



THE 2021 LEGISLATIVE SESSION EDITION

TEXAS CONSTRUCTION ASSOCIATION

Working on issues of major importance to the
Texas construction industry

Winter 2021

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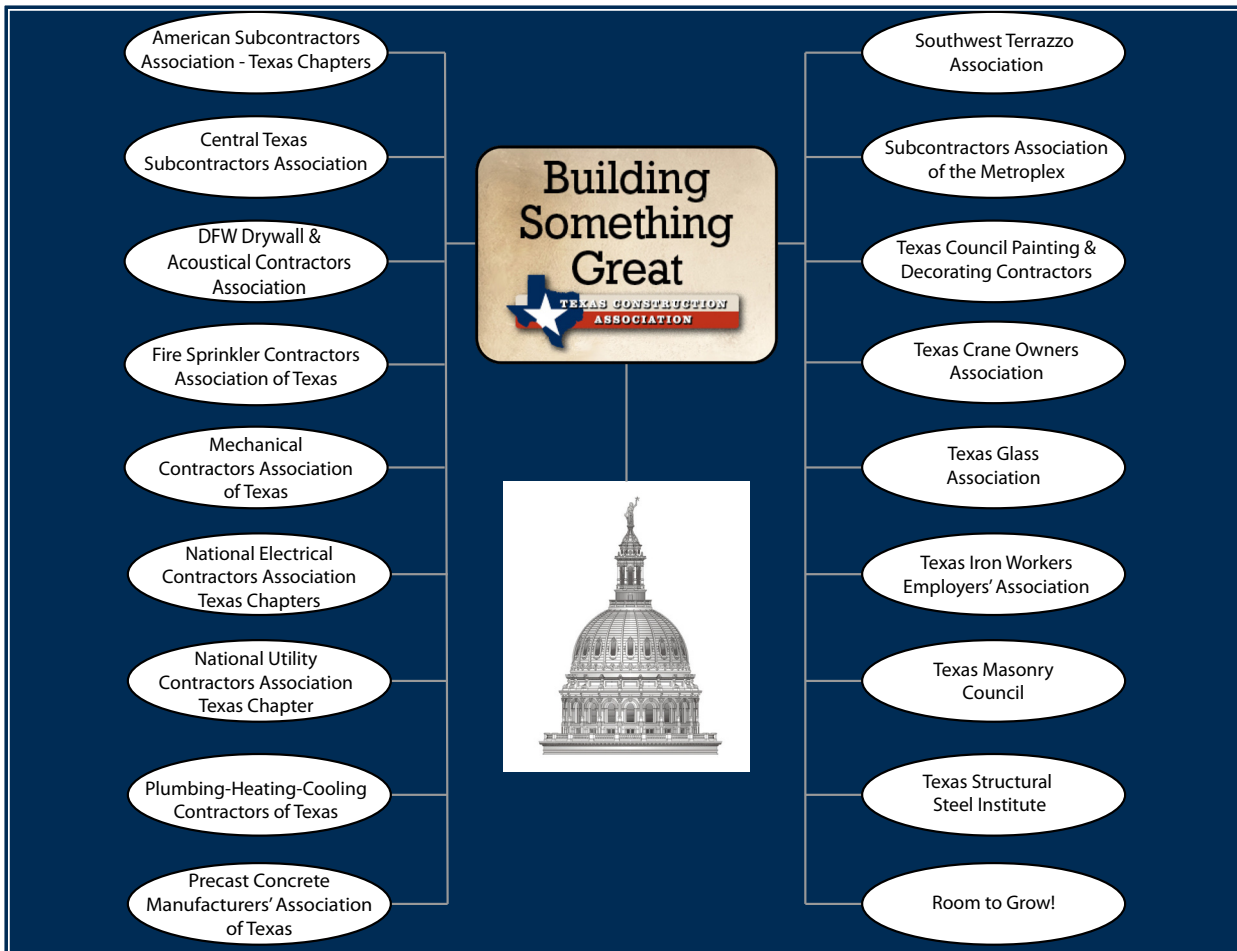
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Texas 2020 General Election

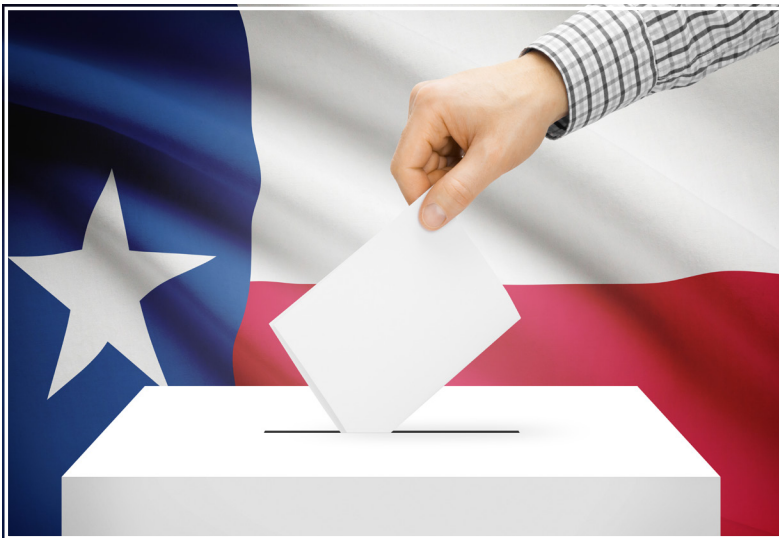
by Eric Woomer

In some ways, this year's historic election was like a Hollywood blockbuster: big stars, with big expectations; a monstrous budget; a record-breaking turnout at the box office with lines around the block; and everyone talking about it. A nail-biter throughout, with a cliffhanger ending that leaves you guessing. And yet, despite all the hype and money splashed across the video screen, when it concludes and you step out of the theater and into the sunshine, everything is pretty much the same.

The unprecedented attention to presidential politics, and the national attention gained by Democrats, failed to dramatically impact races closer to home. Although there was a one-seat gain for Democrats in the Texas Senate, there remain 83 Republicans and 67 Democrats in the Texas House.

There was really only one race in Texas that was expected to impact the partisan divide in the State Senate (19 Rs and 12 Ds heading into election night): Senate District 19, held by Sen. Pete Flores (R-Pleasanton), who was elected in a special election in 2018 to represent the historically Democratic district running from San Antonio to West Texas. He was defeated by seven-term State Representative Roland Gutierrez (D-San Antonio). One special election remains – on December 19, Rep. Drew Springer (R-Muenster) squares off against Dallas hair salon owner Shelley Luther (R) in a runoff for Senate District 30, to replace Pat Fallon (R-Prosper), who was elected to Congress. However, there will be no impact on the make up of the Senate as

both candidates are Republicans. The 18R/13D margin in the Senate is



significant. In the 2015 session, after the GOP lost their supermajority of 21 (two-thirds), the Senate amended their rules to require only 19 (three-fifths) votes to move a bill through the Texas Senate. Thus, previously, Lt. Gov. Dan Patrick had the luxury of only needing Republican votes to advance his favored legislation. Now, he will need to rely on at least one Democrat. It remains to be seen whether Lt. Gov. Patrick and GOP Senators will consider an effort to eliminate or further reduce the supermajority requirement, which would be another noteworthy departure from longstanding precedent.

The real action in state politics was in the Texas House of Representatives, where a nine-vote margin separated the GOP leadership from the Democratic minority. Many observers expected meaningful gains for the Ds, and perhaps even taking control of the Chamber. But, despite the millions poured into races all over the state, it seems it was all just a wash – there are a couple of new faces, but the partisan divide remains the same (83

Rs and 67 Ds). The flips came in Harris County, where Reps. Sarah Davis (R-Houston) and Gina Calanni (D-Houston) appear to be the only casualties. Open seats like House District 138 near Houston (previously held by Rep. Dwayne Bohac (R-Houston)) and House District 92 in Tarrant County (previously held by Rep. Jonathan Stickland (R-Bedford)) have new occupants but remain in the same party. Nearly all incumbents prevailed, some by very slim margins – notably Reps. Angie Chen Button (R-Richardson) and Jon Rosenthal (D-Houston).

For the House overall, this means a GOP speaker and control of key committees. The announced Speaker candidates at one time included Reps. Chris Paddie, Dade Phelan, Trent Ashby, and Geanie Morrison; however, Rep. Dade Phelan, (R-Beaumont) appears to have a clear path at becoming the next speaker of the Texas House after securing the support of over 90 House members.

While many expect a tamer-than-usual regular session, due to budgetary shortfalls and COVID-19 continuing to impact process and the Legislature's ability to navigate complex or controversial issues, GOP control will have a significant impact on redistricting later next summer, when the Texas Congressional delegation is predicted to gain two seats, and the Republican-led bodies will have the first crack at redrawing lines for U.S. Congress and the Texas House and Senate. ★

A Preview of the 87th Texas Legislature

The major issues vying for the attention of Texas legislators in the upcoming session convening on January 12, 2021, will be, in some way, related to the COVID-19 health crisis. Chief among them will be the state budget, and not just for the next biennium, but for the current one as well. Other issues will be the Governor's authority during an emergency, the on-going debate of state vs. local power and Medicaid expansion.

Texas State Budget

In July the Texas Comptroller, Glenn Hegar, announced a \$4.58 billion shortfall for the current biennium. That means the Legislature will need to address changes to the current (9/2019 - 8/2021) budget during the 2021 session via a Supplemental Appropriations bill. Additionally, the Comptroller will report to the Legislative Budget Board prior to the session to provide the Biennial Revenue Estimate needed to craft a balanced budget. With the economic slowdown in the oil and gas sector and the economic impact of the COVID-19 health crisis hitting state revenues hard, it is expected that the Comptroller's estimate will be several billion dollars below what many legislators believe is needed to meet the demands of Texans.

Executive Authority in an Emergency

During the COVID-19 health crisis, Governor Abbott has issued 25 executive orders addressing a wide variety of matters; not all of them have been well received by Texans and/or Texas legislators. In fact, Gov. Abbott's orders have been the subject of litigation in federal and state court from bar owners and other Texans, as well as separate filings in state court from

state legislators. Some of these lawsuits have been resolved, but others remain pending. Additionally, the Governor recently extended his Harvey Disaster Declaration more than three years after the hurricane hit Texas. These issues will no doubt result in legislation aimed at limiting, or at least clarifying, the Governor's executive authority during an emergency.

State vs. Local Authority

The ongoing tug-of-war between state and local officials will be on full display during the upcoming session. As seen during the COVID-19 health crisis, the actions of many local officials, mainly county judges and mayors, were in direct conflict with executive orders from the Governor. Additionally, the Governor has tasked staff with reviewing statutes and proposing legislation to allow the state to take over public safety duties in cities that vote to "de-fund" their police. No doubt there

will be other issues along these lines that come to light during session.

Medicaid Expansion

The expansion of Medicaid to include more Texans has been discussed since the adoption of the federal ACA and has recently seen more bipartisan support than usual. Some legislators have put the price tag for expansion at over \$1.5 billion whereas others have argued the final number is offset by savings in other areas resulting in a program that would effectively be budget-neutral. Thus, this is shaping up to be a "battle of the economists".

All of the items listed above are in addition to so many other issues, large and small, including, but of course not limited to, Redistricting, COVID-19 liability, public school finance, higher ed finance (Tuition Revenue Bonds) and property tax caps. ★



Responsible Accountability for Design Defects

Flash back to the turn of the 20th century. Following recovery from the Civil War, the landscape of Texas was changing. It was a building boom -- statewide population increases led to larger towns and cities. Building practices changed significantly with the innovations of the use of steel, steam-heating and electrical lighting. Gone were the utilitarian buildings -- although brick and stone were still extensively employed for structure and visual interest, in large cities there were commercial buildings of three to six stories which became sources of considerable pride. These changes brought forth more sophisticated building components, an increase in the number of architects and engineers, and an increased risk.

It was during this time, in 1899, that the Thomas Lonergan Co. was contracted to construct a building in San Antonio. The owner of the building, San Antonio Loan & Trust Co., had hired an architect to draw up plans for a 5-story building. Lonergan undertook the construction of the building, following the architect's plans to the letter; however, it collapsed before it was finished. Lonergan refused to rebuild the building based on the architect's design and San Antonio Loan & Trust sued for damages. The case went all the way to the Texas Supreme Court. *Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907). In its opinion, the Court noted, "The fact that Lonergan Co. contracted to construct the building according to the specifications furnished implied that they understood the plans."

"We are of opinion that Thos. Lonergan Co., having failed to comply with their agreement to construct and complete the building in accordance with

the contract and the specifications, must be held responsible for the loss, *notwithstanding the fact that the house fell by reason of its weakness arising out of defects in the specifications and without any fault on the part of the builder.*" (emphasis added)



"Liability of the builder does not rest upon a guaranty of the specifications but upon his failure to perform his contract to complete and deliver the structure."

Flash forward to 2020, with one exception (passage of HB 2899 in 2019 leveling the field for construction of roads, highways and related improvements), *Lonergan* is still the law of the land in Texas (although 48 states follow the *Spearin* doctrine set forth by the U.S. Supreme Court in 1917 which holds the opposite of *Lonergan*). There have been countless changes in the construction industry, chief among them is the state of Texas' policy decision in the 1930s to license architects and engineers, among other design professionals. Through the passage of licensing statutes, the Legislature determined that in the interest of public health and safety, a certain degree of knowledge is necessary for a person to hold themselves out to the public as a design professional. In fact, the applicable statutes include

prohibitions on unlicensed persons performing acts reserved in statute for licensed professionals.

Unfortunately, the Texas Supreme Court has failed to evolve in its reasoning. While it seems reasonable for a contractor to rely on plans and specifications prepared by design professionals hired by the project owner to build a project, if the work turns out to be defective due to an error in the plans and specifications, contractors bear the risk of liability for the consequences of defective design. Additionally, an implied warranty of constructability by the original contractor to the owner gets passed via contract to the subcontractors. Therefore, under current law, a subcontractor 3 or 4 tiers below the original contractor could be held liable for construction defects attributable to an architect's or engineer's plans. Typical general liability insurance carried by a construction contractor or subcontractor does not cover this liability and the possible loss may well exceed a company's net worth.

Bottom line -- the current system is not fair. The construction team should not be liable for construction that is defective due to erroneous design documents furnished to the contractor by the owner. The Texas Supreme Court's reasoning in *Lonergan* is no longer appropriate in this day and age. Therefore, the Legislature must amend the law to provide for the equitable distribution of liability in construction cases between all parties, including owners and design professionals. Everyone comes to the table and is held responsible for the results of their own work. Period. ★

Securing the Construction Team's Retainage Loan

Section 53.101 of the Texas Property Code states “the owner shall retain 10 percent of the contract price of the work to the owner”; and Section 53.102 states, “the retained funds secure the payment of artisans and mechanic who perform the labor or service and the payment of other persons who furnish material, material and labor, of specially fabricated material...” While typically 10 percent is being deducted from contractors and subcontractors monthly pay requests, it has become apparent that the amount deducted, known as “retainage”, is not being put aside for the benefit of the artisans, mechanics, and material suppliers.

It is common practice in the construction industry that an owner who is not self-funded usually borrows only 90 percent of the monthly construction costs during a construction project. The 10 percent retainage has not been borrowed by the owner; therefore, the owner is not paying interest on the retainage, and the lender is under no obligation to release the money if an owner defaults on the construction loan.

The reality is that retainage is a loan by the construction team to the owner. The owner financing the construction with a bank loan will rarely borrow money to fund its retainage obligation

If owners want to continue to finance 10% of their projects on the backs of the construction team, the construction team's retainage loan needs to be protected.

until the end of a project when the retainage is due to the original contractor. Instead, the owner borrows from the construction team. Thus, the bank holds a note and deed of trust for

100% of the value of the project, funds up to 90 percent of the construction costs during construction, and the construction team members finance the remaining 10 percent through deductions in their pay requests.

The bank's loan is secured by a deed of trust. When executed and timely filed, the deed of trust provides a high priority lien on the property. The construction team's loan is unsecured unless a retainage lien under Chapter 53 is perfected. Even then, that lien is secondary to the bank's deed of trust. In the event of a foreclosure by the bank, all mechanics liens, are wiped away -- the bank's loan trumps the construction team's. If owners want to continue to finance 10 percent of their projects on the backs of the construction team, the construction team's retainage loan needs to be protected. This can be done by ensuring that a perfected lien for retainage survives the foreclosure of the bank's lien on a project. Only then will the current retainage system be just and reasonable. ★








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Texas' Broken Lien Laws Need A Remodel

The lien laws in Texas are broken. Of all the states, Texas has the most burdensome and complex lien law scheme. Due to its complexity many subcontractors and suppliers fail to comply with the statutory filing requirements. People who provide labor or materials should not be required to navigate thru a statutory quagmire in order to establish a lien for unpaid work and materials.

The Texas Constitution, as adopted in 1876, Article 16, Sec. 37, states that "Mechanics, artisans and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor[e]; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

In line with the Texas Constitution, the Legislature has enacted laws dealing with the statutory lien rights for people furnishing labor and material on private work. These lien rights provide security to the contractor, subcontractor, and supplier in exchange for the improvements being made to the owner's property.

Unfortunately, as the Legislature has amended Chapter 53 of the Property Code in piecemeal over the last century, the result has been current liens laws that are difficult for attorneys to decipher and nearly impossible for the lay person to understand. The problems presented in perfecting lien rights are numerous: often it is difficult to obtain the legal description of the property or the name of the owner; deadlines for filing notices vary and depend on the position of the person

in the construction chain; and owners do not necessarily have knowledge of all the subcontractors and suppliers on a project who have a right to file a lien. All of these can serve as a trap for honest mistakes which prevent claimants from protecting their lien rights or result in surprise liens for owners.

TCA has been working with several other groups to craft legislation to address the broken Texas lien law system. Simple changes such as updating and clarifying definitions, allowing email delivery of notices and eliminating the second month notice, will go a long way toward making the lien process more accessible to contractors. Chapter 53 of the Property Code may need a complete rebuild, but even a remodel will benefit everyone involved in construction. ★

Spotlight on Executive Director

Beverly Reynal

North Texas Chapter of the American Subcontractors Association

Since 2014, Beverly Reynal, a graduate of Texas A&M University, has been energetically serving in the role of Executive Director of the American Subcontractors Association North Texas Chapter. In addition, she is presently serving as the National ASA Executive Director Council Chair.

Beverly has spent more than 25 years as a force in the Dallas/Fort Worth Construction Industry. During 18 of these years, she was one of the few female salespersons specializing in the field of commercial concrete. Just prior to joining the staff at ASA, Beverly participated as a member in the activities and events of the ASA North Texas Chapter, National Association of Women in Construction and the TEXO association, while simultaneously serving on the board of directors for both ASA and NAWIC.

Her husband, John, the President of Encore Mechanical, is a member of ASA-NTC. Together, they have inspired both their daughters to pursue higher education related to the construction industry. Beverly promotes Texas Construction Association and the ASA North Texas community, helping to further the success the Chapter has contributed to the Texas construction industry.





2021 TCA WALK ON THE CAPITOL

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MARK YOUR CALENDARS FOR
A **VIRTUAL** EVENT ON
FEBRUARY 9 & 10, 2021

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Your participation is vital to the success of
TCA's advocacy efforts on behalf of the
construction industry in Texas.





TEXAS CONSTRUCTION ASSOCIATION POLITICAL ACTION COMMITTEE

The Texas Legislature is involved in your business.

Its decisions affect the way you do your business every day.

The Legislature passes or defeats laws involving your taxes, your tort liability, your contracts, your insurance protection, the roads you travel, the education and regulation of your workforce, and a myriad of other issues.

To have a say in these issues, you have to be involved.

How do you get involved? Contribute to the TCA PAC.

The TCA PAC is organized to make contributions to individuals running for the Texas Legislature and non-judicial statewide offices. Funds are also used to support grassroots efforts by TCA members.

Why should you contribute to the TCA PAC? The TCA PAC is able to pool the resources of numerous construction industry members to have a greater impact than a single individual.

Is this really important? YES! TCA's advocates must have the ability to make contributions to candidates who share your viewpoint. If you don't have a well-funded PAC, you are at a disadvantage because it is guaranteed that your opponents do.

To contribute, visit the TCA PAC website at www.tcapac.org.

Meet Your Texas Constructi



ALAN

Alan Burrows is a lobbyist with nearly 20 years of experience working in and around the Texas Capitol. He first began working in the Legislature during the 2001 legislative session and over the following eight years worked for Republicans and Democrats in both the Texas House and Senate. Prior to the 2009 legislative session, he established his own lobby practice and counts the Texas Construction Association among his first clients.

Alan is a graduate of the University of Texas at Austin. Outside of work, Alan enjoys swimming, cycling and live music when live music was a thing.

Fun Fact: This past summer, while cycling at Valles Caldera Natural Preserve, Alan stood down a black bear!

CLINT

Clint Hackney is a lobbyist and government affairs attorney in Austin, Texas and Washington, D.C. Periodically Clint can be heard on radio stations nationwide as the author of Tales of American Political History, a weekly program consisting of political stories of our past.

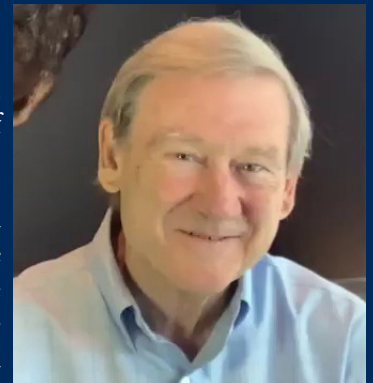
He was born in Lufkin, Texas where he graduated from high school in 1970. He received a B.A. in Political Science from Texas A & M University in 1974 where he was a member of the Corps of Cadets and Ross Volunteers along with many other activities. After undergraduate school, Clint served as a First Lieutenant in the U.S. Army as a paratrooper. Afterwards, he studied Comparative Laws at Oxford University in Oxford, England in 1976 and received a law degree from the University of Houston Law Center in 1977.

Clint was elected to the Texas House of Representatives in 1980 at the age of 28. He served there for eight years representing a District in Northwest Houston. While serving in the Legislature Clint chaired both the House Elections Committee and the House Energy Committee and, among his handiwork in the Legislature he helped rewrite the Election Code in 1985 and played major roles in creating the Texas Department of Commerce (now the Economic Development and Tourism Office) and establishing the state's Rainy Day Fund.

After an unsuccessful statewide campaign, Mr. Hackney moved to Austin to use his expertise in government and public policy. Along the way, Hackney has been a commentator on the Texas State Radio Network, created and owned a commuter bus company, served as Director of Cornerstone Savings and Loan, been active with the Southwest Energy Council and been active in various civic and non-profit organizations.

In addition to his duties to his clients, he enjoys spending time with his lovely wife Susan, his 4 children and 6 grandchildren, and he somehow manages to play some golf and see a lot of baseball.

Fun fact: After receiving his college degree and serving in the Army, Clint landed what he says was "the best job I ever had." He went to Houston and sang and played light rock guitar at Steak & Ale Lounges, as well as his favorite Bar, Marky Farky's on Allen Parkway.



on Association Lobby Team



ERIC

Eric Woomer is a governmental affairs consultant and lobbyist with extensive senior leadership experience advising legislators at the state and national level as well as business interests ranging from Fortune 100 companies to trade associations to family-owned businesses.

Eric has served as Chief of Staff and Legislative Director to three Texas state senators, both Republicans and Democrats, representing areas as diverse as the Texas Panhandle and the Houston Ship Channel. Additionally, Eric served as Press Secretary for U.S. Congressman J.J. “Jake” Pickle, and as a Senior Policy Advisor to U.S. Senator Kay Bailey Hutchison.

In 2010, Eric opened Policy Solutions, a full-service public affairs consulting practice. Eric offers his clients legislative tactical guidance and policy expertise on matters related to energy & water, natural resources, health care, economic development policy, and the state budget. These abilities are complimented with media management skills and compelling collateral writing – speeches, legislative hearing testimony, press conferences & communications materials, briefings, newsletters and white papers.

A 1988 National Merit Scholar, Eric received a Bachelor of Arts degree in Government from the University of Texas in 1993. In 2002, he obtained his Masters of Public Affairs from the University of Texas’ Lyndon Baines Johnson School of Public Affairs. He also received the LBJ Award for Academic Excellence, presented annually by former First Lady “Lady Bird” Johnson to the school’s top graduates.

Eric resides in Austin, Texas with his son, Jackson.

Fun fact: Eric was born in Malawi, Africa, while his parents served in the Peace Corps.

JOCELYN

Jocelyn Dabeau is a lobbyist and attorney with nearly 20 years of experience advocating on behalf of clients across a wide variety of industries, including before the Texas state legislature and many state agencies. Dabeau received a B.A. in government with high honors from the University of Texas at Austin and a J.D. from Harvard Law School.

Dabeau began her career in Dallas, Texas at the law firm of Thompson & Knight, LLP. She then spent six years working as legal counsel for Texas Instruments, followed by a turn as General Counsel and policy advisor for the Texas Health Services Authority. She opened her own law and lobby practice in 2011.

Throughout her career, Dabeau has been active in public service, assisting several non-profit entities with their fundraising and public relations efforts, as well as working in direct service roles in her community. Dabeau has also served on the Board of Directors for the Downtown Austin Neighborhood City and the Original West Austin Neighborhood City, has been an attorney ad litem and a CASA representing children in child custody cases and is currently on the board of the Harvard Law School Association of Austin.

Fun fact: In her free time, Jocelyn enjoys spending time with friends on Lake Austin, dancing, and finding new dog-friendly patio spots for herself and her two pups, Charlie and Lizzie.



Workforce Development & Public Education

During the 2019 session, lawmakers recognized that successful workforce development occurs when public education (K-12), post-secondary education and employers work closely together, and when technical job training is properly funded. In the upcoming 2021 legislative session, the Texas Construction Association along with the Texas Workforce Coalition and its partners will work with the Legislature to build on this success and ensure that everyone understand the needs of employers so that talent pipelines are filled with skilled and educated prospective employees

K-12 Public Education Funding

The Career and Technology Education (CTE) allotment in the Texas state budget is the amount sent to individual school districts to support the provision of CTE to its students, traditionally in high school grades, but the Legislature added middle schools in 2019. Also in 2019, the Legislature set the minimum percentage that school districts must spend on CTE programs from the CTE-weighted allotment at 55%. That means that school districts receive a set amount of money from the state associated with CTE and they are required to spend 55% of those funds

on CTE; the remainder may be spent in other areas at the discretion of the school board. Most districts spend more than that, but many do not spend all the money designated for these programs.

House Bill 334 filed by Rep. Gary Gates for consideration by the Legislature in 2021, would increase the required spending of the CTE-weighted allotment to 90%. Adopting such a measure would not only increase CTE offerings to students, but it would also send a strong message to school administrators about the importance of CTE to Texas school children.

Another funding issue for the 2021 Legislature relates to student transportation. It may seem trivial, but currently, high school students who participate in work-based learning opportunities (internships, apprenticeships, etc.) can get to the company or work site on a school bus only through a set route, or by driving themselves. For some students, driving their own car or ensuring their internship is on a school bus route is not feasible. A statutory change would be needed to allow vehicles other than buses to be used for work-based learning transportation, and for school district costs, including bus and train passes, to be covered by the CTE allotment.

Finally, the “school district teaching permit” is used widely by districts who seek to hire former industry professionals as CTE teachers (those not certified through

an educator preparation program). However, one major barrier to hiring former professionals is teacher pay: districts cannot start those teachers at a higher pay scale to align with their years of work experience in order to be competitive in the market. The Legislature and the education community should consider an “out of the box” solution such as allowing stipends to augment salaries, or signing bonuses, or allowing districts to start salaries at a higher pay-level. Any of these solutions should be funded through the CTE-weighted allotment.

CTE Programs of Study

Within the state’s A-F accountability system, there are certain indicators by students that help school districts receive credit (or a ratings boost) in the student achievement domain for career readiness. These indicators are based on how many students achieve one of the following:

- Earn an industry-based certification;
- Complete a coherent sequence of CTE courses (this is discounted to 1/2 credit point);
- Complete a level I or level II certificate; or
- Complete one of the approved industry-based certifications (IBCs).

The current list of approved IBCs is woefully incomplete and the Texas Education Agency’s (TEA) evaluation process for revising the list is inefficient. In fact, TEA recently announced that the next evaluation process will not be completed until the 2022-2023 school year. This means that the input provided by employers about future workforce needs in 2020 will not be incorporated into classroom



curriculums until the 2023-2024 school year. Therefore, to improve efficiency, the responsibility for evaluating and revising the IBC list should be given to another agency – either the State Board of Education, the Texas Workforce Commission, the Texas Workforce Investment Council, or all three. Additionally, the IBC list should include certifications that students can start in high school and finish postsecondary.

Additionally, there is currently no study or report on “the state of CTE” in public education. To truly study an issue, it is imperative that data and other information be collected and published for public consumption. Therefore, employer groups, including TCA and the Workforce Coalition, will encourage the 2021 Legislature to require the Texas Education Agency (TEA) to produce a robust report about CTE every two years.

Post-Secondary Education

Post-secondary education and training programs are vital to maintaining and growing an effective workforce, and while the pandemic will provide challenges for the next state budget cycle, now is NOT the time to cut technical training and workforce programs. The current economic recession and high unemployment rates mean Texas should reallocate resources to up-skilling and re-skilling to get more Texans trained for the jobs that remain, often middle skill trades. In that vein, it is important to match the employers’ workforce needs with post-secondary educational offerings.

Unfortunately, geographical boundaries of community colleges can be barriers to quality programs in certain areas of the state, either by programs offered or geography served, but especially in service areas outside that community college’s authorized taxing districts. For employers seeking to collaborate

with a higher education partner to serve their needs, the law should allow a community or junior college the first right of refusal to meet those needs of its community’s employers. If the community college is unwilling or unable, local employers should be able to invite competing higher education and workforce training providers, most likely from neighboring communities, to partner with them. This will broaden opportunities for students while better meeting the workforces needs of employers.



Post-Secondary Funding

Employers strongly support the Texas State Technical College (TSTC) model of outcomes-based funding that pays the system based on its graduates’ income. This unique approach is laser-focused on quality instruction and job placement, not the contact-

"...local employers should be able to invite competing higher education and workforce training providers..."

hour models currently in place for community colleges. However, what

if community colleges could opt into a similar funding model for their non-credit courses – technical training, certifications, credentials, continuing education, workforce training – that mirrors TSTC’s “returned value” formula? Like TSTC, students would be tracked into the workforce to determine job placements and wages, so data coordination would be a priority.

Regardless of whether an outcomes-based funding option is adopted for community colleges, employers want

and need better alignment of data collection between the Texas Higher Education Coordinating Board, the Texas Workforce Commission and the Texas Education Agency in order to collect consistent metrics. State agencies must collect, share and distribute robust data on careers, wages, education and program outcomes to better serve employers and to inform students’ decisions about their education and ultimately, return on investment.

Education and workforce development efforts are key to continued operations and growth of industry, and the Texas Construction Association is committed to working with legislators, staff, and other stakeholders like the Texas Workforce Coalition to improve our state’s education-to-workforce pipelines, and to remove legislative or regulatory barriers. ★

Pandemic Liability Protection Legislation

by George S. Christian, Texas Civil Justice League

With pre-filing of legislation for the upcoming 2021 legislative session already under way, Texas Civil Justice League (TCJL) will propose a package of protections from COVID-19-related liability for health care providers, businesses, employers, product manufacturers and distributors, non-profit organizations, religious organizations, schools and universities, and local governments. The proposed legislation is currently undergoing the drafting and preparation process at the Texas Legislative Council and will soon be available to TCJL members for review and comment.

TCJL staff has been working with members of the TCJL Pandemic Task Force, as well as allied organizations, since the summer to develop the proposal. To assist the work of the Task Force, we enlisted the counsel of three of the state's pre-eminent attorneys and legal experts: former Texas Supreme Court Chief Justice Tom Phillips, former Senator and Chancellor of the Texas Tech University System Bob Duncan, and the League's longtime consulting litigation counsel Shannon Ratliff. They have provided invaluable insight and advice on the specific language of the proposal and bringing it to the point of formal drafting.

More than 20 state legislatures have enacted some form of liability protection from exposure to the novel coronavirus, and the governors of some others have issued executive orders extending a liability shield to health care providers, businesses,

and other entities. Because the Texas Constitution adopts the common law of England as the law of decision in state courts (codified in § 5.001, Civil Practice & Remedies Code), it is unclear whether the Governor has the necessary authority to issue executive orders suspending or modifying



its operation in tort litigation. The Legislature, consequently, must act in order to follow our sister states in making sure that the pandemic crisis does not become a litigation crisis for those who have acted in good faith, either to deliver the critically needed treatments, drugs, equipment, and vaccines to those afflicted by the virus, or to the businesses and other entities who have followed appropriate public health guidelines to prevent or mitigate the spread of the virus.

Regardless of whether Congress enacts liability protections at the federal level (which looks uncertain at best), the Legislature must still put Texas-specific laws on the books. Since the advent of the tort reform era in the mid-1980s, the Legislature has adopted numerous statutes modifying the common law, and the Texas Supreme

Court has developed a substantial body of precedent interpreting those statutes, as well as made rule changes and judicial decisions unique to our jurisprudence. Any federal law in this area will merely establish a floor. Texas law is in some respects better for civil defendants than the federal proposals currently on the table, and legislation tailoring liability protection to our law will provide a higher level of liability protection. The federal proposals are also temporary and limited to the novel coronavirus. TCJL's proposal, on the other hand, will be permanent and apply not only to the current crisis, but to any future pandemic emergencies as well.

The centerpiece of TCJL's proposal is a strong liability shield protecting a person, including the person's agent or employee, from an action alleging personal injury or death resulting from another person's exposure to a pandemic disease (i.e., a disease that the World Health Organization or U.S. Centers for Disease Control and Prevention declare as a pandemic). The proposal requires a person alleging the exposure to establish by clear and convincing evidence that:

- The claimant's harm resulted from the defendant's gross negligence;
- Reliable scientific evidence establishes that the defendant's conduct was the cause in fact of the claimant's exposure; and
- The claimant suffered serious bodily harm or death as a result of contracting the disease.

Continued on page 17...



Gina O'Hara
*Program Administrator for
Texas Construction Safety Group*

Our TX Mutual Safety Group program is continuing to have phenomenal success in growth, dividends and loss ratios. As of November 30, we had reached a group premium of \$73 million with 1788 policy holders. Our current loss ratio is 24.1% which has us comfortably in dividend range so far for this term. The payroll represented for our members is almost \$3.8 billion.

Thank you to all of the TCA members who are utilizing this benefit. Your participation makes the work of TCA possible.

To those of you who aren't participating currently, the examples below might be eye-opening to you. This is the Texas Mutual dividend history for three of

our members. This is a combination of the regular dividends along with the safety group dividend. Dividends are not guaranteed, but Texas Mutual has a track record of never missing a year in paying one. The longer a company is insured with Texas Mutual and in the group, the higher the percentages can be. The Texas Mutual dividend has a loyalty component to it.

Accessing the insurance group is simple. Just ask YOUR agent to request a quote in the group from Texas Mutual. Additional answers can be found at www.TXConstructionWC.com or by calling me, program administrator, Gina O'Hara at 512-330-9836, ext. 6324. info@txconstructionwc.com ★

Texas Mutual Dividend Examples

Example 1 - Painter

<u>Policy Effective</u>	<u>Total Premium</u>	<u>Company Dividends</u>	<u>TCA Safety Group Dividends</u>	<u>5 Yr. Net Premium</u>	<u>% Premium Returned</u>
2015-2020	\$194,159	\$129,241	\$16,348	\$56,570	70.86%

Example 2 - Mason

<u>Policy Effective</u>	<u>Total Premium</u>	<u>Company Dividends</u>	<u>TCA Safety Group Dividends</u>	<u>5 Yr. Net Premium</u>	<u>% Premium Returned</u>
2015-2020	\$565,940	\$175,100	\$46,277	\$344,563	39.12%

Example 3 - Electrician

<u>Policy Effective</u>	<u>Total Premium</u>	<u>Company Dividends</u>	<u>TCA Safety Group Dividends</u>	<u>5 Yr. Net Premium</u>	<u>% Premium Returned</u>
2015-2020	\$98,994	\$33,735	\$7,095	\$58,164	41.24%

Commercial Vehicle Litigation By the Numbers

by Texans for Lawsuit Reform

As we've all seen in the past few months, our wellbeing depends on commercial vehicles delivering services and goods to distribution centers, retail outlets and our front doors. It's big business and it is essential. Unfortunately, lawsuits against commercial vehicle owners and operators have also become big business for the cadre of plaintiff lawyers who are endlessly searching for another big payoff.

Commercial vehicle litigation is reaching a tipping point that, unless addressed by the Texas Legislature, will result in business failures, increased costs of doing business for the companies that survive, and increased costs for the goods and services we all need. We simply can't allow these essential businesses to continue serving as punching bags for personal injury trial lawyers.

Defining the Players

Commercial vehicles fall into a number of classes, from minivans used to deliver flowers to big rigs that carry goods across the nation. Some must register with the Texas Department of

Transportation (TXDOT), but many do not. Of those registered with TXDOT, a great majority are small, "mom and pop" operations. In fact, nearly 88 percent

Motor vehicle accident lawsuits in Texas have been increasing.

of active carriers registered in Texas operate 10 or fewer vehicles. We believe many of the commercial vehicles that are not registered with TXDOT are also operated by small businesses, providing services that range from swimming pool cleaning to pest control. These are small business owners doing their part to create jobs and make a living. And all of them are targets for personal injury lawyers because they all have deep pockets.

Yes, even the mom and pop operators of commercial vehicles have "deep pockets" because a commercial vehicle operating in Texas must carry a substantial amount of liability

insurance, ranging from a minimum of \$300,000 to a maximum of \$5 million. Many carry more insurance than the minimum, with layers of insurance reaching into the multi-millions.

In addition to having a substantial amount of insurance available to pay crash-related damages, many companies running commercial vehicles have tangible assets that can be subject to judgments. In other words, through insurance and their own assets, these companies have deep pockets, which are irresistible to personal injury trial lawyers.

Trial Lawyer Targeting of Commercial Vehicles is Working

Personal injury trial lawyer ads seeking clients to file car crash lawsuits are ubiquitous on television, in newspapers and on billboards. Many of the advertisements specifically seek clients to sue owners and operators of commercial vehicles. The advertising seems to be working.

Motor vehicle litigation is increasing in Texas, while other kinds of personal injury litigation are decreasing. According to the Texas Office of Court Administration, the number of motor vehicle lawsuits has increased steadily since fiscal year 2008, climbing 118 percent from fiscal year 2008 to fiscal year 2019. During the same period, other kinds of injury and damage cases decreased seven percent.

In addition to an increase in the number of lawsuits involving a motor vehicle of any kind, the lawsuit-to-crash ratio is increasing over time. By 2019, Texas had reached the point that a lawsuit was filed in about one out of

Breaking Down Commercial Vehicle Litigation in Texas



88% NEARLY 88% OF

ACTIVE CARRIERS REGISTERED IN TEXAS ARE "MOM AND POP" OPERATIONS WITH 10 OR FEWER VEHICLES.



118% MOTOR VEHICLE LAWSUITS INCREASED

118% FROM FY 2008 TO FY 2019. OTHER KINDS OF INJURY & DAMAGE CASES DECREASED 7% OVER THE SAME PERIOD.



\$5M TEXAS LAW REQUIRES COMMERCIAL VEHICLE

OPERATORS TO CARRY ANYWHERE FROM \$300,000 TO \$5 MILLION WORTH OF INSURANCE.



71% IN 2008, THE LAWSUIT-TO-CRASH RATIO WAS

1 IN 17. IN 2019, IT WAS 1 IN 10. THIS IS A 71% INCREASE IN THE LAWSUIT-TO-CRASH RATIO IN ONLY 11 YEARS.

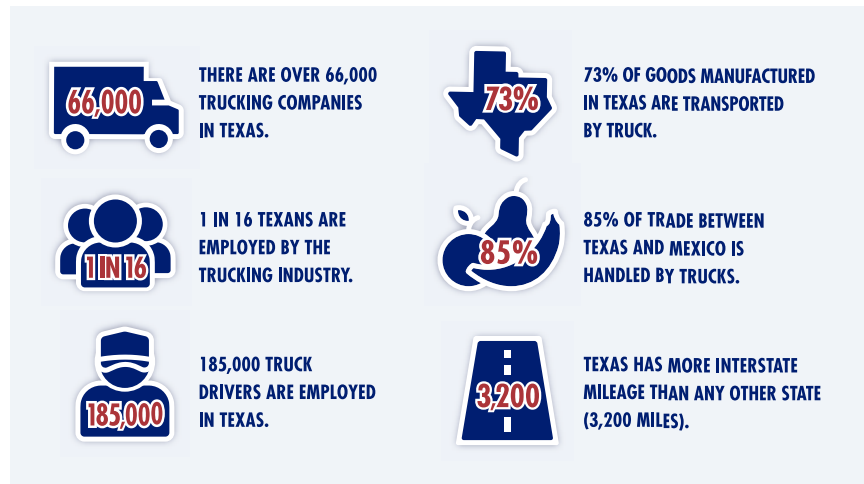
Source: Texas Department of Motor Vehicles, Office of Court Administration, Texas Department of Transportation.

Commercial Vehicle Litigation *Continued...*

10 vehicle crashes. Just 11 years earlier, in 2008, the lawsuit-to-crash ratio was one in 17. This is a 71 percent increase in the lawsuit-to-crash ratio in only 11 years. Anecdotal information we have received indicates the lawsuit-to-crash ratio may be closer to one in five if a large truck is involved.

Based on the data, it appears Texas is moving toward a litigation environment in which a collision with a truck—no matter who is at fault and no matter the severity of the event—is an opportunity to hire a plaintiff's lawyer promising riches. That is simply not a place we can afford to go. ★

Trucking's Contribution to the Texas Economy



Source: Texas Department of Transportation

Pandemic Liability Protection Legislation *Continued...*

Moreover, to maintain the lawsuit, the claimant must serve the defendant with a report by a qualified expert setting out the factual and scientific basis of the claim (as currently required for health care liability claims).

In addition to these heightened requirements for establishing liability, the proposed legislation also creates an affirmative defense to liability if the defendant acted in compliance or consistent with one of the following: federal or state law or regulations, a presidential or gubernatorial executive order or declaration, an action of a local government entity, or recommendations or guidance of a public health authority.

TCJL's proposed legislation also provides robust protections for product manufacturers, distributors, sellers, and other providers of products used to treat, prevent, or mitigate the spread of a pandemic disease. The legislation contains a broad definition of qualified products, including vaccines, drugs, and treatments; medical devices, equipment, and supplies; personal protective equipment; sanitization products; and diagnostic tests. Under

the proposal, a product provider is not liable unless it:

- Had actual knowledge of a defect when the product left its control;
- Acted with deliberate intention, actual malice, or reckless disregard in designing, manufacturing, labeling, selling, or donating the product; and
- The defective product presents an unreasonable risk of substantial harm to the person using or exposed to the product.

The same standards apply to a claim based on a failure to warn or the provision of inadequate instructions regarding the use of the product. They also apply to a governmental unit, health care provider or institution, educational institution, non-profit organization, first responder, or a business, including an agent or employee of the business, that selects, distributes, or uses a product.

Health care provider organizations operating under the umbrella organization Texans Allied for Patient Access (TAPA), including TCJL members Texas Medical Association and Texas Hospital Association, have

produced a proposal applicable to physicians and health care providers (including first responders) that closely parallels the placeholder language in the TCJL draft. This language will be substituted into the TCJL draft so that we go forward with identical proposals. It will protect providers from liability except in the case of reckless conduct or intentional, willful, or wanton misconduct. It will also extend protection beyond the immediate context of providing treatment to persons exposed to the virus to the collateral effects of the pandemic, such as delaying or canceling scheduled procedures, office visits, diagnostic tests, or other treatment of a non-pandemic disease or condition. These protections will be in addition to those applying to emergency care under current law.

With these proposed changes in place, Texas will be better positioned to properly address liability related to the current COVID-19 pandemic and any future pandemics that may occur. Doing so is necessary to assign liability appropriately during difficult times. ★

Texas Economic Protection & Recovery Act

Texas job creators and workers have suffered massive uncertainty due to the pandemic, hurting families and our economy. Small, medium and large businesses alike have all tried valiantly to continue operations and maintain staffing levels, but as the COVID-19 health crisis continues it is getting harder and harder for businesses to operate at pre-pandemic levels.

As one of the twenty-two business and industry association members that have joined together to form the Alliance for Securing and Strengthening the Economy of

Texas (ASSET), TCA is advocating for smart economic policies that will allow job creators to not only operate, but thrive, and continue to

We need smart economic policies that will allow job creators to not only operate, but thrive, and continue to employ millions of Texans.

employ millions of Texans.

The Texas Economic Protection and Recovery Act (TEPRA) will help restart our economy and encourage job creation and investment in all corners of the state. By focusing on core principles such as local mandate preemption, liability protections, and workforce development, TEPRA will ensure that job creators in Texas do not have their hands tied by policies that hurt economic growth. Allowing job creators to do what they do best is the key to the state's ability to recover and come back stronger than before. ★

Your company is eligible to participate in the largest and most tenured office supply discount program simply because of your membership in the Texas Construction Association.

It's true! TCA's program with Office Depot is a benefit that you receive with your membership in the Texas Construction Association. It costs you nothing to register and it provides tremendous discounts!

- Guaranteed **at least 5%** off the lowest price from officedepot.com or in store
- **No Contract** or sign-on fees
- A **15-30% discount** off the top 100 items businesses purchase most
- **Discount cards** allow employees to receive company discounts
- Up to **80% savings** on additional business products
- **Free** next-day delivery of in-stock items for orders over \$50
- **Online portals & store purchasing** cards allow for shopping in store or at your leisure online

**Shop
In Store
or
Online!**

In addition to office supplies, the TCA program provides **BIG DISCOUNTS** on copy & print services:

2.5¢ Black & White Copies

22¢ Color Copies

40% Off Finishing Services

CONTACT

Texas Construction Association
Patrick Finnegan 512-473-3773
pfinnegan@texcon.org

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CONSTRUCTION AND COVID-19 SAFETY



Recommended Safety Precautions

See TCA's home page at www.texcon.org for more extensive resources on COVID-19.

- **MONITOR** local, state and federal authorities' recommendations concerning the pandemic. Use the latest information to inform safety protocols on the jobsite.
- **SHARE** information about the pandemic with employees.
- **TRAIN** workers on the signs and symptoms of COVID-19 and how the disease is spread, including that infected people can spread the virus even if they do not have symptoms.
- **DISINFECT** all shared spaces, as well as portable toilet and hand-washing facilities. Keep hand-sanitizer dispensers filled and readily available.
- **PRE-SCREEN** workers before entry to assess potential exposures and circumstances in the work environment.
- **ENFORCE** the wearing of masks over noses and mouths to help prevent spreading the virus in aerosol droplets.
- **ENACT** tight controls over jobsite access, including screening of all visitors to a construction site in advance of arrival.
- **EDUCATE** the workforce on the types, proper use, limitations, locations, handling, decontamination, removal and disposal of any personal protective equipment (PPE) being used.
- **LIMIT** in-person meetings as much as possible, limit the number of workers in attendance, and implement social-distancing practices.
- **IDENTIFY** and minimize choke points where workers stand together, such as hallways, hoists and elevators, ingress and egress points, and break areas.
- **KEEP** 6 ft of distance between passengers in elevators and personnel hoists, and equip operators with the appropriate respiratory protection and other PPE.
- **COORDINATE** site deliveries for minimal contact. Have delivery personnel remain in their vehicles if possible.
- **ADOPT** staggered work schedules. Provide alternating workdays and/or extra shifts to help minimize the number of employees on a jobsite at a given time.
- **ENSURE** that shared indoor spaces have good airflow, such as by turning on an air-conditioner or opening windows.



Largest Dividend in TCA's History

Year 2020 saw some remarkable, historic events. One event in which many TCA Member Companies shared was the distribution of \$4,800,000 in Safety Group dividends from Texas Mutual Insurance Company, the leading workers' compensation insurance company in Texas. The TCA Member Companies receiving group dividends (these are in addition to the individual company dividends from Texas Mutual) were those who are insured with Texas Mutual in the Texas Construction Safety Group. With over 1,700 TCA Member Companies, the Texas Construction Safety Group is the largest such group in Texas. Congratulations to TCA Member companies in the Safety Group! Keep up the great work of elevating Safety to the highest priority level at the office and on job sites. It pays!

In 2020 TCA Member
Companies shared
\$4,800,000
in Safety Group
dividends from
Texas Mutual
Insurance Company
JOIN US!



Built to Last.

Our group constructs bigger dividends and a safer workplace for you.

Members of the **Texas Construction Safety Group** are eligible to receive extra dividends, a greater discount on their workers' comp premiums and more. If you are committed to a higher level of safety, join other leaders in your field to maximize the rewards. Be part of a safer Texas.

To learn more about becoming a member, contact your agent or **Gina O'Hara** at (979) 774-6238 or info@txconstructionwc.com.

Texas Mutual
WORKERS' COMPENSATION INSURANCE
STAY SAFE, TEXAS



**TEXAS CONSTRUCTION
SAFETY GROUP**
A TCA-Endorsed Workers' Comp Program

While we can't guarantee dividends every year, Texas Mutual has returned \$3.1 billion to safety-conscious policyholder owners since 1999.

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