLA) before ARPA

The EPSLA established a right to paid leave for eligible employees if they met at least one of six qualifying reasons:

- (1) the employee was subject to a COVID-19 related federal, state, or local quarantine or isolation order;
- (2) the employee was advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (3) the employee was experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) the employee is caring for an individual subject to the conditions described in items 1 or 2;
- (5) the employee is caring for his or her son or daughter whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19 related reasons; or
- (6) the employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor (note: no substantially similar condition was identified).

Employers could elect to offer intermittent leave to employees. Full-time employees were entitled to up to 80 hours of paid leave at their full regular rate (up to \$511 per day) for reasons 1–3, and two-thirds of their regular rate (up to \$200 per day) for reasons 4–6. Part time employees were entitled to less paid leave based on their normal hours or a calculation of their hours.

#### 2. Emergency Family Medical Leave Expansion Act (EFMLEA) before ARPA

The Emergency Family Medical Leave Expansion Act (EFMLEA) provided leave for an employee who had worked at least 30 days for that employer at the time they became unable to work or telework due to caring for a minor child or an adult with a disability, or whose school or childcare provider was closed or unavailable due to COVID-19.

EFMLEA leave was paid to a qualifying employee for up to 10 weeks at two-thirds of the employee's regular rate, capped at an aggregate of \$10,000.

### ARPA's Changes to the FFCRA

Although ARPA extended and expanded FFCRA's paid leave provisions, paid leave is no longer mandatory. The result is a voluntary program where employers are reimbursed for providing paid leave through dollar-for-dollar tax credits.

Covered Employers: The requirements for covered employers remain unchanged by the ARPA. Covered employers are private employers with fewer than 500 employees and public agencies. Under certain circumstances, the Secretary of Labor may exempt certain employers with fewer than 50 employees. [29 C.F.R. § 826.40\(a\)-\(b\)](#)). Covered employers may exclude health care providers or emergency responders from taking the paid sick leave. [29 C.F.R. § 826.25](#).

Eligible Employees: The ARPA expanded employees' qualifying reasons to use family leave under the EFMLEA. Before ARPA, EFMLEA was available only to those employees needing time off to care for a child whose school or daycare was closed due to COVID-19 related reasons. After ARPA, family leave under the EFMLEA can be used for any of the qualifying reasons for EPSL. Family and medical leave is no longer limited to childcare issues. See the qualifying reasons above.

#### 1. EPSLA-specific changes as of April 1, 2021

The ARPA expands FFCRA's qualifying reasons for paid leave. Additionally, it resets an employees' eligibility for EPSLA leave as of April 1, 2021, allowing employees who may have previously exhausted leave to seek EPSLA-qualified leave again.

Along with the six qualifying reasons for sick leave under EPSL, ARPA added three *additional* reasons supporting an employee's eligibility for up to two weeks—roughly 80 work hours—of paid leave. The added reasons are in *italics*:

1. *The employee is obtaining the COVID-19 vaccine*
2. *The employee is recovering from an illness, injury or condition related to the COVID-19 vaccine*
3. *The employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 if the employee has been exposed, or the employee's employer has requested such test or diagnosis*
4. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19
5. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
6. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
7. The employee is caring for an individual who is subject to an order as described in (4) or who has been advised as described in (5)
8. The employee is caring for a child whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19 related reasons
9. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. [29 C.F.R. § 826.20\(a\)](#); [Pub. L. 117-2 § 3131\(c\)\(2\)\(A\)](#).

## 2. EFMLEA-specific changes as of April 1, 2021

After April 1, 2021, EFMLEA leave eligibility is no longer limited to employees with a COVID-related child or adult caregiver issues. Under ARPA, EFMLEA-eligibility includes all EPSLA-qualifying reasons (those originally listed in 5102(a) of the FFCRA) and three new qualifying reasons in italics (see above). ARPA of 2021, 107<sup>th</sup> Congress, Pub.L. 117-2, [Sec. 3132 \(c\)\(2\)\(A\)\(i\)](#).

ARPA removes the previous EFMLEA requirement that the initial 2 weeks of leave be unpaid before paid leave is triggered. Eligible employees can now receive up to 12 weeks of paid EFMLEA-qualified leave. ARPA of 2021, 107<sup>th</sup> Congress, Pub.L. 117-2, [Sec. 3132 \(c\)\(2\)\(A\)\(ii\)\(II\)](#)

ARPA Increases the aggregate EFMLEA cap from \$10,000 to \$12,000. ARPA of 2021, 107<sup>th</sup> Congress, Pub.L. 117-2 [Sec. 3132 \(c\)\(2\)\(A\)\(ii\)\(III\)](#)

### Other Key Features of ARPA

- A refundable tax credit for employers for up to 10 days of qualifying paid sick leave per employee, for the period starting on April 1, 2021, and ending on September 30, 2021. The tax credits cover the cost of certain COVID-19 related leave taken from April 1, 2021, through September 30, 2021. See Department of Treasury Fact Sheet March 18, 2021: <https://home.treasury.gov/system/files/136/Fact-Sheet-03-18-21.pdf>. The payroll credit covers 100 percent of qualifying wages for that period.
- Elimination of the FFCRA's initial two-week period of unpaid EFML (but it retains the maximum tax credit equal to two-thirds the employee's regular rate of pay—regardless of qualifying condition—up to a maximum of \$200 per day). The maximum tax credit available to an employer increased from \$10,000 to \$12,000 annually per employee.
- Resets the maximum paid sick leave and medical leave that employers can provide to their employees to April 1, 2021. An employer who claimed the maximum credit for employee for wages from April 1, 2020, through March 31, 2021 can qualify for a credit on wages paid to that same employee from April 1, 2021, through September 30, 2021 (but with no carryover of unused days before April 1, 2021).
- A 100-percent subsidy, covering up to six months of health insurance premiums under COBRA, for eligible employees who lost insurance coverage due to a COVID-related reduction in hours or involuntary termination. ARPA of 2021, 107<sup>th</sup> Congress, Pub.L. 117-2, [Sec. 9501\(a\)\(1\)\(A\)](#). This subsidy applies to medical, dental, and vision plans. It does not apply to health flexible spending accounts. Employers have an obligation to notify impacted employees of the ARPA's COBRA provisions. [Sec. 9501\(a\)\(5\)\(A\)\(i\)](#).

If an employer voluntarily participates, full-time employees may be eligible for up to 80 hours of paid sick leave, up to a cap, with specific rules for full-time employees with varying workweek schedules and part-time employees. [29 C.F.R. 826.21](#). An employer may not require an employee to use other paid leave before using paid sick leave under EPSLA. [29 C.F.R. § 826.160](#).

## **F. Employer's Wage Payment Obligations**

### **1. Fair Labor Standards Act**

Under the federal Fair Labor Standards Act (FLSA), [29 U.S.C. § 201](#) *et seq.*, the Texas Minimum Wage Act (TMWA), [Tex. Lab. Code § 62.001](#) *et seq.*, and common law, employees must be paid for all work performed and for all time worked. This is true regardless of immigration status. It is not a valid defense to FLSA and TMWA claims that the work was done slowly, poorly, etc., or that the employer cannot afford to pay. Work time includes time that an employee has been engaged to wait, as well as travel time between job sites. In general, there are no exceptions made in the case of disasters. See the Department of Labor publication, *Employment & Wages Under Federal Law During Natural Disasters & Recovery*: <https://www.dol.gov/agencies/whd/fact-sheets/72-flsa-disasters-recovery>.

Certain employees are exempt from the FLSA's minimum wage and overtime provisions because they are bona fide executive, administrative, professional, outside sales, or certain computer employees paid a salary of at least \$455 per week. Exempt employees must be paid full salary if the business shuts down for less than a full workweek, or if the employer does not have work available for the employee for the full work week. When the business is open and work is available, the employer may deduct from the employee's salary if the employee is absent from work for one or more full days for personal reasons. An employer can deduct a full day if it occurred because of sickness or disability, as long as the deductions are made pursuant to a *bona fide* sick or disability leave plan, policy, or practice. See [29 C.F.R. § 541.602](#). See Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act: [https://www.dol.gov/whd/overtime/fs17g\\_salary.pdf](https://www.dol.gov/whd/overtime/fs17g_salary.pdf) and Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues: <https://www.dol.gov/whd/regs/compliance/whdfs70.htm>.

More information about wages is available at U.S. Department of Labor Fact Sheets: <https://www.dol.gov/agencies/whd/fact-sheets>, including explanations of the different requirements for different categories of workers (migrant and seasonal agricultural workers, workers on visas, first responders, etc.).

### **2. Texas Payday Law**

The Texas Payday Law requires employers to pay employees who are exempt from the FLSA's overtime provisions at least once a month, and employees who are not FLSA-exempt must be paid at least twice a month on the paydays designated by the employer. [Tex. Lab. Code § 61.011](#). Wages may be paid by (1) delivering them to the employee, or a person designated by the employee in writing, at the employee's regular place of employment during regular work hours, or at a place and time agreed by employer and employee; (2) sending them to the employee, or a person designated by the employee in writing, by registered mail, to be received no later than payday; or (3) delivering them to the employee by any reasonable means authorized by the employee in writing. Employers with a direct deposit plan may also pay wages by direct deposit. [Tex. Lab. Code § 61.017](#). Employers whose employees may have been displaced by a natural disaster should take steps to ensure that pay is delivered in a manner that ensures receipt by the employee.

An employee whose last paycheck is delayed because of a disaster may submit a Texas wage claim with TWC no later than 180 days after the date the wages originally became due for payment. For more

information, including wage claim forms, see How to Submit a Wage Claim Under Texas Payday Law at <https://twc.texas.gov/jobseekers/how-submit-wage-claim-under-texas-payday-law>.

An employee who is discharged from employment must be paid in full no later than the sixth day after the date of discharge. Employees who are not discharged but leave employment voluntarily must be paid in full no later than the next regularly scheduled payday. [Tex. Lab. Code § 61.014](#).

### 3. Wage Theft

The Texas legislature amended the Penal Code to provide victims of wage theft from new/temporary employers with greater protection. [Texas Penal Code § 31.04](#) now categorizes conduct as theft of service when an employer “intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make full payment after receiving notice demanding payment.” Most importantly, under the amended law, the partial payment of wages alone is not sufficient evidence to negate an employer’s intent to avoid payment for a service.

### 4. WARN Act

Under certain circumstances, employees who lose employment as a result of a plant closing or mass layoff are entitled to sixty days’ advance notice under the federal Worker Adjustment and Retraining Notification (WARN) Act, [29 U.S.C. § 2101](#) *et seq.* If the closing or layoff is a direct result of a natural disaster, employers must still give as much notice as possible, even if that notice comes after the disaster. Employees who do not receive proper notice may be due back pay and benefits for up to the sixty-day notice period. The WARN Act notice requirement applies only to employers with at least 100 employees. The employer must give written notice to the bargaining representative of affected union employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. Notice must include whether the layoff or closing is permanent or for six months or less, the date (within a fourteen-day period) that the employee’s employment will end, and the name and contact information of a person in the company who can provide additional information. For more information, including WARN Act compliance assistance materials, see <https://www.doleta.gov/layoff/warn/>.

### 5. Independent Contractor

A worker who is treated as an independent contractor by an employer may, in fact, be an employee, and may therefore be entitled to the protections of the FLSA, the TMWA, the Texas Payday Law, etc. While the Internal Revenue Service (IRS) considers many factors when determining whether a worker is an independent contractor or an employee, *control* is among the most important; a worker is likely an employee if the employer controls when and how the work is performed. The IRS additionally considers how the worker is paid, whether the worker has the potential to realize significant financial gain or loss, and whether the worker uses the employer’s tools or supplies, among other factors. For more information, see the IRS publication, Independent Contractor (Self-Employed) or Employee?: <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>.

## **G. Prohibited Employment Discrimination & Wrongful Termination**

Generally speaking, Texas is an employment-at-will state. This means that if an employer does not like the way the employee performed aspects of the job, if the employee has failed to follow workplace policies,

or if the employee's services are simply no longer needed, an employer can fire the employee unless the firing is otherwise unlawful. Although "at-will" employment is the general rule, there are many exceptions, including the following:

- An employee cannot be fired because of the employee's race, sex (including LGBT status or pregnancy status), religious preference, ethnicity, national origin (including language), age, or disability. See the Equal Employment Opportunity Commission publication, Equal Employment Opportunity is the Law:  
<https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/posters/pdf/eeopost.pdf>.
- An employee cannot be fired for complaining about the employee's rights under employment laws providing for minimum wage, overtime, medical leave, discrimination, workers' compensation, and workplace safety (among others).
- If the employee is covered by the [Family and Medical Leave Act](#) (FMLA, described in the following section), the employee cannot be fired for taking leave because of a serious illness, maternity leave, paternity leave, time off to adopt a child, or time off to help take care of a seriously ill close family member.
- An employee cannot be fired for refusing an order to do something illegal.
- An employee cannot be fired for discussing pay or working conditions with co-workers or complaining with or on behalf of coworkers about pay or working conditions.
- An employee cannot be fired for being a member of, joining, or trying to form a union.
- An employee cannot be fired for reporting an employer's violation of a law to appropriate law enforcement authorities (known as "whistleblowing").
- If an employee has an employment contract specifying the grounds for termination, the employee cannot be fired in violation of that contract (this includes a collective bargaining agreement negotiated by a union in the employee's workplace).

The above list does not cover all of the situations in which it is unlawful for an employer to fire an employee, but it covers some of the more common types of terminations that are unlawful. The list is by no means exhaustive. For more information, see TWC information on wrongful discharge and exceptions: [https://www.twc.state.tx.us/news/efte/wrongful\\_discharge.html](https://www.twc.state.tx.us/news/efte/wrongful_discharge.html).

*Prohibited employer discrimination against evacuees:* Texas law also prohibits discrimination for participation in an emergency evacuation. An employer may not discharge or discriminate against an employee who leaves the employee's place of employment to participate in a general public evacuation ordered under an emergency evacuation order. [Tex. Lab. Code § 22.002](#). Emergency services personnel (including firefighters, police officers, emergency medical technicians, and other individuals who are required to provide services for the benefit of the general public in emergency situations) are exempt from this provision. [Tex. Lab. Code § 22.004](#).

In addition, the *Uniformed Services Employment and Reemployment Rights Act of 1994* (USERRA), [38 U.S.C. §§ 4301–4333](#), makes it unlawful for an employer to deny initial employment, reemployment, promotion, or any benefit of employment to a person who is obligated to perform in a uniformed service, including the Reserves and National Guard. This includes a call to active duty as a result of a national emergency. For further information, see "Your Rights Under USERRA," available at [http://www.dol.gov/vets/programs/userra/userra\\_private.pdf](http://www.dol.gov/vets/programs/userra/userra_private.pdf).

## **H. Unpaid Leave Entitlement**

In addition to paid leave that may be available under an employer's vacation or sick leave policy, the federal [Family and Medical Leave Act](#) (FMLA) requires covered employers to provide up to twelve weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons. See [29 U.S.C. § 2601 et seq.](#); [29 C.F.R. § 825 et seq.](#) Leave is available in part to cover an employee's own serious health condition that renders the employee unable to perform the employee's job, and to care for the employee's spouse, son or daughter, or parent who has a serious health condition. A serious health condition may be attributable to a disaster. For example, a disaster could exacerbate an employee's chronic condition (e.g., stress, anxiety, or soaring blood pressure) and render them unable to perform their job. Similarly, an employee may be required to care for a family member with a serious health condition for a reason connected with the natural disaster (for example, a family member on dialysis where usual dialysis services and transportation are disrupted by disaster).

Employees are eligible if:

- (1) they have worked for their employer for at least twelve months (need not be consecutive);
- (2) they worked at least 1,250 hours over the year preceding their need for leave; and
- (3) the employer has at least fifty employees within seventy-five miles of the employee's work site.

The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances. For the duration of FMLA leave, the employer must maintain the employee's health coverage under any group health plan.

Substitution of paid leave is allowed under the FMLA. [29 U.S.C. § 2612\(d\)\(2\)](#). Employees may take, or employers may require employees to use, paid vacation, personal, family, or medical sick leave concurrently with FMLA, subject to certain limitations. The U.S. Department of Labor updated the regulations under the FMLA in 2008, and these regulations now restrict the substitution of paid leave. Under [29 C.F.R. § 825.207](#), employers can require employees to meet all of the normal requirements of paid leave policies before permitting substitution. For example, if a policy requires that vacation be taken in full day increments, an employer can deny substitution for an employee's one-half day FMLA leave. Similarly, if vacation time cannot be taken during a particular month, substitution could be denied during that time period. Find out more about the FMLA from the U.S. Department of Labor at <https://www.dol.gov/agencies/whd/fmla>.

## **6.4 Regulatory Agency Directives**

The U.S. Department of Labor, in coordination with FEMA, provides funds to state unemployment insurance agencies for payment of DUA benefits. Accordingly, the TWC administers DUA benefits to individuals who lost their jobs or self-employment or who are no longer working as a direct result of a major disaster for which a disaster assistance period is declared. In the event of a disaster, the TWC will publish announcements about the availability of DUA benefits and the deadline to apply for benefits. See the TWC's page on disaster unemployment assistance: <https://www.twc.texas.gov/jobseekers/disaster-unemployment-assistance>.

Unemployed disaster victims who are not eligible for regular unemployment compensation should apply for DUA benefits as soon as possible because there are application deadlines, as well as waiting periods

for receipt of benefits. See the TWC's page on disaster unemployment assistance: <https://www.twc.texas.gov/jobseekers/disaster-unemployment-assistance>.

## 6.5 **FAQs**

### ***Q. 6-1 What is unemployment compensation?***

Unemployment compensation, such as the benefits provided to Texas workers by the Texas Workforce Commission, provides temporary financial assistance for a worker who has been laid off or fired for a reason other than misconduct, or quit a job for "good cause." If you have been fired from your job "for cause" (misconduct), you probably are not eligible to collect unemployment.

### ***Q. 6-2 How do I qualify for unemployment insurance benefits?***

To be eligible for regular (non-disaster) unemployment compensation in Texas, you

- (1) must have earned sufficient wages to qualify for benefits in the "base period";
- (2) must be unemployed or partially unemployed;
- (3) cannot have been fired for misconduct or voluntarily quit without good cause;
- (4) must be able and available to work; and
- (5) must be actively seeking work. See the TWC page on eligibility: <https://www.twc.texas.gov/jobseekers/eligibility-benefit-amounts>.

### ***Q. 6-3 What is Disaster Unemployment Assistance, or DUA?***

DUA provides financial assistance to you if your employment or self-employment has been lost or interrupted as a direct result of a major disaster as declared by the president of the United States *and* you are not eligible for regular unemployment insurance benefits under the TWC's unemployment compensation program (for example, you are self-employed or you are unavailable to work due to an injury that is the direct result of the disaster). While DUA is a federal program, it is administered by states as agents of the federal government. [42 U.S.C. § 5177](#).

### ***Q. 6-4 How do I qualify for Disaster Unemployment Assistance?***

If you are an unemployed U.S. national or qualified alien, you might qualify for DUA if you:

- a. have applied for and used all regular unemployment benefits from any state or do not qualify for unemployment benefits;
- b. worked or were self-employed or were scheduled to begin work or self-employment in the disaster area; and
  - i. can no longer work or perform services because of physical damage or destruction to the place of employment as a direct result of the disaster;
  - ii. can no longer work because the individual is not able to reach the place of employment as a result of the disaster;
  - iii. the workplace is inaccessible due to closures by federal, state, or local officials;
  - iv. cannot perform work or self-employment because of an injury as a direct result of the disaster; or

- v. became the breadwinner or major supporter of a household because of the death of the head of the household as a result of the disaster; and
- c. establish that the work or self-employment you can no longer perform was your primary source of income.

*Disaster Unemployment Assistance for Noncitizens*

Noncitizens must meet the following requirements (in addition to other DUA requirements) to be eligible for DUA. See [20 C.F.R. §§ 625.4, 625.8\(f\)](#):

- a. A noncitizen must be authorized to work for the weeks for which he or she is claiming DUA.
- b. In addition, a noncitizen must have had one of the following statuses during the time he was earning the wages that are used to calculate the weekly benefit amount:
  - i. lawfully admitted for permanent residence in the United States at the time such services were performed;
  - ii. lawfully present for purposes of performing such services; or
  - iii. permanently residing in the United States under color of law at the time such services were performed.

With some exceptions, an individual's weekly benefit amount is normally calculated using the wage credits earned during the individual's base period (which is usually the first four calendar quarters of the five calendar quarters immediately preceding the date the individual claims unemployment benefits). See [Tex. Lab. Code §§ 201.011, 207.004](#). Therefore, the second requirement generally requires the noncitizen to have had one of the three statuses listed above during at least a portion of their base period. An individual who qualifies for benefits at the time of the application, but did not have a qualifying status during the base period may be ineligible for benefits, see <https://www.twc.texas.gov/jobseekers/eligibility-benefit-amounts#unemploymentBenefitsEligibility>.

**Q. 6-5      *How do I file for Unemployment Insurance (UI) or Disaster Unemployment Assistance (DUA)?***

Disaster unemployment benefits are unrelated to FEMA benefits and require a separate application process. You must apply to TWC to determine if you are eligible for regular benefits before you can receive DUA. As a practical matter, the TWC may take your applications for both regular benefits and DUA at the same time.

Apply to TWC online or by phone. You will need to provide the business name and address of your employer, the first and last dates of employment, the number of hours worked, rate of pay, and your social security number or alien registration number if you are not a US citizen or national.

- To apply online, see <https://twc.texas.gov/jobseekers/unemployment-benefits-services>. Review the online benefits tutorial for help and answers: <https://www.twc.texas.gov/files/jobseekers/apply-for-benefits-online-tutorial-twc.pdf>.
- To apply by phone, call a TWC customer service representative at 800-939-6631. For Relay Texas (TTY to Voice): dial 7-1-1 or 800-735-2989; Relay Texas (Voice to TTY): 800-735-2988.

If you are eligible for DUA, TWC will mail information to you about your benefit amount, how to request payments, and other information.

You must complete your work search registration at [WorkinTexas.com](http://WorkinTexas.com) or your local Workforce Solutions Office within three (3) days of applying for DUA. A list of local workforce solutions offices can be found at <https://www.twc.texas.gov/directory-workforce-solutions-offices-services>. You do not have to register if you were self-employed at the time of the disaster and are taking steps to reopen your business. If you do not plan to reopen your business, you must complete a work search registration and seek work.

To receive DUA benefits, you must submit proof of employment with the employer that was affected by the disaster (a pay stub, earnings statement, written statement from your employer or notarized statement from a co-worker) to the TWC within twenty-one (21) days of the date the DUA application is filed. Failure to submit the required documentation within the twenty-one-day time period may result in denial of eligibility for DUA. For more detailed information, see the TWC page on DUA: <https://www.twc.texas.gov/jobseekers/disaster-unemployment-assistance>.

**Q. 6-6      *How do I get proof of prior wages or earnings?***

To obtain proof from the Internal Revenue Service (IRS) of prior income/earnings, file [IRS Form 4506-T](#), Request for Transcript of Tax Return, with the IRS. Write in the name of the disaster, for example "DISASTER [name of storm]," in red letters across the top of the forms to expedite processing. Submit the form according to the instructions. For help, call the IRS Disaster Assistance Hotline at (866) 562-5227. The IRS Resource Guide has links to Disaster Assistance and Emergency Relief Programs at <https://www.irs.gov/businesses/small-businesses-self-employed/disaster-assistance-and-emergency-relief-for-individuals-and-businesses>.

**Q. 6-7      *Are unemployment insurance benefits taxable?***

Yes. Any UI benefits, including federal DUA benefits, are taxable income. You will be issued a Form 1099-G at the end of January the following year showing the amount of benefits paid to you, as well as any federal income tax withheld at the time the benefits were paid. The amount on the 1099-G will not show credit for any repayments made for overpaid benefits. If you repaid any benefits, be sure to keep records of payments, such as reimbursement receipts or canceled check notices, to make adjustments to your taxable income when you file your tax returns.

**Q. 6-8      *What DUA benefits are available?***

If you are eligible, DUA is available for weeks of unemployment beginning after the date the president makes a disaster declaration and for up to twenty-six (26) weeks after the major disaster. For Texas employment, the maximum weekly benefit amount will be determined by the TWC. For more information, visit the TWC page on DUA: <https://www.twc.texas.gov/jobseekers/disaster-unemployment-assistance>.

**Q. 6-9      *Where can I get help finding new employment?***

Reemployment services are available through Texas Workforce Centers. For more information, see <http://www.WorkInTexas.com>. Visit <https://twc.texas.gov/directory-workforce-solutions-offices-services> to find the Workforce Solutions office nearest you.

**Q. 6-10** *Is my employer required to continue my health insurance if my employment is reduced or I've been laid off?*

An employer may be required to extend employer-based group health benefits under COBRA continuation coverage if benefits are lost due to certain qualifying events, including:

- most voluntary or involuntary terminations,
- a reduction in hours triggering a coverage loss, or
- the death of the covered employee.

The continuation period under COBRA generally is eighteen (18) months. This does not mean that coverage is free. Your employer may charge up to 102 percent of the cost of providing coverage to a similarly situated active employee under the group health plan. Under the American Rescue Plan (“ARP”), certain COBRA qualified beneficiaries are eligible for premium assistance during the period from April 1, 2021, through September 30, 2021. During this period Assistance Eligible Individuals are not required to pay their COBRA continuation coverage premiums and employers or plans to whom the premiums are payable are entitled to a tax credit for the amount of the premium assistance. For more information on premium assistance eligibility and how ARP has modified COBRA benefits, please visit: COBRA Premium Subsidy: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy> or FAQs About COBRA Premium Assistance Under the American Rescue Plan Act of 2021: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-premium-assistance-under-arp.pdf>.

Certain employers, including small employers, may be exempt from COBRA. If your employer ends the group health plan for active employees, it is not required to extend coverage through COBRA. For more detailed information, see An Employee’s Guide to Health Benefits Under COBRA: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/an-employees-guide-to-health-benefits-under-cobra.pdf>.

**Q. 6-11** *What happens to my family’s coverage under the Affordable Care Act (ACA) during disaster?*

If you are having trouble making your premium payments because your wages have been impacted by disaster, contact your health insurance provider directly and let them know the reason. If you are displaced due to disaster and must use an out-of-network provider, you must check your policy. Each health plan will have different policies regarding out-of-network reimbursement. Call the number listed on the back of the insurance card or visit the insurer’s website. If you lost your card, contact the Marketplace Call Center ([HealthCare.gov](http://HealthCare.gov)) at 800-318-2596 (TTY: 855-889-4325).

**Q. 6-12** *Who do I contact if we’re on Medicaid or CHIP?*

Your coverage should not be affected. If you have questions, visit the Texas Health and Human Services page on coordinating your services: <https://hhs.texas.gov/services/health/medicaid-chip/medicaid-chip-members/help-coordinating-your-services>. Alternatively, for Medicaid, call the Texas Health and Human Services Medicaid Client Hotline at 800-252-8263. For CHIP, call 877-543-7669 or 800-647-6558.

**Q. 6-13      *If my worksite temporarily closes, will I get laid off?***

In some circumstances, it may make sense for your employer to place its employees on unpaid administrative leave status (temporary leave) while the office or other worksite regroups. If your employer's benefits plan permits continuation of coverage during unpaid administrative leave, you might be able to maintain coverage without a gap. Ask your employer about temporary reduced work hours and other alternatives to full employment while your employer is in a disaster recovery period.

**Q. 6-14      *Can my employment be terminated without notice or cause?***

Generally, yes. Texas is an employment-at-will state. This generally means that if an employer does not like the way you performed aspects of the job, you failed to follow workplace policies, or your services are simply no longer needed, your employer can fire you unless the firing is otherwise unlawful. Although "at-will" employment is the general rule, there are many exceptions. See the section titled "Prohibited Employment Discrimination & Wrongful Termination" above for more information.

The Worker Adjustment and Retraining Notification (WARN) Act, [29 U.S.C. § 2101](#) *et seq.*, requires that employers with 100 or more employees provide sixty days' notice before a mass layoff or a plant closing of at least thirty days. A "mass layoff" occurs when a third of employees are fired at worksites of fifty or more or when 500 or more employees are fired at a large worksite.

If the closing or layoff is a direct result of a natural disaster, employers must still give as much notice as possible, even if that notice comes after the disaster. Notice should be in writing and tell employees whether the layoff or closing is permanent or for six months or less, the date (within a fourteen-day period) that employment will end, and the contact information for the person within the company who can provide additional information. The employer must give written notice to the bargaining representative of affected union employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss.

If you do not receive proper notice, you may be due back pay and benefits for up to the sixty-day notice period. For more information, see the Department of Labor page on WARN Act Compliance Assistance: <https://www.dol.gov/agencies/eta/layoffs/warn>.

**Q. 6-15      *Are there any legal restrictions against firing, suspending, or disciplining employees?***

Various state and federal laws prohibit discrimination in hiring, discipline, discharge, and other terms and conditions of employment for other reasons. Please see the section titled "Prohibited Employment Discrimination & Wrongful Termination" above for more information.

An employer may not discharge or in any other manner discriminate against you if you leave work to participate in a general public evacuation ordered under an emergency evacuation order. [Tex. Lab. Code § 22.002](#). An emergency evacuation order is an official statement issued by the governing body of Texas or a political subdivision of Texas recommending evacuation of all or part of the population of an area stricken or threatened with a disaster. It includes a declaration of local disaster under [Texas Government Code § 418.108](#).

If you are discharged in violation of [Texas Labor Code § 22.02](#), you are entitled to reinstatement in the same or an equivalent position and pay. [Tex. Lab. Code § 22.003](#). Chapter 22 does not apply to certain emergency personnel (e.g., firefighters, peace officers, medical personnel) if the employer provides emergency shelter for those personnel. It also does not apply to workers necessary to provide for the safety of the general public and restoration of vital services. [Tex. Lab. Code § 22.004](#).

**Q. 6-16** *Am I entitled to take leave to deal with my own or a family member's serious health problem?*

Your employer may have a sick leave or vacation policy that entitles you to a period of paid leave. In addition, the federal [Family and Medical Leave Act](#) (FMLA) may provide up to twelve weeks of unpaid leave to eligible employees for certain family and medical reasons. The FMLA applies to employers with at least fifty (50) employees. To be eligible, you must have worked for your employer for at least twelve months (need not be consecutive) and worked for at least 1,250 hours over the year preceding the need for leave. You can take leave for a serious health condition that prevents you from performing your job or to care for a spouse, child, or parent who has a serious health condition. You can continue your existing group health coverage and are entitled to reinstatement at the end of the leave. You will need to let your employer know that you or a family member has a serious health condition for which you require leave.

**Q. 6-17** *I had to evacuate and need to get my pay. What do I do?*

If your wages are not direct deposited in your bank account, make sure your employer has your current address. Direct your employer to send your pay to you by registered mail. If you want to have someone receive or pick up your wages on your behalf, you must provide written consent to your employer to send or give your pay to that person.

**Q. 6-18** *Can my employer make me use leave time if I can't make it to work during a disaster?*

Do not assume that you can leave work or not report to work during a disaster unless there is an official evacuation order. Under Texas law, your employer may not fire or discriminate against you for leaving work as part of an emergency evacuation order. [Tex. Lab. Code § 22.02](#). An emergency evacuation order is an official statement by the government recommending evacuation because of a disaster or potential disaster. If there is no emergency order, your absence may be considered personal leave, unauthorized leave, or possibly grounds for termination, depending on your employer's policies.

For exempt employees, your employer must pay your full salary if the worksite is closed or unable to reopen due to disaster or weather for less than a full work week. If you perform any work during the work week, you are entitled to be paid your full salary, but you may be required to exhaust your accrued personal leave. If your worksite is open and you choose to stay home because of weather, road closures, transportation issues, or other emergencies, the U.S. Department of Labor considers these personal absences. Your employer may deduct from your salary for any full days during which you do not perform work and you chose not to come into the workplace.

For non-exempt employees (those entitled to overtime pay), employers are required to pay only for the hours that you have actually worked. You are not entitled to pay if your employer is unable to provide work due to a natural disaster.

**Q. 6-19     *My employment has been terminated. When will I get my final paycheck?***

Contact your employer immediately to let them know where to send your final paycheck. If you quit, you are entitled to be paid your wages in full by the next regular payday. If you were fired, you are entitled to your full paycheck within six days of the date you were fired. [Tex. Lab. Code § 61.014](#). “Final pay” includes regular wages, fringe benefits payable under a written policy, and any other component of your pay. Read your employment manual or contract. For wage complaints, call the Texas Workforce Commission at 800-832-9243. For more information, see the TWC page on [final pay](#).

**Q. 6-20     *How does the coronavirus (COVID-19) pandemic impact my unemployment benefits?***

While certain COVID-19-related unemployment benefit programs previously were available, Texas ended its participation in those programs effective June 26, 2021. If you live outside of Texas, please consult resources applicable to your state to find out what programs might be available.

**Q. 6-21     *What if I am unable to go into work due to COVID-19?***

Under the Families First Coronavirus Response Act, two new emergency paid leave requirements were created: The Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), as amended by the CARES Act and extended by ARPA.

EPSLA requires covered employers to provide employees two weeks of paid sick leave to the extent such employee is unable to work due to certain specified COVID-19 related circumstances. EFMLEA requires covered employers to provide twelve workweeks of expanded family and medical leave to those who are unable to work because they are caring for a child due to COVID-19 related circumstances. Under EPSLA, based on the COVID-19 circumstance, the eligible employee is entitled to either two-thirds or all of his or her full pay. Under EFMLEA, the eligible employee is not entitled to pay for the first two weeks of their expanded leave. They may substitute paid sick leave under EPSLA, or paid leave under the employer’s preexisting policies. After the first two weeks, they are entitled to two-thirds of their full pay for the ten remaining weeks. The pay under both EPSLA and EFMLEA is capped.