

TRILA
Texas RioGrande Legal Aid



**LEGAL ISSUES
AFFECTING
DOMESTIC WORKERS**
A GUIDE FOR WORKER ADVOCATES IN TEXAS

2012 Edition

A Publication by Texas RioGrande Legal Aid
4920 N IH 35, Austin, Texas 78751
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Introduction

This manual is created as a reference for labor advocates and lawyers that help domestic workers assert their legal rights under Texas and federal law. In this manual, “domestic worker” applies to that broad category of workers who are typically employed by a private homeowner and work in a private home or residence, often as the employer’s sole employee.

This manual is intended as a guide only, and is not a substitute for legal advice. Nonlawyer advocates should review Appendix A (attached) on what may constitute the unauthorized practice of law in Texas.

We hope you find this manual helpful. We welcome your questions, comments and suggestions for improvement and the inclusion of additional legal topics. Please contact us at:

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Special thanks to the
National Employment Law Project,
www.nelp.org, and Jen Lee
for their contributions to this project.

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**PART ONE:
LABOR LAWS AFFECTING DOMESTIC WORKERS**

LABOR LAWS

PART ONE: LABOR LAWS AFFECTING DOMESTIC WORKERS

1. Labor Laws

The following is a brief overview of laws affecting domestic workers that are discussed throughout this manual.

1.1 Not Required by Federal Law

Many common employment practices commonly taken for granted are not legally required. Other employment practices may be required by state law. Texas has few legal protections for workers that exceed the federal minimum.¹ Absent a collective bargaining agreement or other contract, federal law does not require employers to provide:

- vacation, holiday, severance, or sick pay;
- meal or rest periods, holidays off, or vacations;
- premium pay for weekend or holiday work;
- pay raises or fringe benefits;
- a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees²

1.2 Federal Labor Laws

Fair Labor Standards Act

The Fair Labor Standards Act of 1938³ (FLSA) established a national minimum wage and guaranteed ‘time-and-a-half’ for overtime in certain jobs, unless the employer can claim an exemption from coverage.

The 1974 amendments to the FLSA extended its coverage generally to “domestic service employees,” a term with a specific legal definition under the FLSA that includes several qualifications and exemptions.

Federal Civil Rights Laws

Laws protecting employees from discrimination based on age, race, religion, citizenship, national origin, disability, and immigration status only apply to employers with multiple employees (usually more than 15, depending on the law).⁴ For this reason, federal civil rights protections do not apply to most domestic workers, who are often their employer’s sole employee.

¹ As discussed elsewhere in this manual, Texas requires an earnings statement to be provided each time wages are paid Tex. Labor Code § 62.053(4); terminated workers are entitled to payment in full within six days of discharge Tex. Labor Code § 61.014(b).

² See the US Department of Labor, Wage and Hour Division’s “Handy Reference Guide to the Fair Labor Standards Act” available for free download at www.dol.gov/elaws/esa/flsa.

³ 29 USC §201 et seq.

Equal Pay Act

Unlike federal civil rights laws, the Equal Pay Act of 1963 (EPA)⁵ applies to employers regardless of the number of employees. It protects men and women who perform substantially equal work in the same employment from gender-based pay inequities. Standards of proof are more relaxed under the EPA than Title VII and other federal civil rights laws.⁶

Fair Pay Act

The Fair Pay Act of 2009⁷ is a companion to the EPA. The Act modifies the current statute of limitations for wage discrimination and equal pay claims to re-set with every new paycheck. Limitations now run from the date the employer makes the discriminatory wage decision (the most recent paycheck) rather than the first act of discrimination.⁸ Under the EPA, as amended, the two-year statute of limitations runs from the most recent (unequal) paycheck, rather than the first (unequal) paycheck.

1.3 Texas Labor LawsTexas Minimum Wage Act

The Texas Minimum Wage Act⁹ establishes a minimum wage for employees covered under the Act. Texas adopts the federal minimum wage rate by reference, so that any change to the federal wage rate automatically results in a corresponding change to the legal minimum wage in Texas.

Texas Civil Rights Laws¹⁰

Texas law does not offer civil rights protection for workers beyond the federal minimum, and incorporates many federal civil rights laws by reference. Texas tracks federal Title VII antidiscrimination provisions that apply only to employers with 15 or more employees, effectively excluding the majority of domestic workers.¹¹

Participation in emergency evacuation

Texas employers cannot discriminate or lawfully fire a worker who leaves the job to participate in an emergency evacuation.¹² This law applies to all Texas employers regardless of the number of employees.¹³

⁴ Laws that do NOT apply to most domestic workers include:

- Title VII of the Civil Rights Act of 1964 (Title VII), prohibits employment discrimination based on race, color, religion, sex, or national origin. Applies to employers with 15 or more employees.
- Title I and Title V of the Americans with Disabilities Act of 1990, as amended (ADA), prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments. Applies to employers with 15 or more employees
- The Age Discrimination in Employment Act of 1967 (ADEA), protects individuals who are 40 years of age or older. Applies to employers with 20 or more employees.
- The Immigration and Reform and Control Act of 1986 (IRCA), prohibits employers from discriminating against employees or applicants based on their citizenship or national origin and makes it illegal to knowingly hire or recruit illegal immigrants. Applies to employers with 4 or more employees.

⁵ 29 USC § 206(d). To be equal work, the work must “require equal skill, effort, and responsibility, and be performed under similar working conditions.” A man and a woman who perform the same job should be paid the same. There are exceptions if the difference is pay is based on “a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor other than sex.” *Id.*

⁶ Under the EPA a worker may file a lawsuit up to two years after the last inequitable “act” (as, for example, a paycheck) occurred. If the employer’s actions were willful and intentional, the worker has up to three years to file. Remedies under the EPA also include liquidated damages of double back pay, which is not part of recovery under Title VII.

⁷ Lilly Ledbetter Fair Pay Act, 29 USC §§ 621-634.

⁸ The Fair Pay Act was a direct answer to the *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), a U.S. Supreme Court decision holding that the statute of limitations for presenting an equal-pay lawsuit begins on the date that the employer makes the initial discriminatory wage decision, not at the date of the most recent paycheck, as the lower court had ruled.

⁹ Tex. Labor Code § 62.001, et. seq. The Texas Workforce Commission is charged with the responsibility to provide information and to enforce the Act.

¹⁰ An overview of state antidiscrimination laws is available from the Texas Workforce Commission at <http://www.twc.state.tx.us/crd/facts.html>.

¹¹ Tex. Labor Code § 21.002(8)(A). The Texas Workforce Commission – Civil Rights Division is charged with investigating complaints of workplace discrimination. Tex. Labor Code § 21.0015.

¹² Tex. Labor Code Ch. 22.

¹³ Tex. Labor Code § 22.001(5).

**DOMESTIC WORKERS
AND
FAIR LABOR STANDARDS**

2. Domestic Workers and Fair Labor Standards

2.1 Presumption of Employment

Labor laws apply only to “employees.” An “employee” is a worker who works under the direction or control of an employer who, as part of the employment, assumes wage reporting and tax responsibility for the employee.

The employer-employee relationship creates a legal presumption of employment; that is, the worker is an “employee,” not an independent contractor, unless the employer can prove otherwise.¹⁴

Employers may inadvertently or deliberately circumvent labor rights by misclassifying a worker as an “independent contractor.” Domestic workers are especially vulnerable to misclassification. Employment agreements are often cash-based and informal, with both worker and employer lacking a clear understanding of their legal rights and responsibilities.

2.2 “Domestic Service Employment”

Only workers engaged in “domestic service employment” are entitled to labor protection under the FLSA. “Domestic service employment” is defined as services performed by an employee in a private home of the person by whom she is employed. It includes cooks, waiters, butlers, maids, housekeepers, caretakers, handymen, gardeners, and chauffeurs. It also includes babysitters and nannies who are not employed on a “casual” or intermittent basis.¹⁵ It does not include in-home aides, companion caregivers, and other untrained workers hired to care for elderly or infirm persons in a private home.

Two conditions underlie the legal definition of “domestic service employment”:

- The home/workplace must be a private residence (including a temporary vacation home).
- The domestic service activities must be connected to and take place in the employer’s residence.

A worker employed by a boarding house is not in domestic service because a boarding house does not qualify as a private residence. A worker employed by a business that operates from a private residence (such as real estate agent or lawyer’s office) is not engaged in domestic service because the work is connected to the business, not the residence.¹⁶

¹⁴ For the commonly accepted legal test to determine whether the worker is an employee, consult IRS Publication 15-A, www.irs.gov/pub/irs-pdf/p15a.pdf (PDF). Another IRS resource for understanding the work relationship in legal terms may be viewed at www.irs.gov/businesses/small/article.

¹⁵ FLSA § 13(a)(15); 29 CFR § 552.3.

¹⁶ FLSA § 13(a)(15), 29 CFR § 552.101.

2.3 Babysitters and Nannies

The FLSA defines “babysitting services” as the custodial care and protection of infants or children in the private home where the infants or children reside.¹⁷ To qualify for minimum wage and overtime under the FLSA, the work must be regular, not casual or intermittent.

Regular Babysitters

Regardless of hours worked per week, a babysitter is protected by labor laws if her services are:

- provided on regular basis, and
- take place primarily in the employer’s private home.

“Casual” Babysitters

The FLSA does *not* apply to “casual” or intermittent babysitters. A casual babysitter is a person who cares for children in the employer’s home but is not on a regular schedule, babysitting is not her vocation, and she does not depend on child care for her livelihood.¹⁸

2.4 Cooks and Maids

A worker hired by a private employer to cook and/or clean the employer’s home is, by definition, a domestic service worker covered under the FLSA, and is entitled to the prevailing minimum wage and overtime.

2.5 Companion Workers, Aides to the Elderly, Personal Attendants

FLSA Does Not Apply

Untrained and unlicensed domestic workers employed as in-home caregivers are not classified as “domestic service employees” under the FLSA, and are not entitled to minimum wage or overtime.¹⁹

This category of workers includes companion caregivers, in-home aides, personal attendants and others without formal training that care for elderly, infirm or disabled persons in a private home, whether hired through an agency or by a private employer. Duties may include some housework, meal preparation, bed making, clothes

¹⁷ FLSA § 13(a)(15), 29 CFR § 552.103.

¹⁸ FLSA § 13(a)(15); 29 CFR § 552.5.

¹⁹ 29 USC § 213(a)(15); Tex. Labor Code § 62.154; § 62.151. Efforts by labor rights organizations to reclassify this category of domestic workers have yet to be successful. See e.g., the National Employment Law Project’s

2011 policy brief “Fair Pay for Home Care Workers – Reforming the Department of Labor’s Companionship Rules under the Fair Labor Standards Act,” www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf.

washing and other services related to the care of another person who, for reasons disability or age, cannot care for herself. Regular babysitting services are excluded.

20% rule

A companion worker whose duties include other chores not directly related to the care of another person may be entitled to minimum wage if those duties exceed 20% of her work time. A companion worker who spends more than 20% of her work time in “domestic service” – babysitting, general housekeeping, cooking — is entitled to minimum wage and overtime for the entire pay period, not just for the hours devoted to domestic service.

Example: James is an elderly man who lives with his adult daughter, Emily, and her family, in Emily’s home. Emily hires Delia as a companion caregiver for James for 35 hours each week at the rate of \$5 per hour. Delia soon learns she is expected to watch Emily’s children after school, tidy the house, and prepare dinner before leaving for the day. These duties, unrelated to caring for James, account for at least 10 hours of Delia’s 35-hour week. Because 10 hours exceeds 20% of her work time, Delia is legally entitled to minimum wage (\$7.25) for each of the 35 hours worked during that week.

Employment agreement

Companion workers should have a clear written agreement with the employer setting forth job duties as well as tasks the job does *not* include. Keeping a weekly work log can help the worker evaluate how much time is spent on domestic work that is unrelated to the job she was hired to do.

2.6 Nurses and Other Trained Workers

Nurses and other licensed workers in Texas who are paid on an hourly basis are entitled to minimum wage and overtime. These include: Physician’s Assistants (PA), Registered Nurses (RN), Nurse Practitioners, Licensed Vocational Nurses (LVN), Speech, Physical and Occupational Therapists, Speech, Physical and Occupational Therapy Assistants, and Certified Nurse’s Aides (CNA).²⁰

Licensed workers who receive a weekly salary of more than \$455 are exempt from minimum wage and overtime laws.

²⁰ Nurse classifications defined, see Tex. Admin. Code § 217.1.

2.7 Gardeners and Yard Maintenance Workers

Gardeners or yard workers who provide their own equipment, set their own work schedule, and have the discretion to hire other workers as needed are independent contractors who are exempt from the FLSA's minimum wage and overtime rules.

Gardeners and yard workers employed by a single household, whose work hours are set by the employer, and whose tools are supplied are not exempt from the FLSA, and are entitled to minimum wage and overtime.²¹

²¹ 29 CFR § 552.107.

WAGES

3. Wages

3.1 Wage Laws

Federal Minimum Wage Law

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards for private sector workers. Workers covered under the FLSA are entitled to federal minimum wage, currently \$7.25 per hour.²² Overtime pay (for work in excess of 40 hours per week) must be paid at a rate of at least one and one half times the federal minimum wage.²³ The current federal minimum overtime rate is \$10.88 per hour.²⁴

Texas Minimum Wage Law

Unlike many states, Texas' minimum wage law is not based on a dollar minimum. Instead, Texas has adopted the federal minimum wage rate by reference,²⁵ so when the federal minimum wage rate changes, Texas' minimum wage changes along with it.

3.2 Minimum Wage Cannot be Waived

All workers covered under the FLSA have the right to be paid minimum wage or higher. *The right to minimum wage is a legal right. It cannot be waived by the worker or employer.* Any agreement to be paid less than minimum wage is legally void and unenforceable.

3.3 Wages for Domestic Workers

Domestic Workers are Covered by FLSA

Domestic workers are by definition entitled to minimum wage and overtime:²⁶

“Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the [minimum wage] or

²² 29 USC § 206(a)(1)(C).

²³ 29 USC § 206(a)(2)(C).

²⁴ A state minimum wage can exceed the current federal rate of \$7.25 per hour. Workers in Washington State are paid a minimum of \$8.67 per hour, (the highest in the nation). Federal law supersedes states like Georgia, with a minimum wage of \$5.15 per hour but workers must be paid the federal minimum of \$7.25. Local governments may set their own wage rate above the state or federal minimum through a local living wage or minimum wage ordinance. California's minimum wage is \$8.00 per hour,

but workers in San Francisco benefit from a living wage ordinance that mandates a minimum \$9.79 per hour.

²⁵ Tex. Labor Code § 62.051 “[A]n employer shall pay to each employee the federal minimum wage under Section 6, Fair Labor Standards Act of 1938 (29 USC Section 206).” Texas is among the twenty-four states whose minimum wage coincides with the federal minimum. A breakdown by state may be found at the Department of Labor's website, www.dol.gov/whd/minwage/america.

²⁶ FLSA § 13(a)(15), 29 CFR § 552.103.

(2) who in any workweek—

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the [minimum] wage rate.”²⁷

“Live-in” and Live-out”

A domestic worker is entitled to minimum wage regardless of whether she is “live in” (resides with her employer) or “live out” (resides elsewhere).²⁸

If the worker is *live-in*, she is entitled to minimum wage or higher regardless of hours worked, but all hours are paid at the same rate – there is no overtime wage differential. In contrast, the *live-out* worker is entitled to at least the minimum wage as well as overtime at the rate of 1.5 times her hourly rate for each hour worked in excess of 40 in one week.

Multiple Households

An employer of a domestic employee cannot arrange for her to provide services to more than one household, unless her pay and overtime is based on an aggregate of her time spent working at all the households.²⁹

3.4 Earnings Statement

Texas law requires employers to provide a written earnings statement to each employee that must include specific information.³⁰ An earnings statement can be included on check stub or as a separate written statement. It can also be emailed to the worker to coincide with a direct deposit of wages into the worker’s bank account.

The earnings statement must include:

- Deductions from pay
- Net wages
- Beginning and ending dates of the pay period.
- Employee name
- Employer’s name and address.

²⁷ 29 USC § 206 (f), “Minimum Wage.”

²⁸ 29 USC § 552.102(a) “Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day.”

²⁹ 29 USC 207(l) “No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.”

³⁰ Tex. Labor Code § 62.053.

Cash Payments

An earnings statement is required by law to be provided to the worker every time she is paid, regardless of the form of payment. There is no exception for wages paid in cash.

Workers should be advised to keep earnings statements and check stubs in a safe place, in case pay or deductions from pay are disputed.

3.5 “Salaried” versus Hourly Payment

Domestic workers may be paid a set amount for a job, (for example, \$100 weekly for maid service in private home) regardless of the amount of time it takes to complete the job. To find out whether a domestic worker is being paid minimum wage, divide her salary by the hours worked.

Example: Assume that Jane is a live-out domestic worker in Texas who has agreed a salary of \$100 each week to clean a residence. It takes 16 hours each week to fulfill her job duties, bringing her actual rate of pay down to \$6.25 per hour, which is \$1 below the minimum of \$7.25. Jane is entitled to an additional dollar (difference between \$7.25 an hour and her actual rate) for each hour worked, or an additional \$16, to make up the wage deficit.

A work agreement can set forth an hourly rate with a guaranteed weekly minimum of work hours. A guaranteed weekly minimum expressed in hours worked meets the worker’s desire for predictable weekly earnings, while protecting her right to receive minimum wage.

For any employment agreement, domestic workers should:

- Agree on an hourly rate in writing (and a weekly base guarantee if appropriate),
- Keep a written record of hours worked, and
- Make sure that they are paid for all hours worked at the appropriate rate.

3.6 Payment Intervals

An employer must set regular paydays and pay employees on that day. Workers are entitled to be paid at least twice a month, with each pay period being as near as possible to an equal number of days.³¹ An employer may pay more than twice a month, but neither the worker nor employer can agree to payment *less* than twice a month.

³¹ Tex. Labor Code § 61.001(b), (c).

If the employer doesn't designate the two-week intervals, Texas law presumes that the employer must pay wages on the first and 15th day of every month.³² All work done from the 1st to the 15th of the month must be paid no later than the 26th, and work done from the 16th to the last day of the month must be paid no later than the 10th of the following month.

Overtime – When Paid

If entitled to overtime, overtime wages must be paid on the regular payday for the period in which that workweek ends.³³ If overtime cannot be calculated in time for the next pay period, it must be paid no later than the following regular payday.³⁴

3.7 Form and Method of Payment

Texas Payday Law

Except for public employers, all Texas businesses, regardless of size, must comply with the Texas Payday Law.³⁵ Under the law, an “employer” is defined as someone who employs one or more people.³⁶ Anyone that performs a service for compensation is an “employee” (except close relatives and independent contractors) and is entitled to the protection of the Texas Payday Law and FLSA provisions.³⁷

Under the Texas Payday Law, wages are considered paid by meeting the following legal criteria:

“(a) An employer has paid an employee’s wages for purposes of the [Texas Payday Law] if the employer has delivered the wages to the employee:

- (1) in a *form* authorized by § 61.016 of the Act; and
- (2) by a *method* authorized by § 61.017 of the Act.”³⁸

Form of Payment

Texas law requires employers to pay the worker in dollars by cash, check or by electronic funds transfer. An employee may agree, but only in writing, to have all or part of her wages paid in kind or in another form.³⁹

32 Tex. Labor Code § 61.012.

33 29 CFR § 778.106.

34 Id.

35 Tex. Labor Code § 61.001 et. seq.

36 Tex. Labor Code § 61.001(4), (5).

37 Tex. Labor Code § 61.001(3).

38 Tex. Labor Code § 61.001(3) (emphasis supplied)

39 Tex. Labor Code § 61.016.

Releases and vouchers

It is illegal for an employer to agree to pay any employee on the condition that she sign an agreement releasing the employer from liability for unpaid wages. Any release signed by the worker for this purpose is void on its face, and does not preclude a claim for wages owed.

Similarly, an employer cannot pay a worker with a “voucher” or by any means that may be subject to a service charge. Payment must be made in U.S. currency for the amount stated in the written earnings statement.

Method of Payment

A Texas employer may pay a worker’s wages by:

- delivering them to the worker at her regular place of employment and during regular employment hours;
- delivering them to the worker at an agreed time and place;
- sending them to the worker by registered mail to be received by her on or before payday;
- delivering them to another person designated by the worker in writing; or
- delivering them by any reasonable means authorized by the employee in writing.
- If the worker maintains a bank account, the employer can elect to pay wages into the account by direct deposit.⁴⁰

3.8 Bounced or Stopped Payment

If a paycheck is refused based on the fault of the employer, it is not considered a “payment of wages” under Texas law.⁴¹ An employer cannot claim that the worker was “paid” if the paycheck is:

- dishonored due to insufficient funds, a stop-payment order or any other reason attributable to the employer;
- the employer has caused a direct deposit of the wages to be reversed; or
- the employer has taken other similar action to undo the payment of wages.⁴²

A bounced or dishonored payment from an employer is the same as no payment at all, and the worker can bring a wage claim on this basis.

⁴⁰ Tex. Labor Code § 61.017.

⁴¹ Tex. Labor Code § 61.016(c).

⁴² Tex. Labor Code § 61.016; see also Tex. Admin. Code § 821.21 (Administrative rules governing Texas Workforce Commission wage claims).

3.9 Final Payment

Regardless of whether the worker is fired or quits, she is entitled to final payment. Under the Texas Payday Law, discharged workers are entitled by law to be paid in full no later than six days after discharge or termination.⁴³ For all other workers, the employer must pay final wages “in full” not later than the next regularly scheduled payday.⁴⁴

3.10 Late Pay

There is no grace period or “late pay” for an employer to pay regular wages. “Late pay” is the same as “no pay” under the FLSA. The law requires payment of wages “when due,” which normally means at the next regularly scheduled payday. For overtime pay, an employer can wait until the next payday to pay overtime accrued during the preceding pay period.

Wage Dispute No Excuse

If there is a disagreement about the amount of wages owed, the employer still must pay the undisputed amount (the wages the employer acknowledges are due). A worker’s claim that more is owed does not give the employer the right to delay the entire paycheck; only the amount in dispute.

Notation on paycheck

An employer who writes “payment in full” or similar language on the check does not release the employer from a claim for unpaid wages. The worker is entitled to cash the check regardless of the notation, and is not barred from making a claim for unpaid wages.

In this situation, the worker should:

- make a copy of the check
- cross out any notation on the check before cashing it.

This lets her employer know that she is not accepting the check as a full payment.

⁴³ Tex. Labor Code § 61.014(a).

⁴⁴ Tex. Labor Code § 61.014(b).

OVERTIME

4. Overtime

4.1 Overtime for Domestic Employees

Domestic workers are entitled to receive overtime pay for each hour worked in excess of forty hours in a single week.⁴⁵ Texas follows federal law with respect to both the set minimum wage and overtime provisions. The hourly rate of overtime pay depends on whether or not the worker lives with her employer:⁴⁶

- *Live Out* – Domestic workers and babysitters who come and go from work each day are entitled to overtime, which may include wage deductions for meals if the employee agrees in writing.⁴⁷ Overtime is paid at a rate of 1.5 times the worker’s regular hourly rate (“time and a half”) for every hour in excess of 40 per week.
- *Live In* - Domestic workers and nannies who reside in the home where they work qualify for overtime at their regular hourly rates for every hour in excess of 40 hours per week. There is no overtime wage differential.⁴⁸ The employer has the right to deduct the cost of meals and lodging from wages if the employee agrees in writing.

Whether live in or live out, the worker can agree to exclude hours spent sleeping, meal time, and other breaks from compensable hours worked. If the worker is not paid during these periods, however, she must be completely free of her job duties; otherwise she is entitled to payment.

4.2 Right to Overtime Cannot be Waived

Like minimum wage, *the right to overtime is a legal right. It cannot be waived by the worker or employer.*⁴⁹ If the worker is entitled to overtime pay, her employer is required to pay it. Any agreement to waive overtime pay, or to be paid less than the overtime rate, is legally void and unenforceable.

4.3 Employer’s “No Overtime” Policy

There is nothing illegal about an employer’s “no overtime” policy. A worker who knows of the policy but disregards it can be disciplined for not following the employer’s rules. Some employers with a “no overtime” policy assign more work than a worker can finish in 40 hours, leaving the worker with no choice but to stay late or take work home to complete. If an employer knows or should know that he is forcing the worker into unpaid overtime, he must pay it or face possible legal sanctions.

⁴⁵ 29 USC § 207(a)(1).

⁴⁶ 29 USC § 213(a)(15) (companionship and casual babysitting exemption).

⁴⁷ 29 USC § 207(l); 29 CFR § 552.100 (a)(1); 29 CFR § 778.116.

⁴⁸ 29 USC § 213(b)(21); 29 CFR § 552.100 (a)(2). Tex. Labor Code § 62.054 provides, in part: “An employer may not be required to pay an employee who lives on the premises ...who is assigned certain working hours plus additional hours when the employee is subject to call for more

than the number of hours the employee actually works[.]”

⁴⁹ The US Supreme Court has held that an agreement between an employer and an employee that minimum wage and overtime will not be paid is void and unenforceable (even in the event of unauthorized overtime): *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697(1945); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925 (1946).

Example: Dan is hired by Carlos to work in Carlos' home as a full-time live-out babysitter for two preschool children. They agree that Dan will work no more than 8 hours each workday, not to exceed 40 hours each week, at a rate of \$10 per hour. Last week Carlos came home late twice, forcing Dan to stay a total of 7 extra hours. Dan is entitled to \$400 regular pay plus an additional \$105 in overtime (7 hours at time and a half).

“Rework” Time

An employee cannot be made to re-do work on her own (uncompensated) time. When an employee must correct mistakes in her work, the time must be treated as hours worked. The correction of errors, or “rework”, are hours worked, even when the employee voluntarily does the rework.

4.4 Work Week and Work Day

Work Week

A “workweek” is defined as seven consecutive days. A domestic employee should be clear on when her workweek starts and ends and get it clarified in writing. If the employer does not define the workweek, it is usually considered to be from 12:01 am on Sunday to midnight the following Saturday. Any hours worked over 40 in a single workweek entitle the employee to overtime.

Work Day

Unlike some other states, Texas employees are not entitled to overtime if hours worked in a single workday exceed 8 hours. A “workday” is generally considered to be any period within 24 consecutive hours beginning and ending at the same time each day. It is up to the employer to define the beginning and ending hours of the employee's workday. If the employer does not, the workday generally begins and ends at midnight.

4.5 Weekends and Holidays

Weekends and holidays are treated like any other workday, and employers are not required to pay overtime or extra wages for these days. Without a written agreement, an employer has unlimited discretion to set the number of work hours in a day for any day (or every day) of the year.

Many employers do not have a holiday policy, especially if the worker is the only employee. This can be an advantage if the employer is open to negotiating time off. The employment agreement should specify, for example, whether the worker is expected to work on Christmas Day, or will receive extra compensation for working Sundays.

4.6 Compensatory Time in Lieu of Overtime

An employer may seek to avoid paying overtime by alternative compensation arrangements. These include requiring a worker to take “compensatory time” in lieu of cash for overtime hours worked or by “averaging hours from pay period to pay period. All such arrangements violate the FLSA and are void, regardless of whether or not the employee agrees to the alternative compensation.

4.7 Calculating Overtime

The rate of overtime pay depends upon the worker’s regular rate of pay and whether she is “live in” or “live out.” To calculate overtime, start by determining the worker’s regular rate of pay.

Regular Rate of Pay

For an hourly employee, the regular rate of pay is their hourly wage, which must be at least \$7.25 for each hour worked. For workers who are paid weekly, the hourly rate is determined by dividing by 40 hours.

Example: Lila works 40 hours each week and is paid \$300.00 every Friday. $\$300.00$ divided by 40 hours = 7.50. Lila’s regular rate of pay is \$7.50 per hour.

Overtime for Domestic Workers

Live-Out

Domestic workers who live away from the home where they are employed are entitled to one and a half (1.5) times their usual hourly rate for each hour in excess of 40 hours in one week.

Example: Assume that Lila is a live-out worker who is paid \$300.00 weekly. One week she works 48 hours (an additional 8 hours). Lila’s overtime rate is 1½ times her regular rate of pay of \$7.50 per hour. $\$7.50$ divided by 2 = \$3.75. $\$7.50 + \$3.75 = \$11.25$. Lila’s overtime rate is \$11.25 for each hour worked in excess of 40 in a week. 8 hours overtime X \$11.25 = \$90.00. Lila’s gross wages for that week are \$390.00.

Live-In

Domestic workers who live where they work are entitled to overtime at their usual hourly rate for each hour worked in excess of 40 per week (no time-and-a-half).

Example: Assume that Linda is a live-in worker whose regular rate of pay is \$7.50 per hour. Linda is paid \$300.00 each Friday, with no deductions for meals or room and board. One week she works 48 hours. Linda's 8 hours of overtime is paid at the normal rate of \$7.50 per hour. $\$7.50 \times 8 \text{ hours} = \60.00 . Linda's gross wages for that week are \$360.00.

4.8 Joint Employers

Any worker can have multiple jobs with different employers and never exceed 40 hours a week for an individual employer.

Example: Anna works 28 hours weekly at Job One and 32 hours weekly at Job Two. Although Anna works a total of 60 hours each week, she is not entitled to overtime from either employer. Each employer is individually responsible for complying with the wage and hour laws.

If one or more employers who employ the same worker are not completely separate and disassociated, they might be "joint employers" under FLSA.⁵⁰ If joint employment is shown, the employers are treated as one and must pay overtime. Some factors showing joint employment are:

- The worker performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek;
- An arrangement exists between the employers to share the worker's services between them;
- One employer acts in interest of the other employer(s) in relation to the worker, either directly or indirectly.⁵¹

In the above example, if joint employment is shown, each of Anna's employers will be treated as one, and are (jointly and severally) liable to pay Anna overtime for 20 additional hours.

⁵⁰ 29 USC §791.2, and cases cited therein.

⁵¹ Id.

WORK TIME AND HOURS

5. Work Time and Hours

The FLSA does not limit the number of hours in a day, or days in a week, a worker may be required or scheduled to work, including overtime hours. Retail workers are protected from working seven consecutive days without a day off.

5.1 Sleep Time

Less Than 24 Hours

Texas employers are not required to provide a sleep break for workers who work less than 24 consecutive hours. If the job requires the worker to stay awake for the entire shift and the worker falls asleep, she can be disciplined or fired.

However, if sleep time is permitted due to the nature of the job, the worker must be paid for all hours spent at work, including time spent sleeping. An employer cannot deduct sleep time from wages without the worker's written permission.

More Than 24 Hours

If a domestic worker is on duty for 24 hours or longer, the employer does not have to pay for a regularly scheduled sleep period of five to eight hours if:

- the employer provides “adequate”⁵² sleeping facilities, and
- the employee gets at least five hours of uninterrupted sleep time.

If the employee does not get five hours of uninterrupted sleep, the entire sleep period must be compensated.

Note: Live-in workers are not entitled to paid sleep time, only for the hours actually spent carrying out assigned duties.

5.2 Travel Time

As a general rule, a worker's time spent traveling “from home to work” and “from work to home” is not counted as work time and is not compensated.

52 29 CFR § 785.22(a) A “sleeping facility” is not considered “adequate” if the employee is made to share a bed.

Travel time during the regular work day is paid time. If time spent travelling occurs between the start and end of the workday, the time cannot be deducted from the worker's total hours.

Example: Mike is a live-out babysitter who drives to work (the children's home) every morning. Today he drove the children to karate lessons, then to the local swimming pool where his employer (the children's mother) picked them up. With the exception of his drive to work, Mike is paid for the entire workday, including travel time.

BREAKS AND REST PERIODS

6. Breaks and Rest Periods

6.1 Federal and State Laws

With the exception of nursing breaks, neither state nor federal law requires employers to provide breaks to adult employees.⁵³ If breaks are offered, however, employers must comply with the state and federal regulations that govern the kind of break provided.

Unlike Texas, other states (such as California) have legislated mandatory rest breaks for employees. Municipalities (such as Austin, Texas⁵⁴) and some counties may also require rest and meal breaks, depending on local laws.

6.2 Types of Breaks

Rest or Coffee Breaks

Rest or coffee breaks are not required by Texas or federal law. If an employer permits a rest break, it must be a paid break if it lasts 20 minutes or less.⁵⁵ The employer can require the worker to remain at the workplace (or private residence) during the break as long as the worker is completely relieved of her job duties during break time. Employers are not entitled to offset a paid break against other working time, such as travel time or compensable waiting time.⁵⁶

Meal Breaks

Meal breaks are not required by Texas or federal law. A meal break is an unpaid break in the worker's day. If the employer allows meal breaks, certain rules apply. An employer does not have to pay a worker for a meal break that is:

- at least 30 minutes in length, (unless special circumstances require a short period), and
- the employee is “completely relieved from duty for the purpose of eating a regular meal”⁵⁷

The employer can decide the time of the meal break, the length of the break (at least thirty minutes) and where it can be taken. Like rest breaks, the worker does not have the right to leave the job site during the break. During the break, the worker must be completely relieved of her duties. If she works through the break, she must be compensated for it.⁵⁸ This raises some questions for domestic workers who provide in-home child care. A

⁵³ Texas is among the many states (others include Georgia, Utah, North Carolina, Arizona, Alaska, and Florida) with no state rest break laws. In these states, employers can require their employees to work a full day, even 16 hours or more, without a break. Workers can be required to work without any days off, although Texas retail employees must have at least one day off every week. Tex. Labor Code § 52.001.

⁵⁴ An Austin city ordinance requires employers of construction workers to give employees a rest break of no less than 10 minutes for every four hours worked, scheduled as near as possible to the midpoint of the work period. No employee may work more than 3.5 hours without a rest break. Employers must post a sign in English and Spanish informing workers of

these requirements. The penalty for failing to post the notice is a Class C misdemeanor, with civil fines of \$100 to \$500 for each day a violation occurs. Austin City Code Title 4, § 4.5.

⁵⁵ 29 CFR § 785.18;

⁵⁶ 29 CFR §§ 785.14; 785.15

⁵⁷ 29 CFR §§ 785.16; 785.19.

⁵⁸ More information on employee break laws is available from the Texas Workforce Commission at www.twc.state.tx.us/news/efted_breaks.

sitter who is employed to care for children while the mother is at work may have agreed to an hour-long lunch break, but if she is not relieved of babysitting duties for that hour, it is not a meal break, and she must be paid.⁵⁹

Nursing Breaks

By law, employers must allow a “reasonable break time” for nursing mothers to express breast milk or to nurse her baby during work hours for at least the first year following the child’s birth.⁶⁰ The law also gives nursing mothers the right to a private place (other than a bathroom) to nurse or express milk undisturbed.

Employers with less than 50 employees are exempt if it can be shown that nursing breaks cause an “undue business hardship.”

Nursing breaks are considered unpaid breaks, but a worker can take a nursing break during a regular paid rest break.

Texas law

In addition to the federal requirement, Texas law provides that:

- “A mother is entitled to breast-feed her baby in any location in which the mother is authorized to be.”⁶¹
- “A business may use the designation ‘mother-friendly’ in its promotional materials if the business develops a policy supporting the practice of worksite breast-feeding”⁶²

⁵⁹ For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. *Hill v. United States*, 751 F.2d 810 (6th Cir. 1984). affirming cases noted in 29 CFR § 785.19

⁶⁰ Patient Protection and Affordable Care Act (“PPACA”) signed into law on March 23, 2010 (P.L. 111-148). This law amended § 7 of the FLSA. The duration of a “reasonable break time” has not been determined.

⁶¹ Tex. Health & Safety Code § 165.002.

⁶² Tex. Health & Safety Code § 165.003.

LEGAL WAGE DEDUCTIONS

7. Legal Wage Deductions

Many wage deductions are for lawful purposes, such as income withholding, health insurance premiums, and cost of worker meals and lodging. Some wage deductions are unlawful, such as the cost of uniforms the worker is required to wear for the job.

To be lawful, wage deductions must be separately stated and identified on the worker's earnings statement or pay stub.

7.1 Payroll Tax and Withholding

"Payroll tax" usually refers to two different kinds of taxes: the tax an employer must pay from its own funds for each worker it employs ("employment tax"), and the taxes withheld from the worker's wages by the employer ("withholding)."

In 2012, payroll taxes are:

- 15.3% of cash wages paid to each worker, of which
 - * 7.65% is paid by the employer from the employer's funds (employment tax), and
 - * 7.65% is paid by the employee, usually through income withholding (unless the employer picks up the employee's share).⁶³

Employment Tax

An employer must pay employment taxes from its own funds for every worker it paid cash wages in excess \$1,800.00 in 2012.

Income Withholding

Employee withholding is not a final tax. It is the employee's prepayment of income tax withheld by the employer, who must then furnish an end-of-year statement (IRS Form W-2) to the worker postmarked no later than January 31 of the new year.⁶⁴ Filing an income tax return can often result in an income tax refund.

The worker's completed W-4 (Employee's Withholding Allowance Certificate) is her written permission to withhold a percentage of her income for taxes. No law requires a worker to sign a W-4. If there is no W-4, or

⁶³ This does not take into account the H.R. 3765, Temporary Payroll Tax Cut Continuation Act of 2011. Signed into law on December 23, 2011, the Act provides a two-month extension to the 2011 payroll tax cut. See the IRS Publication 926, Household Employer's Tax Guide, www.irs.gov/pub/irs-pdf/p926.pdf.

⁶⁴ See IRS W-2 Instructions 2012 at <http://www.irs.gov/pub/irs-pdf/iw2w3.pdf>.

the worker refuses to sign one, the employer is required to withhold income tax from worker wages as if the worker is single with zero allowances.⁶⁵

Regardless of the method of payment (check or cash), a worker is required to pay income taxes unless:

- her annual income is below \$1700.00; or
- her employer pays her share of income taxes.

An employer can agree to pay the worker's income taxes out of the employer's funds and avoid withholding altogether. If the employer pays the worker's taxes (currently 5.65% of her wages) in lieu of withholding, that 5.65% must be reflected as part of the worker's income.

Example: Mike hired Sharon to provide in-home babysitting for wages of \$100 a week. The employment agreement specified that Mike will pay Sharon's share of federal taxes in lieu of withholding it from her income. Sharon's share of income taxes is 7.65% (the current legal rate). Mike must pay an additional \$7.65 for each \$100.00 in wages paid to Sharon. For income tax purposes, Sharon's weekly wages are \$107.65. Mike must also pay employment taxes of 7.65%.⁶⁶

The employer's agreement to pay the worker's share of income taxes should be part of the employment agreement, making it clear that that employer bears the full burden of payroll taxes and the worker is not responsible.

EITC

The Earned Income Tax Credit (EITC) is a refundable federal income tax credit for low- to moderate-income workers and families. When EITC exceeds the amount of taxes owed, it results in a tax refund to those who claim and qualify for the credit. To qualify, taxpayers must meet certain requirements and file a tax return, even if they do not have a filing requirement. The IRS website provides an online tool ("EITC Assistant") for determining EITC eligibility as well as the estimated EITC the worker might receive.⁶⁷

7.2 Child Support

Like most other states, Texas courts may order the employer to withhold funds from an employee's paycheck for court-ordered support (in the following order):

⁶⁵The purpose of the W-4 form is for the employee to report to the employer the number of allowances to be used in calculating the employee's payroll deductions. By providing information such as marital status and number of dependents, the employer can calculate the appropriate withholding for taxes. The W-2 is a document on which an

employer reports the wages for a specific employee for the year.

⁶⁶ See IRS Publication 926, at www.irs.gov/pub/irs-pdf/p926.pdf.

⁶⁷ The EITC Assistant is available in English and Spanish at www.irs.gov/individuals/article/0,,id=96406,00.html.

- current child support (which includes medical support);
- current spousal maintenance;
- child support arrearages; and
- spousal maintenance arrearages⁶⁸

The court's order is binding on employers doing business in Texas regardless of whether the employee owing support lives or works outside of Texas.⁶⁹ The amount withheld for child support purposes cannot exceed 50% of the worker's net monthly income.

7.3 Meals and Lodging

A worker cannot be forced to accept meals and lodging as a substitute for wages. These deductions are legal as long as the worker has agreed in writing and the deduction clearly appears on the worker's pay stub or statement. Meal deductions are void without the worker's written agreement. The agreement can be a separate document, but is often included as part of an employee handbook for which the worker signs an acknowledgment of receipt or agreement.⁷⁰

Once agreed, however, the deductions are permitted even if the worker's pay is reduced below minimum wage.⁷¹ The rules governing meal and lodging deductions are the same regardless of whether privately employed domestic is "live in" or "live out."

Meal Deductions

Employer furnishes meal

Employers who furnish meals for workers can take a standard deduction for meals without maintaining records and receipts. At the current minimum wage (Texas and federal) of \$7.25 per hour, the meal deductions are:⁷²

Breakfast:	\$2.72 per day - up to 37.5% of minimum wage
Lunch:	\$3.63 per day - up to 50% of minimum wage
Dinner:	\$4.53 per day - up to 62.5% of minimum wage
Max. Total:	\$10.88 per day - cannot exceed 150% of minimum for any day ⁷³

68 Tex. Fam. Code § 8.101 et seq.

69 Tex. Fam. Code § 8.107.

70 Tex. Labor Code §§ 61.018, 61.016.

71 29 USC § 203(m).

72 29 CFR § 552.100 (c).

73 *Id.*

Employer does not furnish meal

An employer that does not provide meals has the option to deduct either the actual cost or fair market value of meal, whichever is less, and must keep records and receipts to justify the amount of the deduction.⁷⁴

Lodging Deduction

An employer can provide lodging for a live-in domestic worker and, if agreed, deduct the cost of lodging. The current allowable deduction is seven and a half (7.5) times minimum wage for each week of lodging, and the employer does not need to keep records.⁷⁵ Currently, the lodging deduction is:

Weekly:	\$54.38 (7.5 X \$7.25)
Biweekly:	\$141.38 ⁷⁶ (7.5 X \$7.25 X 26 weeks)
Semi monthly:	\$117.82 (7.5 X \$7.25 X 52 weeks divided by 6 months)
Monthly:	\$235.62 (7.5 X \$7.25 X 52 weeks, divided by 12 months)

As with meals, if the standard deduction is not used, the employer must keep records for at least three years in order to justify the nonstandard deduction.⁷⁷

7.4 Other Lawful Deductions

In addition to meals and lodging, employers are entitled to deduct the actual or fair market value of other items furnished to the employee if the employee agrees to the deduction in writing.⁷⁸

7.5 Offset for Overpaid Wages

An employer who has overpaid wages to an employee may deduct from wages to offset a previous wage overpayment, even if it takes the wages to below minimum. The employer must:

- document the employee's receipt of such wages in advance of the date the wages were due, and
- have written authorization for the deduction/offset from the employee in accordance with the Texas Payday Law.⁷⁹

74 29 CFR § 552.100 (c).

75 29 CFR § 552.100(d).

76 The biweekly amount is greater than the semi-monthly figure because some months have 5 full weeks.

77 29 CFR § 552.100(d).

78 Tex. Labor Code § 61.108.

79 See *Benton v. Wilmer-Hutchins I.S.D.*, 662 S.W.2d 696 (Tex.App. - Dallas 1983; overruled in part in *Orange County v. Ware*, 819 S.W.2d 472, 474 (Tex. 1991). An employer is entitled to offset previously overpaid wages if the employee provides written authorization to do so. An offset is not considered a garnishment in violation of Section 42.001(b)(1) of the Texas Property Code.

ILLEGAL DEDUCTIONS FROM WAGES

8. Illegal Deductions from Wages

8.1 Texas Payday Law and FLSA

The Texas Payday Law⁸⁰ generally tracks the FLSA. Although there are many categories of illegal deductions, common violations occur when:

- An employer's allowable deductions take the employee to below minimum wage (legal), but the employer failed to get written authorization for the deduction from the employee (illegal), or
- An employee has authorized the deduction in writing, but the amount of the deduction or the deduction itself violates the law.⁸¹

8.2 Written Agreement Required

Texas and federal law allow deductions from wages only if there is a *written* agreement with the employee to do so.⁸² The deductions must also be:

- Reasonable,
- Customarily furnished by the employer to the workers, and
- Separately stated and identified on the worker's earnings statement or paycheck.⁸³

8.3 Illegal Regardless of Agreement

A deduction can be illegal even if the worker has agreed to it in writing. For example:

- Employers are not allowed to force the worker to accept food or lodging in lieu of wages.⁸⁴
- Employers cannot charge the worker more than the actual cost of what is provided to her.⁸⁵
- Employers cannot deduct the cost of anything that is primarily for the employer's own benefit, such as safety equipment, tools, or uniforms.⁸⁶
- Employers cannot deduct the cost of housing if the housing violates health or safety regulations.⁸⁷
- Employers cannot deduct more to make up for paying overtime.⁸⁸
- Employers cannot deduct the cost of work-related travel.

80 Tex. Labor Code § 61.018.

81 For example, the amount that can be deducted from wages for payment of child support cannot exceed 50% of the employee's wages. Tex. Fam. Code § 158.009.

82 Tex. Labor Code §§ 61.018, 61.016.

83 Tex. Labor Code § 62.053.

84 29 CFR § 531.30.

85 29 CFR § 531.3(a).

86 29 CFR § 531.3(d).

87 29 CFR § 531.37(a).

88 29 CFR § 531.37(a).

8.4 Unauthorized Deductions

Written Authorization Required

An employer may not withhold or divert any part of an employee's wages unless the employer:

- (1) is ordered to do so by a court of competent jurisdiction;
- (2) is authorized to do so by state or federal law; or
- (3) has written authorization from the employee to deduct part of the wages for a lawful purpose.⁸⁹

An employer may deduct for the following items only if the employee has consented to it in writing:

- cash shortages,
- breakage, damage, or loss of the employer's property,
- required uniforms,
- required tools or other items necessary for employment, or
- loans.⁹⁰

Employers cannot take adverse action against an employee for refusing to consent to a deduction.

Authorization Must be Specific

An employee's written authorization for deductions must be specific as to the purpose for which the employee has accepted the responsibility or liability. Written authorizations must be:

- Sufficient to give the employee a reasonable expectation of the amount to be withheld from pay; and
- A clear indication that the deduction is to be withheld from wages.

If an employer uses a handbook or policy manual instead of a separate writing, the worker's signed acknowledgment that she has received a copy of the employer's policies can authorize withholding from wages if it meets the above consent requirements. The signed acknowledgment must also include language stating that the worker agrees to the deduction.⁹¹

⁸⁹ Tex. Labor Code § 61.018.

⁹⁰ Tex. Admin. Code § 821.27.

⁹¹ Tex. Admin Code § 821.28.

Uniforms, Tools and Equipment

Generally, if the use of facilities, equipment and uniforms benefit the employer, the employee does not have to pay for them.⁹² Other common employer deductions violate the FLSA if they take an employee's pay below minimum wage. These include deductions to cover the cost of tools, safety equipment, and uniforms that do not fall within the definition of "facilities" under the FLSA; disciplinary deductions (such as "fines" for tardiness), and deductions to cover the cost of items lost or damaged by the employee.⁹³ Texas law additionally requires all deductions to be authorized in writing by the employee.

The cost of uniforms cannot be deducted from wages if the uniform is required by the employer.⁹⁴ Employees are responsible for normal washing and drying of uniforms; however, if ironing, dry cleaning, or separate laundering is required, the employer must pay for it.⁹⁵ Employers may not require an employee to pay a security deposit on a uniform before the employee starts working, or deduct a security deposit for the uniform from the worker's wages.⁹⁶

92 29 CFR § 531.3(d).

93 29 CFR §§ 778.304, 778.306, 778.307.

94 29 CFR § 531.3(d)(1-2).

95 29 CFR § 552.102 (b).

96 29 CFR § 531.32(c).

**RECOVERING UNPAID
OR
UNDERPAID WAGES**

9. Recovering Unpaid or Underpaid Wages

9.1 Demand for Wages

Alternatives to Legal Action

A lawsuit or administrative proceeding can be very time consuming. Each legal remedy has specific procedural requirements, forms and possible costs involved. For this reason, workers should exhaust every nonjudicial remedy before filing either a lawsuit in court or a wage claim with Texas Workforce Commission.

Talk to employer

If wages are late, or have not been paid in full, the worker should first remind her employer that wages are owed and ask when they will be paid. A specific request including the amount of wages owed for the period worked is always better than a vague demand for payment.

Write a demand letter

If talking to the employer does not resolve the issue, the worker (or labor advocate acting in the worker's behalf) can write demand letter. This is a formal letter to the employer demanding payment, describing specifically when the payment was owed, number of regular and overtime hours the payment is for, and any other relevant information. See the sample letter in Appendix I. For help with writing the letter and calculating the wages owed, the worker can seek help from a community advocate, legal aid, or other labor rights organization. See Appendix B for a resource list.

Certified and first class mail

The letter should be sent to the employer by certified mail, return receipt requested to show proof that it was received. If the employer is an individual, it is a good idea to send two identical letters: one by certified mail, the other by first class ("regular") mail. The dual mailing should be noted in the cover letter ("Sent by certified mail RR no. _____, and by first class mail").

The purpose of dual mailing is twofold: Some employers, especially those who have been sued before, may not accept a certified letter. If a letter sent by regular or first class mail has not been returned to the sender as undeliverable, the letter is usually presumed to have reached the intended recipient. This can be useful if the worker must later prove attempts to resolve the claim before going to court, and make it more difficult for the employer to deny notice of the claim.

9.2 Election of Remedies

If the request for unpaid wages is ignored or refused, the worker can elect from two courses of legal action:

- Judicial - File a lawsuit for unpaid wages against the employer in small claims court
OR
- Administrative - File a formal claim with the Texas Workforce Commission (TWC).

This is an important choice, and should only be made after consulting with a labor advocate or lawyer to decide which course of action is best for that worker's situation.

TWC and Claim Preclusion

The Texas Workforce Commission (TWC) is the state agency that both investigates wage claims and decides them through an administrative process. Under the Texas Payday Law, the worker must file a claim for unpaid wages with the TWC within 180 days from the date her wages were due.⁹⁷

- If the worker *does not* file a claim the TWC, she can proceed with a civil lawsuit in state court.
- If the worker *does* file a claim with the TWC – even after the 180-day deadline – she can be barred from filing a subsequent civil lawsuit.

This is a result of the Texas Supreme Court's decision in *Igal v. Brightstar Information Technology Group, Inc.*, 250 SW.3d 78,81-82 (Tex. 2008). Igal filed a wage claim with the TWC after the 180-day filing deadline had passed. The TWC dismissed his claim for lack of jurisdiction.⁹⁸ Igal's subsequent civil lawsuit was barred based on the TWC's dismissal. On appeal, the Court nonetheless concluded that, in dismissing the case, the TWC had ruled on the "merits" of Igal's claim. His subsequent civil lawsuit in state court was thus barred by the doctrine of *res judicata*, (which precludes litigation of the same legal claim in different forum).

Under *Brightstar*, once a worker chooses to have a wage claim decided by the TWC and a ruling is issued, regardless of whether it is on the merits, the administrative route becomes the worker's exclusive remedy. "[A] party may not initially elect one remedy and then choose the other remedy when dissatisfied with the first result."⁹⁹

Texas labor advocates should evaluate workers' wage claims in light of *Brightstar*. A worker's best avenue for relief may be to forego the TWC administrative process altogether and proceed with the lawsuit to recover unpaid wages instead.

⁹⁷ Tex. Labor Code § 61.051.

⁹⁸ Jurisdiction is the power of the court to entertain an action, consider the merits, and render a valid judgment.

⁹⁹ *Igal v. Brightstar Information Technology Group, Inc.*, at 81-82.

9.3 Civil Suit to Recover Unpaid Wages¹⁰⁰

Under FLSA, domestic workers may bring a civil action in federal or state court for up to two times the amount of her unpaid minimum wages and/or unpaid overtime compensation, plus attorney’s fees and costs.¹⁰¹ Depending on the facts, the worker might also be eligible for job reinstatement.¹⁰²

Small Claims Court

A worker can recover unpaid or underpaid wages by filing a lawsuit in Small Claims Court or Justice Court (also known as Justice of the Peace, or “JP” court). Small Claims Courts and Justice Courts, created under Chapter 28 of the Texas Government Code, have concurrent jurisdiction. Each Justice of the Peace sits as the judge of the Small Claims Court.

Requirements and limitations

Like any court, Texas law requires small claims courts to follow certain legal procedures and requirements. Each JP court may have additional requirements or rules of court. Some considerations for bringing a case to small claims court include:

Age – Any person over 18 can file in a lawsuit. A minor can file if an adult can appear in her behalf and is prepared to attend the court hearing with the minor.

Money only – Lawsuits are limited to the recovery of money only.

Under \$10,000 – The amount of money involved, exclusive of costs, must be less than \$10,000.00.

Representation – Small claims court is the “people’s court,” and the process is designed to allow litigants to represent themselves. Attorney representation is permitted but not required.¹⁰³ In the majority of cases, neither side is represented by counsel. There is no legal right to a court appointed attorney.

Filing Fee - Filing fees vary depending on where the case is filed. Fees might be waived by the court if the worker files a notarized Affidavit of Inability to Pay Costs, which is a sworn statement of income showing that the worker cannot afford to pay the filing fees

Statute of Limitations – The worker should file within 6 months of the date the wages were owed. The usual limitation is two years from the date the wages were owed, and in some instances, up to four years.

100 Much of this information was adapted from Texas RioGrande Legal Aid’s instructions for workers on how to sue for unpaid wages in small claims court, attached Appendix J. Another useful guide for suing in small claims court is available in .pdf format from the State Bar of Texas at www.texasbar.com/Content/NavigationMenu/ForThePublic/FreeLegalInformation/OurLegalSystem/HowtoSueinSmallClaimsCourt.pdf.

101 29 USC § 216(b).

102 *Id.*

103 Tex. Gov’t Code § 28.012.

Jury Trial – Either side can request a jury trial, which will require an additional court fee.

Procedural Rules – The Texas Rules of Civil Procedure apply to justice courts.¹⁰⁴

Filing the Small Claims Lawsuit

To file the small claims lawsuit, the worker will need:

- The worker's legal name and complete address,
- The complete name and address of the employer being sued,
- The dollar amount of unpaid wages and damages,
- Work records, including copies of the employment agreements,
- A statement of the basis of the claim, including the date the claim arose and any other relevant dates, and
- A copy of the demand letter (if any) that was sent to the employer before suit was filed, and proof of receipt for certified mail.

Where to file

The lawsuit should be filed in the Justice of the Peace Court where the employer lives or where the work took place. The Texas Judicial System Registry, maintained by the Texas Office of Court Administration, has a searchable database of all Texas courts by county and city.

Go to <http://dm.courts.state.tx.us/OCA/DirectorySearch>.

Employer information

Most domestic workers work for a single employer in a private residence. The residence is where the employer lives *and* where the work took place, so in most cases the correct court in which to file the small claims lawsuit is the one that serves the area where the residence/workplace is located.

Domestic workers who are paid in cash may not know the employer's full legal name or address. If the employer owns the residence, use the property appraisal or tax rolls to cross-search by the employer/owner's name or street. Go to the county government page for a link to the property tax information and tax rolls. Nearly all Texas counties, even those outside of urban areas, have property tax information available online.

¹⁰⁴ Tex. R. Civ. P. Rule 2.

Statement of claim

No formal legal pleadings are required for small claims court. The clerk of the court will provide the claimant with a form, usually called a “Small Claims Statement,” in which the basis of the lawsuit is set forth in writing and the claimant swears before a notary that the facts in the statement are true.

Fees

Filing fees vary by county, and must usually be paid in cash, money order or other certified funds (not by personal check). Additional fees may be required for service of process on the defendant, jury fee, or witness subpoenas.

Fees can be waived if the claimant submits a verified statement (“Affidavit of Inability to Pay Costs,” sometimes called a “Pauper’s Oath”) at the time of filing. The Affidavit sets forth income information and proof of indigence. The clerk’s acceptance of the Affidavit does not mean that the court has agreed to waive the fees completely. If the claimant prevails, fees might be taxed as costs against the defendant. The claimant may also be required to prove before the court the income information contained in the Affidavit. However, the clerk cannot refuse to file a lawsuit if it is accompanied by an Affidavit of Inability to Pay. A generic Affidavit of Inability to Pay Costs is at www.texaslawhelp.org/documents/clusters/tx/433/English/index.

Service on employer

The claimant must provide the correct name of the defendant and tell the clerk where the defendant is likely to be found. The claimant can provide more than one address and location for service, including employer’s residence, workplace, or any other place that would help the process server serve the lawsuit in the defendant. After about two weeks have passed from the time the lawsuit was filed, the claimant should call the clerk of the court to:

- Get the case number,
- See if the defendant has been served,
- If served, whether the defendant has filed an Answer, and
- Verify the trial date or ask when the case will be set.
- It may take several attempts before service on the employer is successful. The worker (now “plaintiff”) is usually notified when the defendant has been served, but the plaintiff should check periodically with the clerk of the court or the constable’s office to check the status of service.

Answer date

The employer (now “defendant”) has 10 days from the date she was served with the lawsuit to file an answer. If the defendant fails to answer or appear at the hearing, the plaintiff will win the lawsuit by default.

Hearing in Small Claims Court

The procedure for setting a small claims hearing varies by court. Some courts require the plaintiff to send a written notice by certified mail to the defendant informing her of hearing date.

A hearing in small claims court is far less formal than hearings in the district or county courts. Each side can offer their own testimony, introduce evidence, and call witnesses to support their position. In small claims court, the judge is free to ask questions of the parties and witnesses. The plaintiff presents her side first. In a wage claim, she should be prepared to explain why she is entitled to recover wages, when they were due, and the total amount due. Documents that might support her claim include employment agreements, earnings statements and the plaintiff’s own testimony.

Ruling and Appeal

The judge may make a decision at the end of the hearing or may defer the ruling until a later date. Either side can appeal the case to the county court, but must do so within 10 days of the judge’s ruling. The appeal is a *trial de novo*, which means the claim will be tried again, as if it were a new case, in the county court.

9.4 Administrative RemediesWage Claim to TWC

Before filing with the TWC, the advocate should inform the worker that this effectively forecloses a later lawsuit for unpaid wages if the TWC’s ruling is unfavorable.

Filing a claim for unpaid wages:

To file a claim for unpaid wages in Texas, a worker must:

- Contact the Texas Workforce Commission.¹⁰⁵
- Obtain the TWC Wage Claim Form:¹⁰⁶
 - * Complete the form legibly and accurately.
 - * Sign and swear to your statement before a TWC representative or a notary.
 - * Identify each type of unpaid wage claimed, and how you determined the amount due.
 - * Include information on how to contact your employer (Important: without specific employer information, your claim will be dismissed).

¹⁰⁵ Call the TWC toll-free at 1-800-832-9243 or in Austin and surrounding areas at 1-512-475-2670.

¹⁰⁶ The TWC Wage Claim form may be downloaded from their website at www.twc.state.tx.us/ui/lablaw/ll1.pdf.

- Send the wage claim form to the TWC:

By mail:

Texas Workforce Commission, Labor Law Section
101 East 15th Street, Room 124T
Austin, TX 78778-0001

By fax:

1-512-475-3025

After filing the claim:

After the wage claim is filed by the employee,

- An investigator will investigate the claim and issue a Preliminary Wage Determination Order (PWDO).¹⁰⁷
- The PWDO will either dismiss the claim, or will order the employer to pay the amount of wages due.¹⁰⁸
- Either party may appeal the outcome of the PWDO in writing within 21 days of the decision, and receive a hearing (often by telephone) in which both parties testify under oath and submit documentary evidence.¹⁰⁹
- After the hearing officer's decision, either party may request a review of the decision by the Commission.¹¹⁰
- After the Commission issues its decision, either party may file a motion for rehearing within 14 days.¹¹¹
- Within 30 days of the Commission's final order, either party may file for judicial review in the court in the county where the worker lives, or if the worker does not live in Texas, in the county in which the employer is located.¹¹²

The TWC can order payment of wages due and, if it finds that the employer acted in bad faith, assess a penalty.¹¹³ The penalty is either the amount of wages claimed or \$1000, whichever is less.¹¹⁴ It may assess the same fine if it finds that an employee filed a claim for wages in bad faith.¹¹⁵

Complaint to DOL

Alternatively, the worker can make an administrative complaint to the Wage and Hour Division of the U.S. Department of Labor (DOL).¹¹⁶ The DOL is authorized investigate the claim and file a civil or criminal action

107 Tex. Labor Code § 61.052.

108 *Id.*

109 Tex. Labor Code § 61.054.

110 Tex. Labor Code §§ 61.058, 61.059.

111 Tex. Labor Code § 61.0614.

112 Tex. Labor Code §§ 61.0614, 61.062.

113 *Id.*

114 Tex. Labor Code § 61.053.

115 *Id.*

116 29 USC § 216(c).

on the employee's behalf.¹¹⁷ The DOL lacks sufficient staffing to investigate and prosecute many of the complaints that it receives. A report by the General Accounting Office found that the DOL Wage and Hour division mishandled the majority of claims by low-wage workers.¹¹⁸

9.5 Criminal Penalties

2011 Wage Theft Law

Effective September 1, 2011, the Texas Legislature closed some of the gaps in the existing wage theft law that made prosecuting theft of wages difficult. Wage theft in Texas is especially prevalent among immigrant workers, who are often reluctant to report wage theft because of their immigration status. The amendment clarified the law to punish an employer for theft of service if the employer does not fully pay a contract worker and ignores a notice demanding payment.

Under the former law, an employer could evade prosecution for wage theft by making a partial payment of wages because the intent for the crime could, by definition, be proven to exist only after the pay period had ended. Under the new law, the employer's criminal intent to avoid payment of wages can be formed at any time during a pay period, and partial payment of wages cannot negate the employer's intent to avoid payment to the worker. See Tex. Penal Code Sec. 31.04 (d-1).

Texas Payday Law

An employer who intends to avoid payment of wages and who fails to pay wages after a demand from an employee is guilty of a third degree felony.¹¹⁹

FLSA

An employer of a domestic worker who violates the FLSA's minimum wage and overtime laws, or who retaliates against his employee for complaining about FLSA violations, may be convicted of a misdemeanor. The employer is subject of a fine of up to \$10,000 and imprisonment of up to six months, or both.¹²⁰

117 29 USC § 216(a), (c).

118 United States General Accountability Office, Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft (March 25, 2009). The DOL has since stated that it will significantly increase the number of Wage and Hour investigators on staff. News Release, "Statement of U.S. Secretary of Labor Hilda L. Solis on GAO investigation regarding past Wage and

Hour Division enforcement," (March 25, 2009).

119 Tex. Labor Code § 61.019.

120 29 USC § 216(a).

OTHER EMPLOYMENT POLICIES

10. Other Employment Policies

10.1 Termination of Employment

At Will Employment

In most circumstances, employers can terminate employees “at will,” meaning at any time for any reason or no reason at all. There are some exceptions to the “at will” rule. It is illegal for an employer to terminate a worker:

- In retaliation for enforcing legal rights (such as filing a claim for unpaid wages), or
- For reporting the employer to a government agency or to the police.

Discrimination

Federal antidiscrimination laws do not protect most domestic workers because they apply to larger employers, generally those with 15 or more employees. These include laws that protect employees from discrimination based on because race, color, national origin, religion, gender, sexual orientation, gender, age or disability (including pregnancy), medical condition, language (or accent), or marital status.

The Equal Pay Act of 1963 (EPA)¹²¹ applies to employers regardless of the number of employees. It applies only to gender-based pay inequities. The Fair Pay Act of 2009¹²² modified the limitations period for bringing a claim under the EPA. The Act modifies the current statute of limitations for wage discrimination and equal pay claims to re-set with every new paycheck, rather than the first inequitable paycheck.

10.2 Vacation Policies

Forfeiture of Vacation Payouts

Quit or laid off

Payouts of accrued leave are required under the Texas Payday Law if promised by the employer in a written policy or agreement. If there is no written agreement about paid vacation, the employer does not owe it. For example, an employer can allow for payment of unused vacation time when a worker leaves, provided that she gives a minimum of two weeks’ written notice before leaving. If the employee does not honor the two-week notice, the employer could legally deny the accrued leave payout because the payout is based on leave accrual up until the last day she was expected to work.

¹²¹ 29 USC § 206(d) To be equal work, the work must “require equal skill, effort, and responsibility, and be performed under similar working conditions.” A man and a woman who perform the same job should be paid the same. There are exceptions if the difference is pay is based on “a seniority system, a merit system, a system which measures earnings by

quantity or quality of production or a differential based on any other factor other than sex.” Id.
¹²² Lilly Ledbetter Fair Pay Act, 29 USC §§ 621-634.

Discharged or terminated

If an employee is terminated for any reason other than layoff, she has no claim to accrued leave regardless of policy.

Child support

Wage withholding for child support applies to certain post-termination lump-sum payments, such as a payout of accrued leave or bonus.¹²³

10.3 Employer References

No False Information

Generally, a former employer can say *bad*, but not *false*, things about an employee when giving a reference. If a former employer is contacted for a reference, that employer can make negative comments about the worker and her performance if the comments are true. The employer cannot knowingly give false information about work performance to keep her from getting a new job. Opinions about work performance (for example, “she was unreliable”) are acceptable, but false fact statements (“I think she was stealing”) are not.

Employer Liability for Negative Reference

Texas employers are virtually immune from liability for disclosing negative information about a current or former employee “unless it is proven by clear and convincing evidence that the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed.”¹²⁴

¹²³ Tex. Fam. Code § 158.215.

¹²⁴ Tex. Labor Code § 103.004(a).

HEALTH AND SAFETY

11. Health and Safety

11.1 Workers' Compensation

Workers' compensation is an insurance program authorized by the state that provides compensation to workers who have suffered a job-related injury. The injured employee receives benefits regardless of who is to blame – the employee, the employer, a coworker, a client or some other person.

Domestic Workers

Most domestic workers are not entitled to coverage under the Texas' worker's compensation laws. Texas workers' compensation law specifically exempts "domestic and casual workers" engaged in employment incidental to a personal residence."¹²⁵ However, Texas law does not define "domestic" and "casual." In common law, a domestic worker has been variously defined as a person hired or employed primarily for the performance of household duties and chores, the maintenance of the home, and the care, comfort, and convenience of members of the household, whereas a casual worker may have the same tasks but her employment is irregular, brief, or sporadic.

An employer can elect to provide worker's compensation coverage for domestic employees.¹²⁶ Unless voluntarily provided or required by a specific contract¹²⁷ or unless the worker arguably falls outside the (undefined) parameters of "domestic" or "casual" in the Texas Labor Code, employers do not need to provide workers' compensation insurance for domestic employees.

11.2 Claims Under Homeowner Policy

The Texas Standard Homeowners Policy¹²⁸ covers liability and medical claims arising out of injuries to domestic workers up to the policy limits. The policy defines "residence employee" as a person who performs duties related to the ownership, maintenance, or use of the residence premises, including maintenance or use of a motor vehicle.

If a residential employer is not satisfied with the limited medical payments coverage provided under the homeowner's policy, the employer/homeowner can consider providing voluntary worker's compensation benefits by adding the Texas Exempt Employees Coverage endorsement to their homeowner's policy.¹²⁹

125 Tex. Labor Code § 406.091.

126 Tex. Labor Code § 406.091(b).

127 Private employers who contract with governmental entities are required to provide workers' compensation coverage for each employee working on the public project. Some clients may also require their contractors to have workers' compensation insurance.

128 For details on Texas Homeowner's standard policy, visit the Texas

Department of Insurance at

www.tdi.state.tx.us/pubs/consumer/cb025.html#policies.

129 Texas Exempt Employees Coverage endorsement (WC 42 03 05) is available through the Texas Department of Insurance at www.tdi.state.tx.us/wc/regulation/documents.

11.3 OSHA

While OSHA applies to private employers — non-governmental businesses with at least one employee — it does not apply to “individuals who, in their own residences, privately employ persons for the purpose of performing for such individuals what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children.”¹³⁰ It therefore excludes domestic workers.

¹³⁰ 29 CFR § 1975.6.

UNEMPLOYMENT BENEFITS

12. Unemployment Benefits

12.1 Domestic Workers

Qualifying for Unemployment

A domestic worker in Texas may qualify for unemployment if:

- She was paid cash wages of \$1000.00 or more during a calendar quarter in the current or preceding year she was employed as a domestic worker, or
- She worked one day for the same employer during 20 or more weeks in the current or preceding year.¹³¹

Work Readiness

The qualifying domestic worker must also be:

- Looking for work,
- Ready, willing, and physically able to work in the United States, and
- Out of work through no fault of her own.

Claims for unemployment benefits are made through the Texas Workforce Commission.¹³²

¹³¹ Tex. Labor Code §§ 201.021(a); 201.027; 201.064.

¹³² Texas Workforce Commission, www.twc.tx.us; (800) 832-9243.

DISCRIMINATION AND RETALIATION

13. Discrimination and Retaliation

13.1 Discrimination

The vast majority of domestic workers will not benefit from state and federal antidiscrimination laws because of the small number of employees working for their employer (often, the domestic worker is the sole employee). The Federal anti-discrimination law, Title VII, only covers employers with 15 or more employees.¹³³

As with federal law, Texas's employment discrimination laws apply to employers "engaged in an industry affecting commerce" and who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.¹³⁴

13.2 Retaliation

Texas Labor Code and FLSA

Both the Fair Labor Standards Act (FLSA) and the Texas Labor Code prohibit an employer from firing or otherwise retaliating against an employee for exercising her rights under wage and hour laws.

An employer violates the law if he retaliates or discriminates against a person who:

- Opposes a discriminatory practice,
- Makes or files a charge,
- Files a complaint, or
- Testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.¹³⁵

Under the FLSA, employers are prohibited from discriminating against or discharging any employee because she:

- "Filed any complaint,"
- "Instituted any proceeding," or
- "Testified in any proceeding"¹³⁶

¹³³ 42 USC § 2000e(b).

¹³⁴ Tex. Labor Code. § 21.002(8).

¹³⁵ Tex. Labor Code § 21.055.

¹³⁶ 29 USC § 215(a)(3).

The worker experiencing retaliation is not required present the complaint to an administrative agency or to file a lawsuit as a prerequisite to receive legal protection from employer retaliation. An “informal” or “internal” complaint made directly to a supervisor or employer qualifies a worker for protection under this provision.¹³⁷ The worker’s complaint can be written or oral.¹³⁸

Employer Sanctions and Penalties

The FLSA anti-retaliation provision carries criminal sanctions of imprisonment for up to six months or a fine of up to \$10,000 or both.¹³⁹ A worker can bring a civil suit and recover “such legal or equitable relief as may be appropriate to effectuate the purposes” of the anti-retaliation provision.¹⁴⁰ Congress considers liquidated damages under FLSA to be “compensatory” rather than “punitive.”¹⁴¹

137 Hagan v. EchoStar Satellite, L.L.C., 529 F.3d 617 (5th Cir. 2008).

138 The US Supreme Court recently held that for purposes of the anti-retaliation provision of the FLSA, the term “filed any complaint” includes both oral and written complaints. *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834, Mar 22, 2011 563 U. S. ____ (2011).

139 29 USC § 216(a).

140 29 USC § 216(b).

141 Congress originally intended that the FLSA liquidated damages provision would be a rough but convenient substitute for pre-judgment interest on unpaid wages, given that interest calculations would be burdensome for small sums that grew each week. *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945).

**WORKPLACE HARASSMENT
AND
SEXUAL ASSAULT**

14. Workplace Harassment and Sexual Assault

Most domestic workers are not protected under federal laws that protect against sexual harassment in the workplace because these laws apply only to employers with many workers. It is still illegal, however, for an employer to touch, hit, demand sex, or engage in any unwanted contact with the worker.

14.1 Texas Criminal Laws

Domestic workers can turn to criminal law for protection against stalking or other unwanted contact from their employer. Domestic workers are particularly vulnerable, since their workplace is the home of their employer. Several Texas criminal laws offer protection for the worker and penalize the employer or perpetrator.

Harassment

A person who makes obscene or threatening comments or suggestions, in person, by phone, in writing or any other electronic means (such as email) can be charged with harassment. The penalty is a class B misdemeanor for the first offense, which can be elevated to class A if the offender has a prior conviction.¹⁴²

Stalking

A person with a repeated pattern and certain course of conduct, such as repeatedly following the victim, may have committed the offense of stalking. Stalking behaviors occur where the stalker, on more than one occasion, may:

- Follow the victim and/or victim's family or household members,
- Vandalize the victim's property,
- Inflict damage to property—perhaps by vandalizing the car, harming a pet or breaking windows at the victim's home,
- Make threatening calls or send threatening mail, or
- Drive by or park near the victim's home, office, and other places familiar to the victim.

The penalty is a third degree felony, unless there is a prior conviction for stalking, in which case the penalty is upgraded to a 2nd degree felony.¹⁴³

¹⁴² Tex. Penal Code § 42.07.

¹⁴³ Tex. Penal Code § 42.072.

Terroristic Threat

A person commits a terroristic threat if he or she threatens to commit any offense involving violence to any person or property, with the intent to place a person in fear of imminent serious bodily injury. The penalty is a Class B misdemeanor.¹⁴⁴

Indecent Exposure

A person commits indecent exposure if he exposes his genitals or anus with the intent to arouse or gratify sexual desire of any person, without regard to whether anyone present will be offended or alarmed by his act. The penalty for this offense is a Class B misdemeanor.¹⁴⁵

Sexual Assault

A person commits sexual assault when the other person does not consent to sexual contact that involves penetration of the anus, sexual organs or mouth. The offense does not require the perpetrator to use physical force; a threat of force is sufficient. The penalty is a second degree felony.¹⁴⁶

Rape or any incidence of suspected sexual assault (including forced fellatio) should be reported immediately to enable law enforcement to gather the appropriate evidence.¹⁴⁷

144 Tex. Penal Code § 22.07.

145 Tex. Penal Code § 21.08.

146 Tex. Penal Code § 22.011.

147 Services for survivors of sexual assault include a 24-hour crisis hotline, crisis intervention, hospital advocacy, law enforcement advocacy and

courtroom accompaniment. Contact the Rape, Abuse & Incest National Network at 1-800-656-HOPE (4673). For information on Texas sexual assault programs, contact the Texas Association Against Sexual Assault (TAASA) at 512-474-7190.

WORKPLACE POSTINGS AND NOTICES

15. Workplace Postings and Notices

Domestic workers are covered by the Texas Payday Law and the FLSA, both of which require employers to post certain workplace notices. There is no specific exclusion from the notice requirement for employers of domestic workers, even if the worker is the sole employee.

15.1 Texas Payday Law

The Texas Payday Law requires certain employers to post, in a conspicuous location in the workplace, a notice indicating the paydays for that employer.¹⁴⁸ The poster is required regardless of whether an employer participates in the Texas Unemployment Compensation system. English and Spanish versions are available from the Texas Workforce Commission by calling 1-800-832-9243 or (512) 475-2670, or downloading it from their website: www.twc.state.tx.us/ui/lablaw/ll10.pdf.

15.2 U.S. Department of Labor - Wage and Hour Division

Employers bound by the FLSA's minimum wage provisions must post, and keep posted, a notice explaining FLSA in a conspicuous place at all worksites.¹⁴⁹ The poster is available for download at the DOL website, www.dol.gov/whd/regs/compliance/posters/flsa.htm

15.3 Worker's Compensation

All employers must post information about the availability of worker's compensation *regardless of whether they participate* in the worker's compensation system.¹⁵⁰ Most domestic service employers do not participate in the system, leaving domestic workers with few options in the event of a work-related injury (e.g., suing under the employer's homeowner's policy; personal injury lawsuits).

The required worker's compensation notices ([Notice 5](#), for employers without workers' compensation insurance; [Notice 6](#), for employers with workers' compensation insurance) may be downloaded from the Texas Department of Insurance website at www.tdi.state.tx.us/WC/safety/hotline.html#notices.¹⁵¹

15.4 Other Notices

Other required workplace notices either specifically exempt domestic workers, or exclude small employers (which effectively excludes most employers of domestic workers).

148 Tex. Labor Code § 61.012. DESIGNATION OF PAYDAYS; NOTICE. (a) An employer shall designate paydays in accordance with Section 61.011. (b) If an employer fails to designate paydays, the employer's paydays are the first and 15th day of each month. (c) An employer shall post, in conspicuous places in the workplace, notices indicating the paydays.

149 FLSA 29 U.S.C., Chapter 8.

150 Refer to 28 TAC Part 2 § 110(B) for additional rules and requirements regarding the posting of workers' compensation notices.

151 In addition to Notice 6, participating employers also post notice of the OIEC Ombudsman Program in the workplace where each employee is likely to see the notice on a regular basis This notice is required by OIEC rule at 28 TAC § 276.5, available for download at www.oiec.state.tx.us/resources/employernotice.

EEOA, ADA¹⁵²

The nondiscrimination provisions of the Equal Employment Opportunity Act (EEOA) and the Americans With Disabilities Act (ADA) apply to employers with 15 or more employees.¹⁵³

FMLA¹⁵⁴

The Family Medical Leave Act (FMLA) applies to all private businesses with at least 50 employees each working day, during at least 20 calendar weeks during the current or preceding year.

OSHA

The Occupational Safety and Health Act¹⁵⁵ excludes does not apply to domestic workers.

USERRA¹⁵⁶

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protect the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service. It does not apply to domestic workers.

¹⁵² Posting is required under the Civil Rights Act of 1964, Title VII (P.L. 88-352) §§ 2003-2010.

¹⁵³ 42 USC § 2000e(b); Tex. Labor Code, § 21.002(8).

¹⁵⁴ 29 CFR Part 825, Subpart C.

¹⁵⁵ 29 CFR § 1975.6.

¹⁵⁶ 38 USC §§ 4301 through 4335. The USERRA poster is available on the US Department of Labor's website at www.dol.gov/vets/programs/userra/USERRA_Private.pdf.

PART TWO:
IMMIGRANT DOMESTIC WORKERS
WORK AUTHORIZATION

PART TWO: IMMIGRANT DOMESTIC WORKERS

16. Work Authorization

Like other foreign workers, maids and domestic workers working in the US are expected to comply with federal labor and immigration laws. The Immigration and Nationality Act (INA) of 1952 is the overriding federal law when it comes to non-U.S. citizens working in the country. Foreign maids and other domestics can work legally in the US if they fall into one of allowable categories of foreign workers.

16.1 Green Cards

A permanent resident card (green card), is proof of a worker's lawful permanent resident status in the United States. Anyone who has a green card can live or work in the United States. A domestic worker may apply for a green card if she can show that

- She is the spouse, child, sibling, or parent of any citizen or permanent resident,
- She engaged to a citizen or permanent resident, or possessing skills that are considered to be in short supply or especially needed in the United States.

16.2 U.S. Visas

The United States allows for a wide range of visas that non-citizens or residents can apply for when visiting the country. Foreign maids may be eligible for several kinds of visas, among them:

- H-2B visas for skilled and unskilled workers may allow temporary work privileges to foreign maids, and
- J-1 Exchange Visitor visas can allow for those who are participating in a work exchange program.
- A-3 Personal Employees visas may allow attendants, servants, and personal employees of diplomats and their families to accompany the diplomat and work for the diplomat and his or her family during the diplomat's duty in the United States.¹⁵⁷

Other visas may apply, though in general, maids are considered unskilled labor, and getting a work visa for these kinds of workers is difficult.¹⁵⁸

¹⁵⁷ 8 U.S.C. § 1101(a)(15)(A).

¹⁵⁸ More on employment of foreign maids:

www.ehow.com/list_6183545_laws-employment-foreign-maids.

16.3 Work Authorization Verification

Federal immigration law makes it unlawful to employ someone knowing that person does not have work authorization.¹⁵⁹ Work authorization is independent of a worker's immigration status. An employer need only verify whether the worker is authorized to work in this country. Immigration status is irrelevant.

Worker Documents

Work authorization is verified by the employer at the time of hiring. The employer must verify on the I-9 form that she has examined document(s) listed in form I-9 as acceptable proof of work authorization. The worker may choose which document(s) from the list to show the employer. The employer is not legally entitled to ask for more or different documents than those listed in the I-9.

An employer does not have the right to keep the worker's original documents, but can retain copies of the documents. Originals must be returned to the worker.¹⁶⁰ Workers should never leave their original documents with the employer, or depend on the employer to return them at a later date.

Exceptions to Work Authorization

Work authorization verification is not required for:

- Workers employed for casual domestic work in a private home on “sporadic, irregular, or intermittent” basis,¹⁶¹
- Independent contractors, or
- Workers or laborers hired by the independent contractor.

An employer is not required to verify an independent contractor's work authorization, but cannot knowingly hire an independent contractor who cannot legally work in the US.¹⁶²

Casual workers

Work authorization verification is not required for “casual workers” engaged in “domestic service.” To be exempt:

- The casual work must be “sporadic, irregular, or intermittent.” If the work is regular, the employer will not be exempt. For example, a full-time maid is covered, but an occasional baby-sitter is not.
- The casual worker must be engaged in “domestic service.” The term “domestic service” has been variously interpreted based on the nature of the work. “Casual” domestic service has been described as regular maintenance and upkeep that might be performed by a household or family member, whereas construction or landscaping work around the home is not.¹⁶³

¹⁵⁹ 8 USC § 1324a(a)(1)(A).

¹⁶⁰ For more information, see “Employer Work Authorization Verification Fact Sheet,” National Employment Law Project, www.nelp.org/page/-/Justice/Employer%20Work%20Authorization%20Verification.pdf.

¹⁶¹ 274 CFR § 274a.1(h).

¹⁶² 8 USC § 1324a (a)(4).

¹⁶³ *Jenkins v. INS*, 108 F.3d 195 (9th Cir. 1997). The court in the *Jenkins* case found that workers hired to do landscaping work near the employer's personal residence did not fall in exception for casual domestic work.

WAGES FOR IMMIGRANT WORKERS

17. Wages for Immigrant Workers

17.1 Immigration Status Irrelevant

A worker's immigration status is irrelevant to her entitlement to legal wages, including minimum wage and overtime.¹⁶⁴ The U.S. Department of Labor (DOL) has confirmed that undocumented domestic workers are covered under the FLSA.¹⁶⁵ Part I of this manual addresses the laws governing wages for domestic workers.

17.2 Wage and Hour Complaints

DOL and ICE Policy

A worker who complains about employment practices or makes a claim for unpaid wages is not required to answer any questions about immigration status. Immigrants are covered by the FLSA and are entitled to full compensation for work already performed.

As a matter of policy, the US Department of Labor (DOL) will not ask a about a wage claimant's work authorization and will not refer the claimant to Immigration and Customs Enforcement (ICE).¹⁶⁶ As a result of formal agreement, since 1998 the DOL and ICE have maintained a policy of separating the DOL's enforcement labor laws from ICE's job of enforcing federal laws governing immigration. Work authorization is an immigration issue, and therefore irrelevant investigation or enforcement of wage and hour claims. For this reason, courts have consistently held that in labor disputes, discovery into immigration status is generally not permitted.¹⁶⁷

17.3 Retaliation - Threats to Report

An employer's threat to report a worker involved in a labor dispute to ICE as a means to discourage or prevent her from enforcing her labor rights is considered unlawful retaliation under the FLSA.¹⁶⁸ A "labor dispute" includes wage and hour violations, health and safety violations, workers' compensation claims, and discrimination complaints. ICE also maintains an internal policy called an "operation instruction" that limits immigration enforcement investigations where there is an ongoing labor dispute.

Despite these protections, an undocumented worker should always consult a lawyer or advocacy group before proceeding with a complaint.

¹⁶⁴ Albertsons, *supra* note 103.

¹⁶⁵ See U.S. Department of Labor, Fact Sheet #48, Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastic decision on laws enforced by the Wage and Hour Division (Aug. 19, 2002) ("Fact Sheet #48").

¹⁶⁶ November 1998 Memorandum of Understanding between U.S. DOL and legacy Immigration and Naturalization Service (INS). See Appendix L attached.

¹⁶⁷ See, e.g., *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987). Discovery into immigration matters is "completely irrelevant" in that it could "inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry into their private lives which was not justified."

¹⁶⁸ See, e.g., *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128 (W.D.N.Y. 2003); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

INCOME TAXES

18. Income Taxes

18.1 Immigration Status

Immigrants may need to show they have paid taxes as a condition of eligibility for immigration relief, or as part of obtaining lawful status.

An immigrant who is not work authorized can pay her taxes or receive a refund using an Individual Taxpayer Identification Number (ITIN). This will also establish a work history that might make the case for permanent residency, depending on future changes to immigration laws.¹⁶⁹

ITIN

An Individual Taxpayer Identification Number (ITIN) is a tax processing number issued by the Internal Revenue Service to workers who do not have, and are not eligible to obtain a Social Security Number (SSN). Others who need ITINs include:

- A nonresident alien required to file a U.S. tax return,
- A U.S. resident alien (based on days present in the United States) filing a U.S. tax return,
- A dependent or spouse of a U.S. citizen/resident alien, and
- A dependent or spouse of a nonresident alien visa holder.

An ITIN is for tax reporting only. It does not authorize work in the U.S. or provide eligibility for Social Security benefits or the Earned Income Tax Credit. ITINs are issued regardless of immigration status because both resident and nonresidents may be required to report to the IRS.

Applying for ITIN

To apply, use Form W-7, Application for IRS Individual Taxpayer Identification Number¹⁷⁰ to apply. Attach a valid federal income tax return and original, notarized, or certified proof of identity and foreign status documents. Send the W-7, federal income tax return, and proof of identity and status documents to:

¹⁶⁹ For more information, see the “ITIN Fact Sheet” available at the National Employment Law Project website: <http://www.nelp.org>.

¹⁷⁰ Available in PDF format from the IRS at <http://www.irs.gov/pub/irs-pdf/fw7.pdf>.

Internal Revenue Service
Austin Service Center
ITIN Operation
P.O. Box 149342
Austin, TX 78714-9342

The ITIN application will take about six weeks to process. The ITIN will be sent to the applicant by mail.¹⁷¹

¹⁷¹ For help with completing Form W-7, or go a taxpayer assistance center (listed in Appendix K) or call the IRS at 1-800-829-1040.

IMMIGRANT STATUS DISCRIMINATION

19. Immigrant Status Discrimination

19.1 Civil Rights Laws

Federal civil rights laws apply only to employers with 4 or more workers, depending on the law, and so exclude nearly all privately employed domestic workers.¹⁷² Two of the most important laws that protect undocumented workers are noted below:

IRCA

The provisions of the Immigration Reform and Control Act of 1986 (IRCA), an amendment to the Immigration and Nationality Act (INA)¹⁷³ applies to small employers with four to fourteen employees.

The IRCA makes it illegal for employers of four or more employees to knowingly hire or continue to employ undocumented workers.¹⁷⁴ It also protects workers from employment discrimination based on immigration or citizenship status, and prohibits “document abuse” discrimination, as, for example, requiring immigrants to present a “green card” or other INS issued to establish employment eligibility. The IRCA is enforced by the US Department of Justice.¹⁷⁵

Title VII

The nation’s major civil rights legislation, Title VII Civil Rights Act of 1964, protects workers from discrimination based on national origin, race or color, gender or religion. Title VII covers only large employers with 15 or more employees. The law is enforced by the Equal Employment Opportunity Commission.

¹⁷² Some of the information for this section was adapted from the helpful materials developed by Workplace Fairness, www.workplacefairness.org/immigrationstatus.

¹⁷³ 8 USC § 1324b.

¹⁷⁴ Except workers hired before November 6, 1986. The IRCA requires employers to ask the worker for documents to show identity and

authorization to work in the U.S.

¹⁷⁵ The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Civil Rights Division, U.S. Department of Justice, enforces the IRCA’s antidiscrimination provisions.

OTHER ISSUES AFFECTING IMMIGRANT WORKERS

20. Other Issues Affecting Immigrant Workers

20.1 Workers' Compensation

If an employer provides workers' compensation insurance, undocumented workers and their legal beneficiaries are entitled to Workers' Compensation benefits, regardless of whether they reside in Texas or in the United States.¹⁷⁶ Most domestic workers, however, are not entitled to worker's compensation because their employers are not required to provide it.

20.2 Unemployment Benefits

Unemployment insurance benefits are not available to undocumented workers in Texas.¹⁷⁷

20.3 False Promises of a Green Card

Green cards are not easy to obtain, and a worker should be skeptical of anyone who promises to help her get one. Sponsorship for a green card is a long process that is not always successful. Some features of the process include:

- Permanent labor certification is only available for full-time, permanent jobs – which exclude many domestic worker positions.
- An employer must first apply to the US Department of Labor. (ETA Form 9089) and show that he or she tried to hire an employee who was already authorized to work in the U.S. but no one was available with the required qualifications.
- The worker must sign the Application for Permanent Labor Certification stating that she intends to accept the job with the employer if the petition is approved. If she has not signed such a form, her employer has not begun the process of sponsoring her.
- Even if the employment certification is granted, her employer still has to file another form, the Immigrant Petition for Alien Worker (I-140).

To follow up on an employer's promises, a worker should request copies of the labor certification application and any other correspondence with the Department of Labor.

¹⁷⁶ Tex. Labor Code § 406.092.

¹⁷⁷ Tex. Labor Code § 207.043.

20.4 Social Security “No Match” Letters¹⁷⁸

The Social Security Administration (SSA) may inform employers by letter that there is a “discrepancy” between the social security number provided by the employer and the one on file for the employee. This is sometimes known as a “no match” letter. The discrepancy raised by the “no match” letter is considered to be a private matter between the SSA and the individual worker. Its stated purpose is to ensure that the worker receives credit for earnings and benefits administered by SSA.

An employer that receives a “no match” letter from the SSA might mistakenly believe that it has something to do with the worker’s work authorization or immigration status. An unscrupulous employer might use the “no match” letter as a means to intimidate a vulnerable worker, or threaten to use it as leverage against the worker’s immigration status.

Workers whose employers use a “no match” letter or other correspondence from the SSA against them may have legally enforceable rights. The worker should get legal help from an employment or immigration attorney to determine if any action should be taken, and if so, what kind.

¹⁷⁸ For more information, go to the National Immigration Law Center, www.nilc.org/immsemplymnt.

APPENDICES

APPENDIX A

The following is a primer for advocates on what activities constitute the unauthorized practice of law in Texas.

Unauthorized Practice of Law

A worker can represent herself in court without a lawyer, but only a licensed attorney can provide legal advice. The following is an overview of what constitutes the unauthorized practice of law in Texas and scope of services a nonlawyer advocate may provide.

Practice of Law

Texas defines the “practice of law” as “preparing a pleading or other documents incident to a legal action, managing an action or proceeding on behalf of a client both in and out of court and giving advice or rendering any service that requires the use of legal skill or knowledge, such as preparing a will, contract, or other [legal document].”¹⁷⁹ The definition includes “all advice to clients, express or implied, and all action taken for them in matters connected with the law.”¹⁸⁰ An activity that constitutes the practice of law is a legal question for the courts to decide.¹⁸¹

The unlawful advice can be verbal, written, or a combination both. Directing a client to a set of legal forms is assistance. Recommending a specific form is advice. Helping a client to complete a legal form is assistance, but advising a client on which legal option to choose within the form is advice.

For example, a layperson advising customers on which immigration forms to file and then preparing them for the customer was found to constitute the unauthorized practice of law.¹⁸² In other cases, unauthorized activities have included preparing and filing mechanic’s lien affidavits,¹⁸³ preparing and sending demand letters and negotiating claims with insurance companies,¹⁸⁴ and contracting to represent persons with personal injury and property damage claims.¹⁸⁵

License required

Only lawyers that are members of the State Bar of Texas can practice law in this state.¹⁸⁶ Lawyers from other states must get a Texas license, or have a Texas lawyer appear in their behalf in a Texas court proceeding.

¹⁷⁹ Tex. Gov’t. Code § 81.101(a).

¹⁸⁰ See, e.g., *Crain v. Unauthorized Practice of Law Committee*, 11 S.W.3d 328, 333 (Tex. App. – Houston [1st Dist.] 1999), pet. den’d, cert denied, 532 U.S. 1067, 150 L. Ed. 2d 211, 121 S. Ct. 2218 (2001).

¹⁸¹ *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985).

¹⁸² *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985).

¹⁸³ *Crain v. Unauthorized Practice of Law Committee*, supra.

¹⁸⁴ *Greene v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293 (Tex. App. – Dallas 1994, no writ); preparing and sending demand letters on personal injury and property damage claims and negotiating and settling the claims with insurance companies constitutes the practice of law.

¹⁸⁵ *Brown v. Unauthorized Practice of Law Committee*, 742 S.W.2d 34 (Tex. App.—Dallas 1987, writ denied).

¹⁸⁶ Tex. Gov’t. Code § 81.102.

Compensation not required

Legal services do not have to be fee-generating to be considered the practice of law. Work performed by Legal Aid and pro bono attorneys, for example, is considered to be the practice of law even if the client is not charged for the service.¹⁸⁷

Not the Practice of Law

Court accompaniment

Court accompaniment is not unauthorized practice of law. An advocate can accompany a client to court for guidance, support, and help with navigating the local court system, as long as she does not represent to others that she is a lawyer. An advocate may sit with the client at counsel table in a court proceeding if permitted by the court, even if the client is representing herself. If the client is self-represented, the advocate cannot speak for her; she must address the court on her own.

Legal materials and software

In Texas, the “practice of law” does not include the design, creation, publication, distribution, display, or sale of written materials, books, forms, computer software, or similar products IF the product clearly states that it is not a substitute for the advice of an attorney.¹⁸⁸

Representation

By attorney

Legal and ethical rules prevent advocates and lawyers from providing legal advice to a worker who is already represented by another lawyer for that legal matter. The worker can be “represented” regardless of whether the lawyer is paid for services provided, or whether the representation agreement was written or oral.

Self-representation

The right to self-representation is guaranteed by Sixth Amendment and Texas’ open courts provision. A worker can act as her own lawyer without violating the rules governing unauthorized practice of law.¹⁸⁹ Self-representation is allowed regardless of whether the legal matter is contested or uncontested, or whether the other side is represented by a lawyer. Court clerks cannot legally refuse to file *pro se* documents, and judges must hear cases brought by *pro se* litigants.

¹⁸⁷ Magaha v. Holmes, 866 S.W.2d 447, 448-49 (Tex. App. – Houston [1st Dist.] 1994).

¹⁸⁸ Tex. Gov’t. Code § 81.101(c).

¹⁸⁹ Art. I, § 13 of the Texas Constitution.

Penalties

For civil violations, the remedy is usually injunction (court-ordered cessation of the activity) and the payment of fines, fees and court costs. To rise to the level of a criminal offense, the advice must be in exchange for compensation. Punishment can range from a Class A misdemeanor to a felony.¹⁹⁰

Guidelines for Advocates

Advocates must avoid activities that require the use of legal skills or knowledge in a specific case, such as:

- Explaining the available legal remedies,
- Applying the law to the client's case,
- Predicting the outcome of a case,
- Advising the client on a course of action to follow in a specific circumstance,
- Draft legal documents,
- Represent the client in court, or
- Advising a client which form to file.

Advocates can direct clients to legal resources and forms, as long as these activities do not involve the provision of legal advice based on a client's unique fact situation. Some helpful resources include:

- Texas Legal Services and Other Resources for Low-Income Texans, a publication of the State Bar of Texas and Texas Lawyers Care, available for free download at www.texasbar.com/Content/NavigationMenu/ForThePublic/CantAffordALawyer/2010ReferralDirectory.pdf.
- Texas Law Help, a nonprofit website providing free legal information on a variety of topics and some free self-help legal forms with instructions in English and Spanish: www.texaslawhelp.org.
- Texas Statutes and Codes, a searchable website maintained by the Texas Legislature that includes all current Texas statutes and codes, including the Texas Family Code, www.statutes.legis.state.tx.us.

¹⁹⁰ Tex. Penal Code § 38.122.

ADVOCATES' ROLE ¹⁹¹	
You Can...	You Cannot...
Provide information in court docket reports, case files, indexes and other legal materials that are public record.	Disclose a judge's ruling on an issue submitted for decision until the outcome is noted in the court's docket (rendered).
Answer questions about court rules, procedures, ordinary practices, and types of legal actions that workers can pursue.	Answer worker questions about the merits of a case and the course of legal action to pursue based on her specific facts.
Provide examples of forms or pleadings and show her where to get them	Draft or prepare forms or pleadings.
Provide procedural definitions. "A motion is..."	Give procedural advice. "You should file a motion..."
Help compute due dates and deadlines.	Speculate as to when a judge will make a decision on a particular matter.
Identify which court forms might meet the client's needs (warning: no guarantees and should seek attorney's assistance.)	Recommend that the client use a specific form or file a particular motion.
Help complete worker complete forms she has chosen, answer questions about the form, read, explain, define unfamiliar terms, help fill in blanks with information provided by the worker.	Tell the worker what specific answer she should write on a court form or interpret the meaning of court rules, laws, or cases.
Read court- or lawyer-approved forms and instructions to the person.	Modify the forms or instructions and give or read the modified forms or instructions to a person.
Provide copies of the law, rules, ordinances, and cases or tell where the law or cases may be found.	Interpret the meaning of those statutes, rules, ordinances or cases.
Provide basic information about court procedures (e.g., the right to cross examination, order of case presentation, how to address the court).	Assist with case preparation by advising which witnesses to call, what evidence to introduce, what arguments to make to the court.

¹⁹¹ This chart was adapted for Texas from one created by the Ohio Judicial Conference in 2005, available at www.ohiodvresources.org.

Accompany the worker to court and monitor the court proceedings.	Present oral or written arguments to the court.
Sit with the worker at counsel table if permitted by the court.	Assume the court's permission to sit at counsel table is valid for every case.
Help the worker gather evidence, identify witnesses, or create a chronology of events.	Present evidence to the court unless called as a witness.
Accompany the worker to mediation, provide factual information to the mediator, and answer the mediator's questions.	Advocate or negotiate on behalf of the worker during the mediation session.

APPENDIX B

Labor Rights - Community Resources

Texas RioGrande Legal Aid (TRLA)

www.trla.org

Phone: 1-888-988-9996

Texas Civil Rights Project

www.texascivilrightsproject.org

Phone: (512) 474-5073 (Austin)

Phone: (915) 532-3799 (El Paso)

Phone: (956) 787-8171 (South Texas)

Border Agricultural Workers Project

www.farmworkers.org/bawppage

201 E. Ninth Avenue

El Paso, Texas 79901

Phone: (915) 532-0921

Fax: (915) 532-4822

E-mail: sinfront@farmworkers.org

Equal Justice Center (Austin)

www.equaljusticecenter.org

510 South Congress Ave., Suite 206

Austin, Texas 78704

Phone: 512-474-0007

Equal Justice Center (San Antonio)

www.equaljusticecenter.org

6609 Blanco Rd, Suite 260

San Antonio, Texas 78216

Phone: 210-308-6222

Fuerza Unida

www.lafuerzaunida.org

710 New Laredo Hwy

San Antonio, Texas 78211

Phone: (210) 927-2294

Fax: (210) 9217-2295

Houston Interfaith Worker Justice Center

www.hiwj.org

1805 West Alabama, 2nd Floor

Houston, TX 77098

Phone: (713) 862-8222

La Mujer Obrera

www.mujerobrera.org

2000 Texas Avenue

El Paso, Texas 79901

Phone: (915) 533-9710

Fax: (915) 544-3730

E-mail: info@mujerobrera.org

Harris County AFL - CIO

www.hcaflcio.org

2506 Sutherland Street

Houston, Texas 77023

Phone: (713) 923-9473

Fax: (713) 923-5010

Southwest Public Workers Union

www.swunion.org

1416 E. Commerce Street

San Antonio, Texas 78205

Phone: (210) 299-2666

E-mail: info@mujerobrera.org

Workers' Defense Project / Proyecto Defensa Laboral

www.workersdefensa.org

5604 Manor Road

Austin, TX 78723

Phone: (512) 391-2305

APPENDIX C

Labor Rights – Agency Enforcement

Wages and Overtime

Texas – Texas Payday Law

Texas Workforce Commission

Labor Law Department

www.twc.state.tx.us

Phone: (512) 837-9559

Toll Free (within Texas only): (800) 832-9243

TDD: (800) 735-2989

Relay Texas: (800) 735-2988

Federal – Fair Labor Standards Act

U.S. Department of Labor, Wage and Hour Division

www.dol.gov/esa/whd

Phone: 1-866-487-9243

TTY: 1-877-889-5627

Gender-Based Pay Equity

Federal - Equal Pay and Fair Pay Acts

Equal Employment Opportunity Commission

Charges are made to one of 53 nationwide regional field offices. To locate the one nearest you as well as additional instructions for filing a charge, go to:

www.eeoc.gov/employees/howtofile.cf

Workers can call 1-800-669-4000 to submit information that will be forwarded to nearest EEOC field office.

Workplace Discrimination or Harassment

Harassment

Support and resources for stalking, assault, harassment, and other unwanted sexual contact:

Texas Association Against Sexual Assault (TAASA)

www.taasa.org

1-800-656-HOPE

To find a local sexual assault center:

www.hopelaws.org/locations

Dial 9-1-1 for emergencies. Dial 2-1-1 (non-emergency) to contact local law enforcement to make a report, or to file charges with the local prosecutor's office.

Civil Rights - Texas¹⁹²

Texas Workforce Commission Civil Rights Division

www.twc.state.tx.us/customers/rpm/rpmsubcrd.html

Phone: (512) 463-2642

Toll-free within Texas: (888) 452-4778

Texas Relay: (800) 735-2989

TTY: (512) 371-7473

Fax: (512) 463-2643

Civil Rights - Federal¹⁹³

Equal Employment Opportunity Commission

Charges are made to one of 53 nationwide regional field offices. To locate the one nearest you as well as additional instructions for filing a charge, go to:

www.eeoc.gov/employees/howtofile.cf

Call 1-800-669-4000 to submit information that will be forwarded to nearest EEOC field office.

¹⁹² Tex. Labor Code Chs. 21 & 22.

¹⁹³ Title VII of Civil Rights Act (applies to employers with 15 or more employees).

Workers' Compensation

Texas Workers' Compensation Commission

www.tdi.state.tx.us/wc/indexwc.html

Phone: (512) 804-4000

Toll-Free (Injured Worker Hotline): (800) 252-7031

Fax: (512) 804-4431

Safety & Health

Texas

*Texas Department of Insurance, Worker's Compensation Division*¹⁹⁴

www.tdi.state.tx.us/wc/safety/index.html

Workplace Hazard Hotline:

Toll-free (800) 452-9595 (calls taken in English and Spanish).

The caller may remain anonymous.¹⁹⁵

The caller should provide the name, address, and telephone number of the employer; specific location(s) of the safety or health hazard(s); and a description of the hazard or unsafe condition.

Federal

Occupational Safety & Health Administration (OSHA)

www.osha.gov/workers.html

Phone: 1-800-321-OSHA (6742)

TTY 1-877-889-5627

Call or visit OSHA website for information on how to file a complaint and the location of the nearest regional field office.

Unemployment

Texas Workforce Commission

www.twc.state.tx.us/customers/jsemp/

[jsempsub2.html](http://www.twc.state.tx.us/customers/jsemp/jsempsub2.html)

Phone: regional offices listed at

www.twc.state.tx.us/ui/bnfts/offices.html

TDD: (800) 735-2989

Relay Texas: (800) 735-2988

E-Mail: UI_Info@twc.state.tx.us

¹⁹⁴ Tex. Labor Code Ch. 401.

¹⁹⁵ However, all call logs and hotline files are subject to disclosure under the Texas Public Information Act (PIA).

APPENDIX D

Sample: Employment Contract

Employer Information:

Name

Physical address

Business

Cell

Facsimile

Employee Information:

Name

Address

Telephone

Alternate Telephone

Agreement:

On _____ an agreement is made between _____ and
[date] [employer's name]

[employee's full name]

En _____ un acuerdo está hecho _____ y
[date] [entre nombre completo del empleador]

[nombre completo de la trabajadora]

Duration of Employment:

Employment shall begin on _____ and continue until either party terminates
[date]
employment according to this agreement.

El empleo se iniciara el _____ hasta la fecha que el empleador o la
[fecha]
trabajadora termine el empleo debajo al/a la de este acuerdo.

*If an employee quits, she must be paid at that time but no later than the next scheduled pay period. If an employee is fired, she must be paid in full no later than the sixth day after she is terminated.¹⁹⁶

*De acuerdo al código laboral de Tejas si empleado dejó el trabajo, el empleador tiene la responsabilidad de pagarle a el/la trabajador/ra todo el sueldo y beneficios que se le deba, si posible en el ultimo día de trabajo de el/ella, pero no más tarde de la fecha en que se efectuara el próximo período de pago. Si el empleador termina el empleo, el trabajador debe ser pagado todo su sueldo y beneficios en tres días de la fecha que se termino empleado.

Place of Employment:

The work will be performed at _____.
[location and physical address]

El trabajo se llevará a cabo en _____.
[dirección]

Hours of Employment:

The work hours are as follows:

Monday _____	Thursday _____
Tuesday _____	Friday _____
Wednesday _____	Saturday _____
	Sunday _____

El horario será siguiente:

lunes _____	jueves _____
martes _____	viernes _____
miércoles _____	sábado _____
domingo _____	

¹⁹⁶ Tex. Labor Code §§ 62.014, 61.017 (Payment After Termination of Employment).

An employee who makes a request in writing may request a final payment by mail.

Notes – Work Schedule

Notas - acerca del horario

Duties and Responsibilities:

The worker's main responsibilities will be (detailed list):

Las responsabilidades principales de la trabajadora serán (lista detallada):

-
-
- * Changes to worker's responsibilities must be noted in writing and signed by the worker and the employer. In the case of substantial changes in the worker's responsibilities, the worker has the right to ask for an increase in salary and/or work hours as agreed upon by the employer and the worker.
 - * Cambios en las responsabilidades de la trabajadora deben estar anotadas por escrito y firmados por el empleador y la trabajadora. Un cambio substancial en las responsabilidades de la trabajadora le dará a la trabajadora el derecho de pedir un aumento de sueldo y/o horas del que ambos, empleador y trabajadora, esten de acuerdo.

Wages and Payment of Wages:

Employer will pay Employee at a rate of \$_____ per hour.

Employer will pay Employee every _____.
(specify weekly, biweekly; exact days/dates)

El empleador es responsable de pagare a la trabajadora \$_____ por hora.

El empleador es cada _____.
(semana o quincena; anote el dia especifico)

- * Texas law requires employers to pay wages at least twice per month.¹⁹⁷
- * El código laboral de Tejas exige que el empleador le pague a la trabajadora su sueldo por lo menos dos veces al mes.

Benefits and Leave:

The employer offers the worker the following benefits (for example, paid sick days, paid vacation):

El empleador ofrece a la trabajadora los siguientes beneficios (por ejemplo, días de pago de enfermedad, tiempo de vacación):

*The employer and the worker will agree to days when the worker will be absent from work, respecting both the worker's need for flexibility and the health needs of the patient (if applicable). The worker will call the employer as soon as she knows that she will need time off, either for her own health reasons or to care for a member of her family.

*El empleador y la trabajadora llegarán a un acuerdo sobre los días que estará ausente del trabajo por razones de vacaciones, respetando tanto la flexibilidad necesaria para la trabajadora y las necesidades de salud del paciente (en el caso de trabajos de cuidado de pacientes) La trabajadora llamará al empleador en cuanto sepa que necesita días de enfermedad, bien sea por su propia salud o para cuidar a un miembro de su familia.

Job Cancellations and Schedule Changes:

In case of job cancellation, the worker will be notified within _____ before the scheduled time. If the worker is not notified within this time, she will be paid _____% of the total pay for this day.

En el caso de cancelación del trabajo, se avisará a la trabajadora con _____ de aviso antes de la hora de trabajo. Si no se avisa dentro de este período de tiempo, se pagará _____% del pago total para este día.

¹⁹⁷ Tex. Labor Code § 61.001(b), (c).

Periodic Review of Contract:

This contract will be reviewed every _____, on the following dates: _____

During these dates, each party will have the opportunity to evaluate the contract and add new changes.

Este contrato se revisará cada _____, en las siguientes fechas _____

En estas ocasiones, los dos, empleador y trabajadora, tendrán la oportunidad de evaluar el acuerdo y proponer cambios.

 firma del empleador/*employer's signature*

 fecha/*date*

 firma de la trabajadora/*worker's signature*

 fecha/*date*

- * The employer and the worker must receive copies of this document. Any changes made to this contract must be recorded here and will form part of this entire agreement.
- * El empleador y la trabajadora deben obtener copias de este documento. Cualquier cambio a este contrato debe agregarse a este y tomará parte de este contrato.

APPENDIX E

Sample: Employer's Confirmation Letter

Address of Employer

Date

Dear Domestic Worker,

This letter confirms your employment with us as a full-time nanny for _____ children, ages ____ and ____.

Your employment with us will commence on January 15, 20 ____ for a term of _____ (months/year).

Your workweek is Monday through Friday, and your hours are from 8:00 am to 5:00 pm, with a one-hour lunch break between those hours.

Your pay rate is \$17 per hour (\$680 weekly) and does not include meals. You will be paid 1.5 times your usual pay rate (time and a half, or \$25.50 per hour) for every hour worked over 40 hours in a single week. [If live in: overtime paid at regular rate of pay]. You will be paid every Friday, and we will give you an earnings statement with each paycheck.

Your responsibilities are limited to taking care of the two children, feeding them breakfast and lunch, and light housekeeping. Light housekeeping includes meal preparation and clean up as well as picking up after the children.

[live in workers: You will have a private bedroom in the residence, with access to the kitchen, dishwasher and other household appliances.]

You are entitled to five sick days and three personal days each year. You will receive two weeks of paid vacation per year if you provide a minimum of _____ weeks' advance notice. Paid holidays include New Year's Day, Good Friday, Memorial Day, Independence Day, Thanksgiving Day, Labor Day, and Christmas Day. If you choose to work on a holiday, we will pay you the overtime rate for each hour worked.

You will be paid while the family is on vacation whether or not you accompany us. If you accompany us, we will pay your travel and incidental expenses. We will pay 50% of your health insurance premiums up to \$200 per month. We do not have worker's compensation insurance. If you are injured while working, we cannot agree to pay your medical bills.

We agree to give you at least three weeks' notice, or three weeks' severance pay, if we no longer need your services. We request that you likewise give us three weeks' notice before leaving the position.

[Employer name]

APPENDIX G

Hiring Questions and Answers

Responding to an Advertisement

Many employers hire through advertising on Craigslist, online jobsites, the newspaper or other media. Respond to the ad as instructed. If it says reply by email only, or call between certain hours, honor the employer's request. The first contact with an employer is usually to arrange an interview or meeting time to talk over the details of the job in person.

Save a copy of the advertisement or job posting and take it with you to the interview.

Try to schedule all interviews during normal business hours (Monday through Friday between 8:00 am and 5:00 pm).

If granted an interview, note the date, time, and location. Is it in a private home? If it is a childcare position, will you get to meet them?

Let another person know the interview time, address and name of the potential employer.

If you feel unsafe, consider asking someone to accompany you to the interview.

Bring Pen, Paper and Documents to Interview

You need to write down what the employer tells you about the job and take notes on the employer's answers to your questions.

Keep a record of what the employer tells you about your job duties, wages, overtime, start date, how often you will be paid, holiday policies and any other details.

Bring proof of work authorization (documents listed in I-9).

Bring a sample employment agreement in case you are offered the job at the interview. This way you can review the terms of employment writing, make changes to the agreement, negotiate other terms, and get the agreement signed before your first day on the job.

Worker Questions for Employer – General

What would my responsibilities be? Am I expected to do babysitting and housekeeping, only babysitting, or only housekeeping?

If they say, "light housekeeping," ask them to specify.

How many people are in the household?

Do you have pets? If so, will I be expected to care for them?

How many employees are in the home and what are their responsibilities?

Am I expected to go with you when you travel? If not, will I be paid when you are away?

Am I the first person in this position?

Why did the last babysitter/housekeeper leave? How long did she work for you?

Will I have regular days off?

What time will my work day begin, and what time will it end?

How will I take my meals? Can I bring my lunch?

Do you pay overtime after an 8-hour day?

How much advance notice do you give when overtime is required?

How many residences do you have?

Do you provide paid sick leave? If so, can I rest assured that my right to take sick leave won't be unreasonably denied?

How much paid vacation time will I have?

When will I be eligible for a raise?

Do you pay transportation costs? If I work late, do you pay for taxi fare home?

Do you pay for workers compensation insurance?

Standard contract

Worker Questions for Live-in Domestic Workers/Nannies

Where will I sleep? Is it heated and air conditioned?

Am I expected to sleep in the same room as the child?

Do you expect me to prepare meals for anyone other than myself and the child?

How will I take my meals?

Is there a meal allowance?

Will my access to phone and mail be limited in any way?

How much notice will you give me to move out if you no longer need my services?

Am I expected to do any other housework aside from tidying up after the child I am caring for?

Employer Warning Signs

There are some signs that may cause you to reconsider whether or not you want to work for a certain employer:

The employer avoids your questions or does not give a direct answer.

The employer will not sign an employment contract or discuss specific terms or conditions of employment.

The employer advertises for certain duties then adds to them during the course of the interview.

The employer is vague about paydays and/or the start and end times of your workday.

The employer puts your concerns or requirements on "hold" or tells you she'll get back with you.

The employer asks you to sign a release that waives your right to minimum wage and overtime compensation.

This is illegal.

The employer makes a negative comment about your English.

The employer comments about your race or your body, or makes suggestive remarks.

The employer wants to borrow or keep your original work authorization documents (this is illegal).

Personal Questions from Employer

An interview is usually not the time to ask personal questions. Personal questions related to your job, or to start a conversation to put you at ease during the interview, are probably OK. For example, if you are interviewing for a nanny position, the employer might want to know if you own a car.

Employers only need to know whether you are authorized to work in this country. Questions about your immigration status are NOT appropriate or relevant to your job interview.

If you don't want to answer a question, or feel uncomfortable about it, ask the employer whether the question is related to a job requirement.

Personal questions that are usually NOT appropriate include:

Are you married? Do you have a boyfriend?

Where is your family?

Do you have any kids? Do you plan to have kids soon?

Where are you from?

Do you have any disabilities or health problems?

Can you read English?

What is your personal telephone number/number to reach you (after hours, 24/7)?

How long have you been in the U.S.?

Are you a citizen?

Do you have a green card?

What to Get in Writing

It is important to put the terms and conditions of employment in writing to make sure that you and your employer understand each other. Asking for a written employment agreement is standard business practice – you are not asking for anything out of the ordinary and it does not suggest that you think your employer is untrustworthy. In fact, most employers expect some sort of written agreement because it protects them as well as you.

The contract, or agreement, should include:

Hours and wages, including work schedule

Holidays and vacation time

Personal days and sick days

Health benefits

Length of employment and how much notice will be given to you if your work is no longer needed or you are laid off.

If hired at the interview, you can take your notes and compose a handwritten contract with space for you and your employer to sign and date. A handwritten contract, a formal contract, or a signed letter from your employer setting forth the terms and conditions of employment (including pay) can be enforced in court.

Oral Contracts

Avoid oral employment agreements, even if your employer seems trustworthy or wants a “handshake” agreement. If there is no written employment agreement, it would be almost impossible to prove that your employer violated your legal rights. If the employer does not give you a confirmation letter, or there is no written employment contract, you can write down should write down everything you and your employer agreed to, date it, and keep it in a safe place. Your notes may help you to later prove that there was a contract in the event of a dispute.

If you can prove that there was an oral employment contract, the law says that it can't be enforced if the work under the contract lasts more than one year from the date of the agreement.¹⁹⁸

Asserting Your Rights – Responses to Employer

—*Your first week's pay will be held as a “security deposit.”*

The law says that you cannot hold my salary as a security deposit or for any other reason without my permission.

—*You need to pay for your uniform*

The law says that you are to provide the uniform if you require it for my work. Its cost cannot be deducted from my pay.

—*I will pay you once a month.*

Texas law says that I am entitled to be paid at least twice every calendar month, but not less.¹⁹⁹ Paying me once a month is not legal.

—*I don't have to pay you minimum wage because you are paid a “salary.”*

If you divide my wages by the hours I work each week, it must be above \$7.25 an hour, no matter how many hours I work each week. The law says I can't agree to anything below minimum wage.

—*I don't have to pay you minimum wage because you are working part-time.*

The law says I am entitled to minimum wage no matter how many hours I work each week. I cannot waive this right.

¹⁹⁸ Tex. Bus. & Comm. Code § 26.01 (Statute of Frauds).

¹⁹⁹ Tex. Labor Code § 61.001(b), (c).

—I don't have to pay you minimum wage because you are undocumented.

The law says my immigration status doesn't matter as long as I have work authorization. I am still entitled to minimum wage and overtime.

—I don't have to pay you minimum wage because you are working at my home, not for a business.

Even if I am working in your home and am your only employee, I am entitled to minimum wage and overtime. I cannot waive these rights.

—You don't get overtime in this job.

If I work over 40 hours in a single week, the law says I am entitled to overtime at 1 ½ times my hourly wage for every hour I work over 40 hours in one week. I cannot waive this right.

—You don't get overtime because you live with us.

As a live-in worker, the law says I am still entitled to overtime at my regular hourly rate of pay for every hour that I work over 40 hours in a week. I cannot waive this right.

—I don't give days off.

I will be more productive if I have _____ (day(s), or parts of days, *e.g.*, Monday and Wednesday afternoons) off.²⁰⁰

—If you hurt yourself while working in my house, you have to pay all of your medical expenses.

I might be responsible for any medical bills that are not covered by your homeowner's insurance policy.

²⁰⁰ Texas doesn't require an employer to give ANY days off, except full time employees in retail sales, who cannot work 7 consecutive days. Tex. Labor Code § 52.001.

APPENDIX H

Domestic Workers FAQ

Unpaid and Underpaid Wages²⁰¹

1. *My employer says I am only entitled to be paid once a month. Is that right?*

Employers must set regular paydays, and pay employees on that day. This is still true even if you are the employer's sole employee. You are entitled to be paid at least twice a month.²⁰² If your employer doesn't tell you your pay dates, Texas law says your pay periods are on the 1st and 15th day of every month.²⁰³ Work from the 1st to the 15th must be paid by the 26th, and work from the 16th to the last day of the month must be paid by the 10th of the following month.

2. *My employer says he will pay me for overtime but not at the same time as my regular paycheck. Is this right?*

If you have worked more than 40 hours in a single week, your overtime wages must be paid on the regular payday for the period in which that workweek ends.²⁰⁴ If it can't be calculated in time to add it on to your regular paycheck, the latest your employer is allowed to pay it is no later than the following regular payday.²⁰⁵

3. *On my last paycheck, I was shorted several hours. What should I do?*

Keep a record of hours worked during the relevant pay period, the pay stub or earnings statement and your paycheck. If you need to cash it before resolving the dispute, make a copy of the check, both the front and back, showing your endorsement.

Ask your employer whether the failure to receive a paycheck was due to a processing error or bank mistake. If so, the employer and/or bank may agree to cover any additional charges you incurred as a result of this mistake. This will also ensure that you are not at fault for failing to submit records for the hours that you worked.

4. *How long do I have to wait to be paid once I quit? What about if I am fired?*

If you are fired, you are entitled by law to be paid no later than six days after discharge or termination.²⁰⁶ If you left for another reason, such as finding a different job, you are entitled to be paid on the next regular payday.²⁰⁷

201 Some sections adapted from Workplace Fairness, a nonprofit advocacy group that helps to advance employee rights and advocacy for workers. www.workplacefairness.org/unpaidwages.

202 Tex. Labor Code § 61.001(b), (c).

203 Tex. Labor Code § 61.012.

204 29 CFR § 778.106.

205 *Id.*

206 Tex. Labor Code § 61.014.

207 *Id.*

5. My employer is not paying me the minimum wage (or overtime):

Prepare a demand letter to your employer clearly setting forth your claim for unpaid wages.

The letter should include the number of hours worked, the wages due, and overtime wages if you worked over 40 hours per week for the pay period(s) for which you were not paid or were underpaid.

Include a deadline for your employer to respond. Send the letter by both certified and first class mail. A certified mail receipt is the best proof that your employer received the letter, but many people do not sign for or pick up certified mail. Sending the same letter by certified mail and first class mail is the best assurance that your employer received it. If the first class letter does not come back to you as undeliverable, it is presumed to have reached its destination.

If you get no response by the deadline in your letter, file a complaint with the Texas Workforce Commission by calling toll-free at 1-800-832-9243 or in Austin and surrounding areas at 1-512-475-2670. The wage Claim form can be downloaded from the TWC website, www.twc.state.tx.us/ui/lablaw/ll1.pdf. Send the completed and verified form to Texas Workforce Commission, Labor Law Section 101 East 15th Street, Room 124T Austin, TX 78778-0001 or fax it to the TWC at 1-512-475-3025

6. My employer paid me, but the paycheck bounced. What should I do?

Under Texas law a bounced paycheck is the same as not being paid at all.²⁰⁸ If your employer does not make good on the deficiency or re-issue your check with sufficient funds to back it up, then you should treat it like you would if you had not been paid; that is, file a wage claim with the Texas Workforce Commission as previously described.

7. How long do I have to file a wage complaint?

Under the Texas Payday Law, you have 180 days from the date your unpaid wages were due to file a complaint with the Texas Workforce Commission.²⁰⁹

Breaks

8. My employer deducts one hour from my pay each day for meals, but I am still expected to watch the children during that time.

²⁰⁸ Tex. Labor Code § 61.016.

²⁰⁹ Tex. Labor Code § 61.051.

If you are expected to continue all or part of your job (such as child care) during time set aside for a meal break, it is not a true break and your employer must pay you for your time.

Meal breaks are not work time. If your meal break is at least 30 minutes long, your employer does not have to pay you for that time. To be an unpaid meal break, however, you must be “completely relieved from duty for the purpose of eating a regular meal”²¹⁰

9. My employer will not let me take a break to express milk or to nurse my baby.

All employers *must* allow a “reasonable break time” for a nursing mother to express breast milk or nurse her baby during work hours for the first year following the child’s birth. This law is rather new, so your employer may not know about it. Tell your employer that the Patient Protection and Affordable Care Act (“PPACA”) requires your employer to give you the nursing break.²¹¹

Immigration

10. My employer has threatened to have me deported. Can she do this?

It may depend on the underlying reason for her threat to deport.

If you complained about poor working conditions or unfair treatment, your employer may be retaliating against you. Reporting you to immigration because you complained about your employment is unlawful retaliation and it is against the law. If this is the case, Immigration and Customs Enforcement (ICE) views this as an employment dispute, and will not interfere with another federal agency (such as the Equal Employment Opportunity Commission) investigation.

If your employer threatens you with deportation for any other reason, contact a community organization or legal services to ask for advice.

11. My employer won't return my passport and/or other documents. What do I do?

Your employer has no legal right to keep your documents for any reason. If she refuses to return them, it is considered theft. File a report of stolen property with the police and contact a community organization for help.

²¹⁰ 29 CFR § 785.19. More information on employee break laws is available from the Texas Workforce Commission at www.twc.state.tx.us/news/eft/d_breaks.

²¹¹ Patient Protection and Affordable Care Act (“PPACA”) signed into law on March 23, 2010 (P.L. 111-148). This law amended § 7 of the FLSA.

Sexual Harassment

13. My employer keeps touching me and I don't want him to. What do I do?

For the touching to amount to harassment, the conduct must be “unwelcome,” make sure your employer knows in no uncertain terms that you do not want to be touched. If the problem persists, be sure to keep a journal of all incidences and consider making a police report.

Write down the places, dates, and times of your employer’s unwanted conduct and include the details. Your journal might later be used to prove that you were harassed. If you are a live-in domestic worker, keep the journal in another location, not where you live and work.

APPENDIX I

Sample: Demand Letter

The following advocate letter has optional paragraphs depending on the violation(s).

Employer Address *By Certified Mail, No.* _____
and by First Class mail

Re: _____ (name of worker)

Dear _____:

WAGES DUE

We are writing in behalf of _____ your (*current/former*) employee regarding wages owed to her for hours that she worked for you at
(*place of employment*) _____ during the following time periods:

List each day and time of nonpayment or underpayment

Example: 1. July 11, 2011 - 12:00 pm – 4:00 pm (4 hours)

According to our client, you employed her at a rate of \$ _____ per hour on the dates and times listed above.

(Worker) worked a total of _____ hours during this period but did not receive full compensation for hours worked.

Under federal law, domestic workers are entitled to minimum wage of at least \$7.25 per hour worked, regardless of the number of hours worked each week. If weekly hours exceed 40 in a single week, domestic workers are entitled to overtime at a rate of 1.5 times the usual rate of pay. At current minimum wage, the overtime rate is \$10.88 per hour.

You therefore owe wages for a total of _____ regular hours, or a total of \$_____ in unpaid wages for the above periods.

Overtime Wages Due

In addition to regular wages, you also owe overtime wages for _____ hours of overtime, or \$_____ for the above periods.

Federal law requires domestic workers to be paid overtime a rate of 1½ times the regular rate of pay for every hour worked in excess of 40 hours in a single week.

OR

Federal law requires that a domestic worker who lives in her employer's residence be paid overtime for every hour worked in excess of 40 in a single week at the regular rate of pay.

According to our calculations, you therefore owe \$_____ in unpaid wages for the above period(s).

MEAL OR REST BREAKS

According to (worker), your employment agreement includes a one-hour meal break and two rest breaks of 20 minutes each for each 8 hours worked. (Worker) states that (meal/rest) breaks have not been honored

OR

(she) has been required to work through meal/rest breaks for the pay period(s)_____.

You therefore owe _____ hours, or \$_____ in unpaid wages for the period(s) _____.

ILLEGAL DEDUCTIONS

According to (Worker), you made improper deductions from (her) pay. Federal law requires that all deductions other than tax withholding must be *in writing and approved by the employee* beforehand.

(Worker) did not agree to the deduction of \$_____ from (her) wages during the period(s) for _____ (purpose of deduction).

OR

The deduction from (Worker's) pay is not permitted by law, regardless of whether (Worker) consented to the deduction.

You therefore owe \$_____ in unpaid wages for the period (s) _____.

CONCLUSION

Please remit to (worker) within _____ days of receipt of this letter the total amount of unpaid wages, which is \$_____ by certified check or money order made payable to (worker) and deliver payment in full to (worker) by mail or by hand-delivery to (“worker, c/o _____c/o _____ (advocate and address) no later than _____ pm on _____ 2011.

If the unpaid wages are not timely received, we will have no alternative but to take legal action in court or through a formal complaint to the Texas Workforce Commission, United States Department of Labor or other appropriate agency.

Sincerely,

(worker advocate)

APPENDIX J

Income Tax Resources

Internal Revenue Service (IRS)
(800) 829-1040; www.irs.gov

For low-income taxpayers who need assistance in resolving tax dispute with the IRS, the Low Income Taxpayer Clinic (LITC) provides free or low-cost services. Services include assistance with audits, appeals, collection disputes and account problems. Clinics are run by a local community or nonprofit organization. Applicants must meet income eligibility guidelines and other criteria for services. To find the LITC nearest you, call the IRS at 1-877-777-4778, or go to www.irs.gov/advocate/content for taxpayer advocate assistance.

Applicants should bring the following:

- Social Security cards for the taxpayer, their spouse and dependents, if applicable,
- Birth dates for primary, secondary and dependents on the tax return,
- Current year's tax package if received,
- Wage and earning statement(s) Form W-2, W-2G, 1099-R, from all employers,
- Interest and dividend statements from banks (Form 1099),
- A copy of last year's federal and state tax returns if available,
- Bank routing numbers and account numbers for direct deposit,
- Other relevant information about income and expenses,
- Total amount paid for day care, and
- Day-care providers tax identification number.

Call 2-1-1 for the nearest LITC. Regional LITC's in Texas include (by city):

<p><i>Sugarland</i> Centro Familiar Cristiano, Inc. 281-340-2400</p>	<p><i>Ft. Worth</i> Legal Aid of Northwest Texas www.lanwt.org 800-955-3959 817-336-3943</p>
<p><i>San Antonio</i> Project Quest www.questsa.org 210-270-4690</p>	<p><i>Austin</i> Foundation Communities 512-447-2026 info@foundcom.org</p>
<p><i>Houston</i> Houston Volunteer Lawyers Program www.hvlp.org 713-228-0735</p>	<p><i>Lubbock</i> Texas Tech University www.law.ttu.edu 806-742-4312 800-742-8037</p>
<p><i>Midland</i> Federal Tax Clinic www.fedtax5.com 432-682-5200 877-333-8925</p>	<p><i>Bryan</i> Lone Star Legal Aid 800-570-4773 979-775-5050</p>
<p><i>El Paso</i> El Paso Affordable Housing Credit Union Service www.freetaxeselpaso.org 915-838-9608</p>	

APPENDIX K

ICE Policy Regarding Labor Disputes

Operations Instruction 287.3a - Questioning Persons During Labor Disputes²¹²

When information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with the rights of employees to form, join or assist labor organizations or to exercise their rights not to do so; to be paid minimum wages and overtime; to have safe work places; to receive compensation for work related injuries; to be free from discrimination based on race, gender, age, national origin, religion, handicap; or to retaliate against employees for seeking to vindicate these rights.

Whenever information received from any source creates a suspicion that an INS enforcement action might involve the Service in a labor dispute, a reasonable attempt should be made by Service enforcement officers to determine whether a labor dispute is in progress. The Information Officer at the Regional Office of the National Labor Relations Board can supply status information on unfair labor practice charges or union election or decertification petitions that are pending involving most private sector, non- agricultural employers. Wage and hour information can be obtained from the United States Department of Labor (Wage and Hour Division) or the state labor department.

In order to protect the Service from unknowingly becoming involved in a labor dispute, persons who provide information to the Service about the employer or employees involved in the dispute should be asked the following: 1) their names; 2) whether there is a labor dispute in progress at the worksite; 3) whether they are or were employed at the worksite in question (or by a union representing workers at the worksite); and 4) if applicable, whether they are or were employed in a supervisory or managerial capacity or related to anyone who is. Information should be obtained concerning how they came to know that the subjects lacked legal authorization to work, as well as the source and reliability of their information concerning the alien's status.

It is also appropriate to inquire whether the persons who provide the information had or have a dispute with the employer of the subjects of the information. Likewise, the person providing the information about the aliens should be asked if the subjects of the information have raised complaints or grievances about hours or working conditions, discriminatory practices or about union representation or actions, or whether they have filed workers' compensation claims.

212 In April 2000, OI 287.3a was redesignated as 33.14(h) of the Special Agent Field Manual.

Generally there is no prohibition for enforcing the Immigration and Nationality Act, even when there may be a labor dispute in progress. However, where it appears that information may have been provided in order to interfere with or to retaliate against employees for exercising their rights, no action should be taken on this information without the review of the District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol Agent.

When Service enforcement action is taken and it is then determined that there was a labor dispute in progress, or that the information was provided to the Service to retaliate against employees for exercising their employment rights, the lead immigration officer in charge of the Service enforcement team at the worksite must ensure to the extent possible that any arrested or detained aliens necessary for the prosecution of any violations are not removed from the country without notifying the appropriate law enforcement agency which has jurisdiction over these violations. Any arrangements for aliens to be held or to be interviewed by investigators or attorneys for the state or federal Department of Labor, the National Labor Relations board or other agencies/entities enforcing labor/employment laws will be determined on a case-by-case basis.



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2012 Edition

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