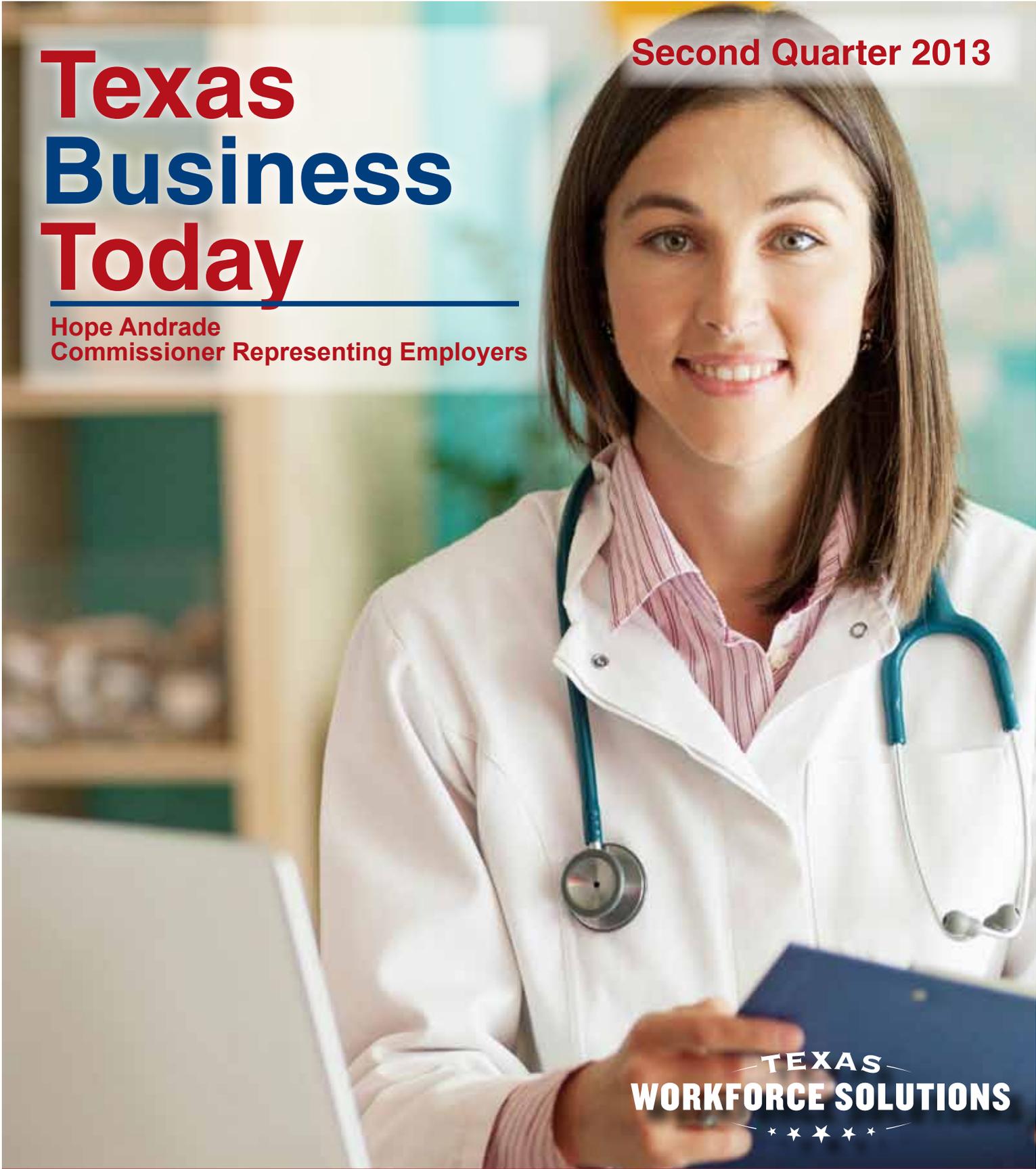


Second Quarter 2013

Texas Business Today

Hope Andrade
Commissioner Representing Employers



TEXAS
WORKFORCE SOLUTIONS
* * * * *

Firsthand witnesses are important factor in unemployment appeals

- The do's and don't's of hiring minors • New law affects employer response time to claims •

TWC continues to meet workforce needs

As partners working for our state's continued prosperity, we are all committed to supporting Texans in the realization of their work-related goals and aspirations. And our continued efforts are timely, as over the past year, Texas saw jobs added during every month of FY

Commissioner's Corner

2012. In fact, over the year, Texas added more jobs (+324,700) than any other state and we now have the second largest workforce in the nation. This growth brought new demand for workers with a variety of skills. To help meet this demand, there were a few bills passed this Session to bolster work readiness efforts in Texas.

Legislation such as the Texas Fast Start Program, the direct sharing of job demand data with local school districts, and the Texas Workforce Innovation Needs Program will allow us to better prepare students for the needs and demands of employers now and in the future. The Texas Fast Start Program will use competency-based learning to allow students to receive certificates and degrees in high-demand fields in an expedited fashion. Similarly, the Texas Workforce Innovation Needs Program allows institutions of higher education and school districts to establish innovative career programs that lead to a career or technical certificate or an Associate's Degree.

The commission is also helping to prepare our future workforce with the skillsets to pursue the jobs of tomorrow. This includes promoting programs that encourage students to consider careers that involve STEM— Science, Technology, Engineering and Math. We recognize that such efforts must be diverse, going beyond what could be considered, “textbook” STEM initiatives.

STEM skills today actually cover a much broader range of occupations. For example, machinists now commonly rely on a range of specialized skills, including programming and math skills, to operate modern manufacturing equipment. As more and more I.T. infrastructure is integrated into manufacturing lines, experts have noted that the tools of their industry are changing, and applications are increasing in scope and complexity.

We are proud to promote and support a workforce system that provides communities, employers, and individuals opportunities to succeed. I am convinced that Texas continues to succeed together because we work together. 🇹🇽



Legislation such as the Texas Fast Start Program and the Texas Workforce Innovation Needs Program will help better prepare students for the needs and demands of employers now and in the future, according to Texas Workforce Commission Commissioner Andrade. *Photos courtesy TWC Communications*

Sincerely,

Hope Andrade
Texas Workforce Commission
Commissioner Representing Employers

— TEXAS —
WORKFORCE SOLUTIONS
* * * * *

Firsthand witnesses are critical to unemployment appeals

If you have appealed an initial unemployment determination that was not in your favor, your case will most likely be set for an appeal hearing. This hearing is a telephone hearing where all the parties, witnesses, and the hearing officer, are conferenced in via telephone to participate. Because the hearing is not being held in one specific location, it is not necessary for all witnesses to be together in the same room. As long as the employer has phone numbers where the witnesses can be reached, they can be conferenced into the call and can participate in the appeal hearing. This means that the employer should be able to make its **firsthand witnesses** available to testify on the employer’s behalf.

What are firsthand witnesses? These are people whose knowledge of an event comes from having experienced it with their own senses. In other words, they *saw what happened* with their own eyes or *heard what happened* with their own ears. Very often, the final incident leading to a claimant’s job separation is witnessed by other employees who just happened to be present. These employees would be considered firsthand witnesses because any information they have about the final incident

comes from their actual personal experience. They did not learn about what happened because someone else told them about it or because they read a written statement prepared by someone else.

It is imperative that employers present firsthand witnesses in support of the employer’s position at unemployment insurance (UI) hearings. Although the hearing notice TWC sends out prior to the hearing contains instructions for both parties to present firsthand witnesses in support of their case, many employers don’t read these instructions. Instead, they make the mistake of having an HR staff person or a manager present at the hearing whose knowledge of the reason for the claimant’s separation comes from notes written by the claimant’s supervisor, or written statements provided by co-workers. Although these documents are still considered evidence, this evidence is considered secondhand hearsay evidence. It is not given the same weight as firsthand testimony provided under oath and subject to cross-examination. So what happens when the employer provides solely secondhand hearsay evidence of the claimant’s misconduct and the claimant denies it under oath?

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Cover image: Nurse working in hospital. *iStockphoto/Thinkstock*

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Here's an example:

A security guard is fired for sleeping on the job after receiving prior warnings for similar behavior. This employee clearly knows that his job is in jeopardy. However, at the appeal hearing, the employer presents an HR representative who states that she does not work directly with the claimant. The claimant works the night shift as a security guard at a client job site while the HR representative works in the main office from 8 a.m.– 5 p.m. However, the HR representative has talked to the claimant's co-workers and has reviewed written statements from these co-workers which describe the final incident that led to the claimant's discharge. The HR representative testifies that the claimant's supervisor and a co-worker found the claimant at his post, sitting in a chair, with his arms crossed, his head back, his eyes closed, his mouth open, snoring away. They observed the claimant for several minutes. After no further movement, except for the snoring, the supervisor awakened the claimant by shaking him on the shoulder. Because the claimant had been previously warned about this type of behavior, the employer decided to discharge him. Not surprisingly, the claimant testified to something very different. He denied sleeping while on the job. He said that he was sitting in a chair at his post and was simply resting his eyes for a brief moment. He was aware of his supervisor and co-worker walking up to him. The claimant opened his eyes as soon as he heard them walk up to him. With such conflicting testimony, who will most likely prevail in this case? The claimant will. Because the employer presented only secondhand hearsay evidence to prove the claimant's misconduct, and the claimant denied any wrongdoing under oath, the claimant wins.

Now imagine what would happen if the employer had presented the two firsthand witnesses who saw the claimant sleeping with their own eyes. Although the claimant could still deny his actions, it would be much harder for him to do so. And even if he did, by providing two firsthand witnesses, the employer is that much closer to proving that the claimant was discharged for misconduct connected with the work. Unfortunately, many employers discover that they should have presented their firsthand witnesses when they receive a decision from the Appeal Tribunal which qualifies the claimant for benefits based on the fact that the employer's secondhand hearsay evidence could not overcome the claimant's sworn denial. At that time, many employers will appeal to the Commission, ask for another hearing, and offer to present firsthand witnesses. However, since the next level of appeals does not involve a new hearing, but rather a review of the evidence (testimony and documents) recorded at



Very often, the final incident leading to a claimant's job separation is witnessed by other employees who just happen to be present. *Wavebreak Media/Thinkstock*

the appeal hearing, offering to produce the witnesses at that time does not usually help the employer. The time for the employer to present its best, most complete, and most persuasive case is at the Appeal Tribunal hearing because employers may not get another opportunity to present their evidence.

Does this mean that if an employer only has written statements and secondhand hearsay testimony that it should just throw in the towel? Of course not. Each UI case is very fact-specific and stands alone. There are cases where secondhand hearsay evidence may be sufficient to overcome a claimant's sworn denial. There are also cases where hearsay evidence may be the only evidence presented and may result in the employer prevailing on its case. The point is that one never knows how an appeal hearing will turn out. Employers should therefore make sure to put forth their best cases. It's important to understand that there are no guarantees -- not every unemployment claim will result in a favorable outcome for the employer. However, by remembering that firsthand testimony is better than written statements or other secondhand hearsay evidence, the employer stands a better chance of presenting a winnable case. 🇹🇽

*Elsa G. Ramos
Legal Counsel to Commissioner Hope Andrade*

What employers should know before hiring minors

Those employers who have hired young workers for jobs during the summer school break may be wondering what the laws require regarding payment of wages and whether any special laws come into play when the summer jobs come to an end. It is important to be aware of the laws that govern the working hours, job duties, and pay rate for those employees under 18 years old. These laws are in place to protect the safety, health, and well-being of minors.

Age Restrictions

With very few exceptions, hiring children younger than 14 years old is against the law. The exceptions exist for certain occupations in agriculture, child actors, and children employed directly by their parents. However, under no circumstance can a child younger than 14 years old work in manufacturing, mining, or in any hazardous duty occupation (see below).

Restrictions on Work Hours

For employers subject to coverage under the Fair Labor Standards Act (FLSA), there are restrictions not only on how many hours per day or week 14- and 15-year olds can work, but also on which hours of the day these employees are allowed to work. If the minor is attending school, including summer school, they cannot work during school hours. Outside of school hours, minors in this age range can work no more than three hours during a school day and no more than 18 hours during a school week. The minors can work only during the hours of 7 a.m. – 7 p.m. each day. If the minor is not enrolled in summer school, then he or she can work no more than 8 hours per day and no more than 40 total hours during a non-school week. From June 1 of each year, through Labor Day, the minor can work from 7 a.m. – 9 p.m. If the employer's business is not covered by the Fair Labor Standards Act (FLSA), Texas law provides that 14- and 15-year olds can work no more than 8 hours per day and no more than 48 hours per work week. They may not work from 10 p.m. – 5 a.m. before a school day, or from midnight - 5 a.m. before a non-school day, including during the summer.

There are no limitations on work hours for minors who are 16 or 17 years old. However, when scheduling these employees, it would be a good idea to keep in mind the student's school hours and any local curfew laws that may exist.

No Hazardous Duties

No person under the age of 18 can perform duties the Department of Labor considers hazardous. Examples of hazardous duty occupations include: cooking, baking, operating a vehicle, and outside window washing. For a complete list of hazardous duty occupations, please see: <http://www.twc.state.tx.us/ui/lablaw/cllsum.html>.

Pay Issues for Minors

Few employers are aware that they can pay minors below minimum wage during the first 90 days of employment. During this period, the employer can pay the minor \$4.25 per hour. After this time, minors must be paid Federal minimum wage, which is currently \$7.25 per hour. Additionally, employers can apply to the U.S. Department of Labor for a certificate allowing the employer to pay certain student employees, apprentices, or individuals with certain disabilities an hourly rate that is below minimum wage. For more information on the requirements to obtain the special certification, please visit the Department of Labor's website: <http://www.dol.gov>.

Employer Policies

Remember that certain documents that are normally signed by employees may not be legally binding on minors. These include documents such as drug testing consent forms, background check consent forms, employee handbooks, and certain employer policies, including a Wage Deduction Authorization. For these documents, it is best to obtain the signature of not only the minor employee, but the minor's parent or legal guardian.

Otherwise Minors Receive the Same Treatment as Adults

Other than the exceptions already noted, minors should receive the same treatment as adult employees. For example, the normal new hire paperwork must be completed (I-9 form, W-2 for income tax purposes, and reporting to the Texas Attorney General's office). Normal payroll laws apply to all employees under 18 years of age.

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It is important to be aware of the laws that govern the working hours, job duties, and pay rate for those employees under 18 years old. These laws are in place to protect the safety, health, and well-being of minors. *Creatas/Thinkstock*

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Overtime laws apply to minors, just as they do adults. Therefore, if a minor works more than 40 hours in a work week, the minor would be entitled to overtime pay at a rate of 1.5 times his or her regular rate of pay. Of course, the employer should consider the limits on work time described above prior to allowing a minor to work more than 40 hours in a week.

Consequences of Violating Child Labor Laws

Violation of child labor laws is a crime! In Texas, violation of these laws is a misdemeanor, which could result in a fine up to \$4,000, and/or incarceration of up to one year. In addition, the TWC can issue employers an administrative penalty of up to \$10,000 per violation. Therefore, it is in the employer's best interest to ensure that all employees involved in the hiring and supervising of employees are aware of child labor laws.

Work Separations

The laws regarding work separations for younger workers are basically the same as those applying to adult workers.

However, a common question is “what would happen if a student employee quits to go back to school, or is laid off because the student’s classes no longer allow enough time to work?” If such an employee files an unemployment claim, the student would likely be denied benefits because of one or both of the following reasons: 1) a student returning to school after a summer job is generally regarded as having quit voluntarily for personal reasons and is subject to disqualification from benefits; and 2) a full-time student is typically unavailable for full-time work and is usually held ineligible for unemployment benefits during the school year. However, employers should not assume that TWC will automatically find such facts and rule that way. It is up to an employer to file a timely response to an unemployment claim notice and explain why the company believes that the claimant should not receive benefits.

For a more detailed explanation of child labor issues, please see the following section of our book, *Especially for Texas Employers*: http://www.twc.state.tx.us/news/eftc/child_labor.html. 🇹🇽

*Sonia Luster
Legal Counsel to Commissioner Andrade*

What I have seen and learned about HR in the last 50 years

by Tom Potter, SPHR

I entered what is now known as Human Resources in March of 1963 quite by accident, as a lot of us did in those days.

I was 19 years old and had been with that company for 6 years starting in 1957 when I had just turned 13. The Company was Handy-Andy, Inc., a supermarket chain based in San Antonio. I had worked my way into a management position with one of their biggest stores. The company's personnel director happened to shop in that store and offered me an entry-level position in his department.

I took him up on his offer not knowing how to spell "personnel". I basically filed documents in personnel files and answered the phone. I gradually worked my way up in the department over the next 14 years, leaving as V.P. of Employee Relations. At their peak, Handy-Andy was the largest private sector employer in San Antonio with over 5,000 employees. The personnel department had 18 employees.

I then went to another great San Antonio-based company, Hasslocher Enterprises, a restaurant chain, and spent over 25 years heading their H.R. department. They had over 2,000 employees at that time. I started my own consulting business in 1991 and remained with Hasslocher on a part-time basis until recently retiring and retaining my consulting business.

I would like to begin by describing how H.R. was in 1963. If you did not have a labor union (and most of us did not), the only employment laws you had to contend with were those that dealt with workers' comp, unemployment comp, and wage-hour issues. TWC hearings were in-person with the Hearing Officer in your locale. There was no EEOC, OSHA, or OFCCP. There was no FMLA, I-9 form, Polygraph Protection Act, ADA, Title VII, COBRA, GINA, PPACA, ERISA, or WARN, etc.

Also, there were no cell phones, smart phones, pagers, tablets, personal computers, fax machines, Internet, e-mail, social media, or other conveniences and gadgets we now cannot do without. Life was simpler then.

Then came July 1, 1964. That is the day the Civil Rights Act of 1964 was signed into law by President Johnson (it became effective one year later). This was a huge change, not only to H.R., but to most facets of everyday life. A year later in 1965, President Johnson signed E.O. 11246 and a

new term was created: "Affirmative Action".

A number of additional employment law bills came through the years. All of those require regulations to be written by the enforcing agencies. Then come the lawsuits, some of which can alter the original intent of the act passed. There is now more than 5 times the number of employment-related laws than there were in 1963.

I also witnessed the rise and fall of labor unions in the last 50 years.

What I Have Learned

I have learned a lot, but I am still learning. As I write this article, a situation arose with a TWC hearing that I have never dealt with in the past, and I have dealt with thousands of such hearings. Some of the things I have learned:

Importance of keeping up with changes in H.R.: Most of this can be done by attending seminars (Your local TWC Texas Business Conference is the best bang for the buck!). Also by joining a local and/or national business or professional organization (SHRM and/or TAB for instance).

Importance of knowing the business you are in: I don't mean the H.R. business, I mean the business your employer is in. Far too many staff people have never been on the firing line or the assembly line of their employer, or walked a mile in the shoes of an operations employee or manager.

Importance of professional dealings with the various regulatory agencies: Some of the best advice on this subject came from a now-deceased wage/hour investigator I spent a lot of time with in the mid-60s on a complicated investigation. He said "Tom, if you are going to try to make common sense of these regulations, you will lose your mind." He also told me of some unprofessional conduct by unnamed employers he found during previous investigations, such as withholding information requested, lying, or being discourteous or rude to him.

Importance of Line Managers knowing and understanding basic employment law: All employers expect their managers to have this knowledge and understanding, but few do anything to assure it. I am called upon frequently to conduct such training, and I am amazed at how many managers have no clue about things they can

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The most important responsibility any manager in any business has is to hire and train the right people for the right job. Too many managers regard this as an interruption of their work, rather than the reason for it. *iStockphoto/Thinkstock*

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say or do that can get their employer in trouble. Remember – they are the agents of the employer. If one of them says or does something wrong to an employee or applicant, it is the same as if the owner or CEO said or did it.

Importance of documentation of employment matters: Some humorous sayings on this subject: “The 3 rules of employment law are document, document, and document” and “If it ain’t documented, you cannot prove it happened.” This documentation does not have to be on a fancy form – a simple handwritten note in the file dated and signed will do and is very credible.

Importance of understanding that there are no “little people” in your organization, “little” meaning not important or insignificant: If you think about it, there are no such jobs or people. The person who sweeps the floor has an important role in your business and is no less sensitive or deserving of fair treatment than anyone else in the company.

Importance of being able to call or otherwise contact the regulatory agencies for answers: Most employers are hesitant to call these agencies for fear they will have to divulge their identity, resulting in an audit from that

agency. I have called most of these agencies many times on behalf of my clients who would rather not make the call. I have always been treated with respect and professionalism by any such agency I have contacted, even when I wind up speaking with an investigator with whom I have never conversed. Most of the time, such contact is not even needed. A simple Google search or a search of the agency’s website will answer the question at hand.

Importance of hiring and training the right people for the right job: This is the most important responsibility any manager in any business has. Too many managers regard that as an interruption of their work, rather than the reason for it.

In conclusion, I appreciate the opportunity to write this article and hope that I have shed some light on the past 50 years in H.R. as I have seen them. The next four years will probably be as challenging, if not more so, than the last 50, but that is a different article for someone to write. 🇺🇸

[Editor’s note: Mr. Potter modestly observes that he has no website or advertising listings, but that is because he is so well-known in the HR industry that he has no need of such things. He may be reached via e-mail at tpotter3@satx.rr.com.]

Gov. Rick Perry signs off on employment-related legislation

This article lists the most significant employment-related bills that were passed by the Legislature and, with the exception of the first one listed, were signed into law by the Governor. In the next issue of TBT, we will highlight a few of the bills that will have the greatest impact on the majority of Texas employers. 🇹🇽

William T. Simmons

Senior Legal Counsel to Commissioner Hope Andrade

Civil Rights - Discrimination

HB 950	Relating to unlawful employment practices regarding discrimination in payment of compensation. Would have incorporated federal law in the Lily Ledbetter Fair Pay Act of 2009 into Chapter 21 of the Texas Labor Code (ongoing pay discrimination relates back to original act of discrimination). This was the only significant employment-related bill that was vetoed by the Governor.
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Human Resources – General

HB 581	Relating to a limited waiver of sovereign immunity for state and local governmental entities in certain employment lawsuits filed by nurses. Effective date: 090113.
HB 586	Relating to the waiver of sovereign immunity for certain claims arising under written contracts with state agencies. No waiver of immunity for employment contracts. Effective date: 090113.
HB 647	Relating to employment by open-enrollment charter schools of certain persons as teachers. Effective date: 061413.
HB 729	Relating to access to criminal history record information by certain hospitals and other facilities. Covers access to criminal history information for applicants and employees at DADS-regulated nursing homes and related facilities. Effective date: 061413.
HB 1188	Relating to limiting the liability of persons who employ persons with criminal convictions. Tightens up on standards for proving negligent hiring and supervision of employees with prior convictions. Effective date: 061413.
HB 1223	Relating to the temporary exemption of certain tangible personal property related to data centers from the sales and use tax. Employer would have to create at least 20 “permanent” jobs that would last at least five years. Effective date: 090113.
HB 1302	Relating to the imposition of a sentence of life without parole on certain repeat sex offenders and to certain restrictions on employment for sex offenders. If the victim was younger than 17, sex offenders may not operate a bus, taxi, or limousine, provide any unsupervised service in another person’s residence, or operate an amusement ride. Effective date: 090113.
HB 1659	Relating to certain actions taken by certain licensing authorities regarding a license holder or applicant who received deferred adjudication for certain offenses. Effective date: 090113.
HB 1759	Relating to a correction, clarification, or retraction of incorrect information published. Provides a detailed set of procedures for mitigating defamation. Effective date: 061413.
HB 2015	Relating to the proper classification of workers performing services under certain governmental contracts; providing a penalty. TWC must develop rules for classification of workers on public works contracts; \$200/worker penalty for misclassification; three-year statute of limitations. Effective date: 010114.
HB 2683	Relating to employment in certain consumer-directed services and by certain facilities and to the nurse aide registry and the employee misconduct registry. Effective date: 010114.
HB 3433	Relating to the regulation of certain private security companies and occupations. Effective date: 061413.

HB 3739	Relating to the continued employment of municipal employees who become candidates for public office. Effective date: 061413.
SB 128	Relating to criminal history record information concerning certain applicants and clients of the Department of Assistive and Rehabilitative Services. Effective date: 061413.
SB 152	Relating to the protection and care of persons who are elderly or disabled or who are children. New duties, training, and protection against retaliation for state hospital employees. Effective date: 061413.
SB 746	Relating to unlawful acts against and criminal offenses involving the Medicaid program. Whistleblower protection with respect to reporting Medicaid fraud. Effective date: 090113.
SB 939	Relating to reporting child abuse and neglect and to training regarding recognizing and reporting child abuse and neglect at schools, institutions of higher education, and other entities. Extensive training and reporting requirements for educational institution staff regarding child abuse. Effective date: 090113.
SB 1609	Relating to the training of employees of certain covered entities. HIPAA training and retraining for new hires and after changes in privacy laws. Effective date: 061413.

Pay / Benefits / Wages and Hours

HB 12	Relating to gifts made to a state agency for a state employee salary supplement. Effective date: 061413.
HB 432	Relating to charitable contributions by state employees to assist domestic victims of human trafficking. Effective date: 061413.
HB 480	Relating to leave for certain state employees who are attending educational activities of their children. State employees would get eight hours of paid leave per year to attend their children’s school events. Effective date: 061413.
SB 443	Relating to leave for reserve law enforcement officers for required training. Up to 5 days’ paid leave to obtain required continuing peace officer training. Effective date: 061413.

Public Accommodations

HB 489	Relating to the use of assistance animals that provide assistance to persons with disabilities; providing criminal penalties. Applies to all public accommodations, including offices and modes of transportation; civil and criminal penalties for discrimination against disabled individuals using assistance animals; inquiries limited to nature of service provided by animal. Effective date: 010114.
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Regulatory Integrity / Enforcement / Criminal Penalties

HB 2539	Relating to requiring computer technicians to report images of child pornography; providing a criminal penalty. Effective date: 090113.
SB 869	Relating to the regulation of the practice of pharmacy. Tightens up the licensing, certification, and regulation of pharmacy staff, in particular pharmacy technician trainees. Effective date: 061413.
SB 972	Relating to the repeal of certain offenses relating to certain occupations regulated by the Texas Department of Licensing and Regulation. Repeals § 91.063 (criminal penalty for violation of staff leasing laws) and § 92.031 of the Labor Code (criminal penalty for violation of temporary common worker laws (“labor halls”)). Effective date: 051813.
SB 1312	Relating to the regulation and practice of veterinary medicine. Effective date: 090113.

Unemployment Insurance

HB 26	Relating to unemployment compensation eligibility and chargebacks regarding certain persons who are victims or whose immediate family members are victims of sexual assault or family violence. No disqualification if claimant left due to sexual assault of claimant or claimant's immediate family (parent, spouse, or minor child), or family violence involving same; chargeback protection for employer. Effective date: 061413.
HB 585	Relating to procedural requirements under the Property Tax Code. Amends appointment process for appraisal review board members. Effective date: 010114.
HB 916	Relating to the amount of a chargeback for unemployment compensation benefits paid to a person who is partially unemployed. Provides chargeback protection to base period employers who continue to employ claimants for their regular part-time hours. Effective date: 090113.
HB 939	Relating to the transfer of certain amounts from the employment and training investment holding fund and the training stabilization fund. 15% of the ETI and training stabilization funds will be transferred to TWC for workforce development expenses; 15% of that amount will be transferred to the Texas Veterans Commission to fund employment programs for veterans. Effective date: 090113.
HB 983	Relating to the eligibility of temporary election officers for unemployment compensation. New 201.063(a) UI tax exemption for temporary election workers, officers, or officials. Effective date: 090113.
HB 1550	Relating to unemployment compensation chargebacks regarding certain persons who are involuntarily separated from employment. Additional chargeback protection for employers in 207.046(a)(1) cases. Effective date: 090113.
HB 1580	Relating to excluding certain short-term employment from unemployment compensation chargebacks and grounds for benefit disqualification. Allows claimants to try out new jobs with less risk of disqualification for resigning and no chargebacks to employers. Effective date: 090113.
HB 2034	Relating to unemployment compensation eligibility and chargebacks regarding certain persons who leave work to attend training. No disqualification and chargeback protection if employees quit to attend Commission-approved training. Effective date: 090113.
HB 2035	Relating to the shared work unemployment compensation program. Additional information required for shared work plan applications; some slight additional restrictions regarding loss of fringe benefits. Effective date: 090113.
HB 3005	Relating to the authority of TWC to use certain unemployment compensation funds for reemployment activities. Effective date: 061413.
SB 21	Relating to drug screening or testing as a condition for the receipt of unemployment compensation benefits by certain individuals. Drug testing for certain UI claimants, as per new federal law. Effective date: 090113; applies to UI claims filed on or after 020114; implementation dependent upon issuance of enabling regulations by U.S. DOL.
SB 658	Relating to the imposition and collection of a penalty for fraudulently obtaining unemployment compensation benefits. Federal mandate: 15% penalty on willful fraud; penalties collected shall be deposited into the UI trust fund. Effective date: 100113.
SB 920	Relating to the requirement that an unemployed individual be actively seeking work to be eligible for unemployment compensation benefits. Tightens work search requirement as per HR 3630. Effective date: 090113.
SB 1537	Relating to certain required notices under the Texas Unemployment Compensation Act, including employer liability arising from failure to provide the notice. Federal mandate: loss of chargeback protection for a pattern of late or inadequate responses to UI claims; TWC will adopt rules. This new law could have a very significant impact on how employers respond to unemployment claims. Effective date: 100113.

Workers' Compensation

HB 1762	Relating to workers' compensation and other remedies available to an injured temporary employee. Temporary help firm may obtain workers' compensation and is covered by the exclusive remedy provisions of the TWCA. Effective date: 090113.
SB 381	Relating to the misuse of the name or symbols of the division of workers' compensation of the Texas Department of Insurance in a deceptive manner. Effective date: 090113.
SB 644	Relating to the creation of a standard request form for prior authorization of prescription drug benefits. Effective date: 090113.
SB 1216	Relating to the creation of a standard request form for prior authorization of health care services. Effective date: 090113.
SB 1286	Relating to the regulation of professional employer services. Changes terminology from "staff leasing services firms" to "professional employer organizations"; PEOs and clients will each have the benefit of the exclusive remedy provision under the TWCA. Effective date: 090113.
SB 1536	Relating to the Texas military. Workers' comp benefits must take service member's regular pay into account. Effective date: 090113.

Workforce Miscellaneous

HB 376	Relating to the regulation of child-care providers by the Texas Workforce Commission and local workforce development boards. Advisory group for the Texas Rising Star Program. Effective date: 090113.
HB 617	Relating to transition and employment services for public school students enrolled in special education programs. Effective date: 090113.
HB 1741	Relating to requiring child safety alarms in certain vehicles used by child-care facilities to transport children. Effective date: 123113.
HB 2000	Relating to career schools and colleges. Effective date: 061413.
HB 3028	Relating to the use of the skills development fund to support certain joint credit courses offered by school districts under agreements with public junior colleges. Effective date: 061413.
SB 45	Relating to the provision of employment assistance and supported employment to certain Medicaid waiver program participants. Effective date: 061413.
SB 64	Relating to a policy on vaccine-preventable diseases for licensed child-care facilities. Employer must have policy allowing exemption from vaccine requirements for CDC-covered contraindications, and can also have an exemption for religious beliefs. Effective date: 090113.
SB 162	Relating to the occupational licensing of members of the military and spouses of members of the military. Expedited occupational licensing for military members. Effective date: 051813.
SB 242	Relating to the eligibility requirements for certain occupational licenses issued to applicants with military experience. Military experience and training counts toward licenses. Effective date: 061413.
SB 307	Relating to the transfer of adult education and literacy programs from the Texas Education Agency to the Texas Workforce Commission. Effective date: 090113.
SB 427	Relating to the regulation of certain child-care facilities and administrators of those facilities. Effective date: 090113.
SB 428	Relating to background and criminal history checks for parents or other relatives of children in residential child-care facilities. Effective date: 090113.
SB 441	Relating to the establishment of the Texas Fast Start Program to promote rapid delivery of workforce education and development. Effective date: 061013.
SB 1142	Relating to an adult high school diploma and industry certification charter school pilot program for adults 19 to 50 years of age. Effective date: 090113.
SB 1226	Relating to the establishment of an employment-first policy and task force that promote opportunities for individuals with disabilities to earn a living wage with competitive employment. Effective date: 061413.

Important new unemployment law provision will affect employer response time to claims

SB 1537 could be one of the most significant new laws from the 2013 general session of the Texas Legislature on how Texas employers respond to unemployment claims. Under the new law, an employer responding to an unemployment claim must respond on time and give

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“sufficient factual information” to allow TWC to make a sound determination regarding the claimant’s benefit rights,

and if an employer delivers an inadequate or untimely claim response, and has been found to have given TWC inadequate or untimely claim responses on at least two prior occasions, the employer will be ineligible for chargeback protection if it later appeals a ruling in favor of the claimant and wins the appeal. Thus, it will be more important than ever before for an employer to stay on top of the unemployment claim process and ensure that it responds on time and adequately. More information on how this law will affect employers will be available once TWC adopts rules for implementation of the new provisions.

Small Business Week

In June, 2013, we celebrated Small Business Week in honor of the hundreds of thousands of small businesses that are such an incredible engine of job creation. Considering the entrepreneurial spirit that drives these businesses, it is little wonder that Texas is the number one state in the nation to do business. See our press release and video at the following links: <http://www.texasworkforce.org/news/press/2013/061813press.pdf> and <http://www.youtube.com/watch?v=uSASIIIBC7w&feature=youtu.be>.

New Online Appeal Filing System

The Texas Workforce Commission is pleased to announce that beginning July 1, 2013, it will be possible to file an unemployment insurance appeal or a payday law appeal on the Texas Workforce Commission website. A new appeal form has been created and made available at a hyperlink on the home page of the TWC, <http://www.twc.state.tx.us/>. Just click on the hyperlink, complete the appeal form, and submit.

NLRB Poster: Invalid & Unenforceable

In 2012, the National Labor Relations Board (NLRB) had announced that private employers were required to post a notice by April 30, 2012, which would inform employees of their union rights. However, on May 7, 2013, the D.C. Circuit of Appeals ruled that the NLRB’s

notice requirement is invalid and unenforceable under the National Labor Relations Act (NLRA). One issue found by the court was that the requirement violated employers’ rights under the First Amendment and NLRA provision 29 U.S.C. § 158 (c) to “not speak.” The court specifically found that the 3 enforcement mechanisms in the rule went beyond the NLRB’s statutory authority, i.e., the Board did not have the authority to declare that failure to post the notice: 1) constitutes an unfair labor practice, 2) suspends the running of the six-month statute of limitation for filing an unfair labor practice charge, and 3) allows the Board to consider such failure “as evidence of unlawful motive in a case in which motive is an issue.” The rule will not go into effect until the NLRB successfully appeals to the D.C. Circuit court or to the U.S. Supreme Court. Bottom line: Employers are not required to post the notice.

Salary Discussion Policies

In general, policies prohibiting employees from discussing their pay and benefits with coworkers are illegal, since they violate a longstanding provision of the National Labor Relations Act that protects employees’ rights to discuss the terms and conditions of employment with each other. A recently-settled case illustrates that point well. First, one employee was fired for discussing bonuses with other employees. Next, another worker was fired for defending her coworkers in a meeting and engaging in other protected concerted activity. The company then filed what the National Labor Relations Board called a retaliatory lawsuit against one of the employees after she filed a claim with the NLRB. In settling the claim, the employer agreed to pay back wages and benefits to the fired employees, withdraw the retaliatory state court lawsuit, pay the employees’ attorney’s fees for defending against that retaliatory lawsuit, post a notice at the workplace, and mail the same notice to former employees, about the settlement admitting the various violations of the law and advising employees of their rights under the NLRA. Employers with such policies are advised to consult a qualified employment law attorney regarding how to minimize the risk of potential claims. For more information, see the following article in *Especialty for Texas Employers*: http://www.twc.state.tx.us/news/efte/salary_discussions.html.

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EEOC Wins \$240 Million Jury Verdict

The Equal Employment Opportunity Commission won what they describe as a “historic” verdict, when an Iowa federal jury awarded \$240 million to a group of intellectually disabled plant workers who were subjected to disability-based discrimination and harassment. The lawsuit, *EEOC v. Hill Country Farms, Inc.*, was brought under the Americans with Disabilities Act (ADA) by 32 intellectually disabled workers who formerly worked at a turkey manufacturing plant in Muscatine County, Iowa. The workers alleged that, for 20 years, they were paid significantly less than their non-disabled co-workers and subjected to physical and verbal abuse. The jury awarded the plaintiffs \$7.5 million each (\$5.5 in compensatory damages and \$2 million in punitive damages); however, since the law caps such damages at \$300,000 per plaintiff, those amounts are likely to be reduced.

Guidance on Disabilities

New EEOC guidance on the specific disabilities of diabetes, epilepsy, cancer, and intellectual disabilities is available on the EEOC website at <http://www.eeoc.gov/laws/types/disability.cfm>.

Breast-Pumping: Sex Discrimination?

The Fifth Circuit Court of Appeals reversed a controversial trial court ruling that had held that a discharge of an employee because she was lactating or expressing breast milk did not constitute unlawful sex discrimination. In *EEOC v. Houston Funding, II, Ltd.*, the employer argued that Title VII did not cover “breast pump discrimination.”

The trial court held that “firing someone because of lactation or breast-pumping [was] not sex discrimination,” and lactation was not a related medical condition of pregnancy. On appeal to the Fifth Circuit Court of Appeals, the Court established that because lactation is a burden that is only imposed on women, an adverse employment action motivated by this factor would constitute unlawful sex discrimination. The Court further confirmed that lactation is a related medical condition of pregnancy of the Pregnancy Discrimination Act.

Discover Workplace Accommodation Solutions

The newly-revamped Ask Job Accommodation Network (<http://askjan.org/blog/>) is an opportunity to share workplace accommodation solutions. JAN receives over 45,000 contacts per year, which include conversations that help them better understand what’s working effectively in the workplace. Employers or individuals can share their experiences and

interact with the JAN staff. Sharing and learning about accommodation success stories can benefit others around the nation.

Employer’s Offer of Relief to Plaintiff Defeats FLSA Collective Action Suit

The U.S. Supreme Court ruled on April 16, 2013 in the case of *Genesis Healthcare Corp. v. Symczyk* that if an employer faced with a collective-action lawsuit under the Fair Labor Standards Act offers to pay the named plaintiff the amount due, there is no longer any basis for the collective action, even if the plaintiff rejects or ignores the offer. The Court’s full opinion is online at http://www.supremecourt.gov/opinions/12pdf/11-1059_5ifl.pdf. Justice Kagan’s dissenting opinion, noting that an unaccepted offer leaves the matter as if no offer had been made, gives a hint at a legislative response that Congress might decide to take up at some point. The interesting legal discussion in the case obscures the underlying cause of the FLSA claim: the employer had a practice of deducting a half-hour’s time from an employee’s pay for a lunch break, even if the employee worked through the break. Experienced employers know not to do that – employees must be paid for all time actually worked, even if they work over their scheduled hours. It may be possible to pull out a victory by the skin of one’s teeth, as happened in this case, but it is certain that the employer’s legal defense bills for winning this case were in the serious six digits. Best advice: keep track of all actual work time, and ensure that employees are paid the agreed-upon rate for all hours actually worked, plus overtime pay if applicable. If employees violate their work schedules or break policies, handle such occurrences as disciplinary matters, not pay matters.

Federal Court Decision on Unpaid Interns

On June 11, 2013, a federal district court in New York ruled that two unpaid interns working on the set of the movie “Black Swan” were essentially regular employees who were entitled to be paid at least minimum wage and overtime under the FLSA. The judge’s ruling emphasized the importance of the six-part test for interns and trainees that is used by the U.S. Department of Labor. The decision highlighted the facts that the internship bore no resemblance to any kind of educational setting, and that the work the interns did was essentially the same as that performed by other lower-level workers. More information on the legal standards for trainees and interns is in our book online at http://www.twc.state.tx.us/news/eft/advanced_flsa_issues.html#interns_trainees. 

*Marissa Marquez, Deputy Senior Legal Counsel to
Commissioner Hope Andrade
William T. Simmons, Senior Legal Counsel to
Commissioner Hope Andrade*

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