

Texas Business Today

Fall 2010

Tom Pauken, Chairman
Commissioner Representing Employers

TEXAS
WORKFORCE SOLUTIONS
* * * * *

Texting and Facebook in the Workplace

- Tip-pooling/ Tip-sharing agreements •
- Reimbursements available for return-to-work •

Chairman asks: Time for a new economic strategy?

“Jobless America threatens to bring all of us down with it” is the headline of a recent story by Jeremy Warner in the British newspaper, The Daily Telegraph. In the article, Warner notes that the U.S. unemployment rate nationally continues to hover in the 10-percent range and that the U.S. may be facing something new: “a structural problem of unemployment.”

High levels of joblessness are made even worse by the enormous levels of government debt. The Telegraph reporter cites “IMF estimates which see gross U.S. debt rising to well in excess of 110 percent of GDP by 2015.” Warner concludes on an even gloomier note that Washington policymakers have “no strategy for the

jobless and no strategy for rolling back debt.”

Americans sense the seriousness of the situation and are demanding more than

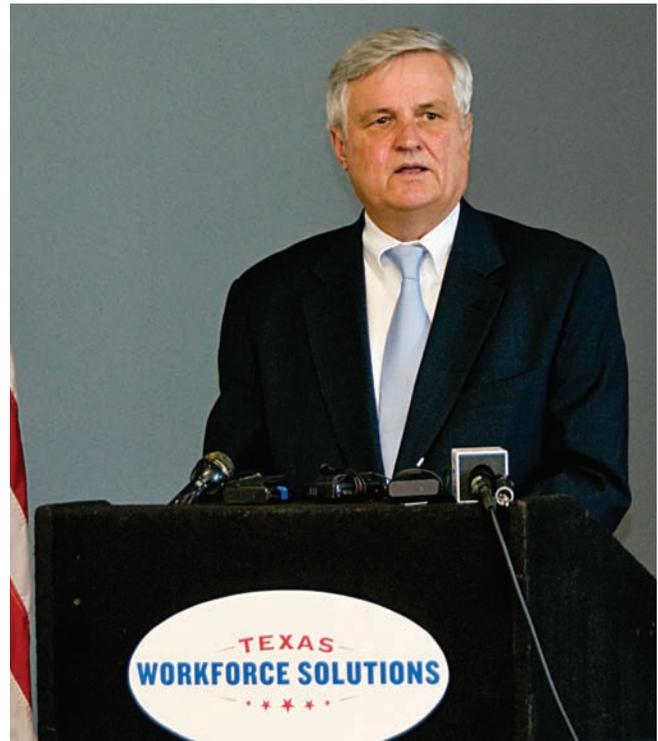
Chairman's Corner

the same old empty political slogans and short-term fixes from Washington policymakers. The various stimulus schemes from Washington to inject “government money” into the system in order to get the American consumers to spend our way out of this nasty national recession simply haven’t worked. We’ve had “cash for clunkers”, “tax credits for homebuyers”, artificially low interest rates from the Fed, huge spending increases at the federal level -- all supposedly designed to get the consumer spending again and to get unemployment rates down. The Washington policymakers are simply making a bad situation worse. All they have to show for their various “stimulus packages” are persistently high unemployment rates and much greater government debt levels.

Isn’t it time to try a different approach?

Let me make the case for a bold economic strategy designed to put Americans back to work while getting federal spending under control. Rather than continue the Keynesian policies of attempting to have our government spend its way to recovery, a truly long-term solution to high unemployment is to start growing the private sector again. To borrow a phrase from the late President John F. Kennedy, “a rising tide lifts all boats.”

The quickest way to get the American economy moving is by replacing our onerous business tax system that has the perverse effect of exporting prosperity and good American jobs abroad. From 1999 to 2009, there was zero growth in private sector employment nationally with the only growth in employment coming from an increase in government jobs. During that same ten-year period, the U.S. lost one third of its manufacturing base. That’s a total of 5.5 million good American jobs



Texas Workforce Commission Chairman Pauken speaks at a recent Texas Back to Work event. *Texas Workforce Commission photo*

that were shipped overseas, outsourced or simply went away. We currently are running trade deficits with ninety separate nations, and our manufacturing trade deficit from 2000 to 2008 amounted to 5.4 trillion dollars. The loss of private sector jobs has worsened since the Obama administration took office.

The situation may be dire, but it isn’t hopeless. One way to jump-start the economy and start bringing good jobs home to America is by replacing the current corporate tax system with its 35% tax rate and its 6.2% payroll tax. A better way to tax business is with a revenue-neutral, business consumption tax that would be applied to all goods and services coming into the U.S. All companies exporting from the U.S. would receive a tax abatement or tax credit against their business consumption tax. Immediately, this change in tax policy would result in leveling the playing field between us and our trading competitors. This change in tax policy will help bring jobs home to America, get our economy moving again, and begin rebuilding our manufacturing base. Moreover, this new economic policy will lead to a substantial

reduction in our trade deficit. Known as the Hartman Plan, this idea is beginning to get bipartisan support. Former Democratic Senator Fritz Hollings supports this approach to business taxation as do Sen. Jim DeMint and Congressman Paul Ryan.

To tackle the federal spending and debt problems, our national government first must enact an austerity budget, akin to what the new Cameron government is doing in Great Britain. The new motto coming out of Washington D.C. should be “doing more with less.” We showed that such an approach could work, as it did in President Ronald Reagan’s first term in office from 1981 through 1984, when literally we cut domestic spending at a time of high inflation. No administration has been serious about cutting spending since then. Given our extraordinary levels of government debt in 2010 we have no alternative except to get our federal debt levels under control before it is too late.

Any major effort to rein in federal spending also must address the excessive concentration of power in Washington, D.C., with its ever mounting federal mandates and earmarks. This is an apt moment for a major shift away from the concentration of power in Washington, D.C., to a decentralized approach which would allow the states and local communities to exercise a much greater control over how those federal dollars

are best spent in their respective areas. “One size doesn’t fit all” when it comes to dictating policy by a centralized bureaucracy headquartered in Washington, D.C. Diversity is a strength, not a weakness of our great nation. As quickly as possible, we need to move power and money away from Washington, D.C., and back into the hands of the states, communities, and the people themselves.

America faces a more serious set of problems than at any time in my lifetime. But, great problems present great opportunities for major reforms of those policies which have led us into a state of economic crisis.

Let the debate begin. 

Sincerely,



Tom Pauken, Chairman
Commissioner Representing Employers



Chairman’s Corner	2
Texting & Facebook	4
Tip-pooling and Tip-sharing	10
Business Briefs	12

Cover image: Stockbyte/ Thinkstock

Texting and Facebook

Minimizing Employer Liability

You know how texting and Facebook go: you text your friend to ask what he is doing for lunch; you update your Facebook status informing everyone about what you are doing at the moment; you text a quick “Happy Birthday!” to a loved one; you post a picture you took with your cell phone on Facebook so all your “friends” can see. These days, text-messaging and Facebook are

An Overview

inevitable. They have become a part of our everyday lives and have also become topics of conversations on our Employer Hotline in Chairman Tom Pauken’s office. Some of the situations we have heard have been: “My employee text-messaged me to tell me they were going to be tardy;” or “I saw some inappropriate pictures of my employee on Facebook. Can I fire her?” We have also reviewed unemployment claims that have discussed texting and Facebook. So, what does this mean for you as an employer?

Texting & Facebook: Employee Use

Before we explore the impact text-messaging and Facebook have on a business, let’s first look at how much these media are being used by employees. With regard to texting, according to the Nielsen Company’s September 2008 report titled, “In U.S., SMS Tops Mobile Phone Calling,” (an “SMS” is a short message system) the average U.S. cell phone subscriber sent and received an average of 216 phone calls and 79 text messages per month in the second quarter of 2006. The report also showed that by the second quarter



According to the Nielsen Company’s September 2008 report titled, “In U.S., SMS Tops Mobile Phone Calling,” the average U.S. cell phone subscriber sent and received an average of 216 phone calls and 79 text messages per month in the second quarter of 2006. *Photodisc/ Thinkstock*

of 2007, the typical U.S. cell phone subscriber made and received 228 phone calls and 172 text messages per month. By 2008’s second quarter, the report showed that the average was 204 phone calls and 357 text messages per month. As one can see, text-messaging is utilized more than calling. According to an October 2009 Press Release from CTIA titled, “CTIA – The Wireless Association’s Semi-Annual Wireless Industry Survey Results,” 4.1 billion text messages were being sent each day in the U.S. during the first half of 2009, significantly more than the 2.1 billion text messages per day in the first half of 2008. Can you imagine how many of those individuals are employed? No imagination needed – according to a 2009 poll conducted by the Marist Institute for Public Opinion,

nearly nine out of 10 (or 87%) of U.S. residents are cell phone owners, and that figure rises to 92% among Americans with jobs, meaning that almost every employee in a company may have a cell phone with text-messaging capabilities.

Now, how many employees are using Facebook? According to an August 2010 Nielsen report titled, “What Americans Do Online: Social Media and Games Dominate Activity,” the top way Americans spend their time online is on social networking sites - at 23%. Facebook, which in July 2010 hit 500 million users, was the most-visited social networking site. Almost 85% of all time spent in the social networking sector is on Facebook, compared to just 5.6% for MySpace. Therefore, it is possible that your employees are on

social networking sites most of their day. In fact, Network Box's April 2010 article states that "more business internet traffic goes to Facebook than to any other internet site." According to the article, Facebook is the top website visited by businesses in the first quarter of 2010 at 6.8% of all business traffic.

Texting & Facebook: Employer Use

Employers, like employees, are also texting. For example, an article titled, "Small Businesses Marketing with Text-messaging," from AllBusiness.com states that "text-messaging is gaining popularity as an advertising medium because it is relatively inexpensive and allows businesses to reach out to highly targeted consumers." For example, businesses can send instant coupons and promotional messages. An article titled "How to Use Text-messaging to Reach Customers" on Startupnation.com indicates that employers are also using text-messaging to "communicate efficiently and effectively" with customers in order to provide good customer service. For example, doctors, dentists, salons, and other service companies are texting appointment reminders and confirmations.

Just when you thought Facebook was for the unproductive, employers are using Facebook as well. A July 2010 USA Today article titled, "More Small Businesses use Twitter, Facebook to Promote," explained that a "surge in social media use by small businesses reflects a shift in how they operate and their comfort with increasingly easy-to-use technology." Darren Waddell, Vice President of Marketing at MerchantCircle, an online social network for small businesses, was quoted stating that businesses with fewer than five employees "see Facebook and others as a way to reach targeted consumers."

However, not only are employers using social networking sites to promote their businesses, but they are also using these sites to screen job

applicants. For example, in a June 2009 CareerBuilder.com survey, 45% of employers reported using "social networking sites to screen potential employees, compared to only 22 percent of employers last year." According to a June 2009 article from Cnet.com titled, "Want a Job? Give Bozeman your Facebook, Google passwords," the City of Bozeman, Montana has gone as far as to request job applicants to provide their user names and passwords to popular social networking sites.

Employers are also using Facebook to terminate employees. For example, The Charlotte Observer reported in May 2010 that a waitress working for Brixx Pizza in Charlotte, North Carolina was fired after updating her Facebook status. A couple came in for lunch and ate for three hours, which caused the waitress to work past her regular shift. The couple gave her a \$5 tip and afterwards her Facebook page stated: "Thanks for eating at Brixx, you cheap piece of ----camper." Apparently, she thought the tip was miniscule. She was fired for violating company policy against speaking disparagingly about customers. The waitress was quoted as saying "I did write the message. But I had no idea that something that, to me is very small, could result in my losing my job." How often is Facebook involved when terminating or disciplining employees? In a June 2009 survey by Proofpoint, an online security firm, 8% of the employers with more than 1000 employees were reported as having terminated an employee for Facebook use during company time. 17% also reported taking issue with an employee's use of social media while on the clock.

The Legal Impact from Texting and Facebook

What does federal law say about employees texting at the workplace? Not a lot. There is no Texas or federal law requiring employers to allow employees to have access to their personal cell phones, or to make or receive personal phone calls during

work hours, though some reasonable limitations are common. Prohibiting your employees to bring personal cell phones to the workplace and their use can be one strategy in preventing a hostile work environment or sexual harassment claim from an employee. For example, "textual harassment" has become an issue in the workplace. According to a July 2009 article by Law.com titled, "'Textual Harassment: No Laughing Matter,'" text-messaging in the workplace is "turning into a growing liability for employers, which are landing in court over inappropriate and offensive texts" that are showing up on employees' cell phones. The article quotes David Walton, a management-side attorney at Cozen O'Connor, stating that there is an "incidence of sexual harassment via text messages." He adds that employers are not frequently reviewing text messages and most of the reviews are done after an employee complains. In addition, a February 2010 article from Expresspros.com titled "Text Messages and Sexual Harassment" notes that "even seemingly innocent text messages can be the source of unwanted advances by a co-worker." For example, "winking or smiling emoticons" can make a message seem inappropriate. Thus, text-messaging may lead employers into lawsuits. Finally, the National Law Review's May 2010 article titled, "In an Age of New Technology, Be Wary of 'Textual' Harassment," states that "text-heavy lawsuits have been on the rise recently and that trend is likely to continue."

Texas employers, however, should remind their employees that they may be criminally liable for harassing co-workers via text messages. Texas House Bill 2003, effective September 1, 2009, amended the Texas Penal Code to add a new section, 33.07 "Online Harassment," which classifies the sending of "an electronic mail, instant message, text messages, or similar communication" referencing any identifying information of another person as a Class A misdemeanor if the communication is sent:

1) “without obtaining the person’s consent;” 2) with the intent of causing recipients of such a communication to believe that the other person sent or authorized it; and 3) with the intent to harm or defraud any person. The statute further states that this offense is a third-degree felony if the one committing the offense intends to solicit a response by emergency personnel. However, what if the employer discovers or is placed on notice that an employee has been a target of inappropriate text messages? Will the employer be vicariously liable for the employee’s actions? In *Burlington Industries, Inc. v. Ellerth*, the U.S. Supreme Court held that “an employer is negligent with respect to sexual harassment if it knew or should have known about the conduct, but failed to stop it.” Employers wonder whether they have a right to search their employees’ personal cell phones to check if they are sending inappropriate text messages to other employees. This issue was indirectly addressed in a U.S. Supreme Court case in which a public employer and a government-issued pager (not an employee’s personal cell phone) with text-messaging capabilities were involved.

In July 2010, the U.S. Supreme Court issued a decision in *City of Ontario v. Quon*, ruling that a public employer’s review of an employee’s personal text messages on a government-issued pager which had text-messaging capabilities did not violate the Fourth Amendment (Search and Seizures). The Ontario Police Department had a written computer policy reserving the right to monitor “network activity including e-mail and Internet use,” and warning that employees should have no expectation of privacy. The policy did not directly address text messages, but the city did send out a memo to its officers clarifying that the computer policy extended to communications made through

devices furnished by the city. Under an informal policy, the police lieutenant decided to inspect text messages of police officers who had charges in excess of 25,000 characters a month. The police officer in question, Sgt. Jeff Quon, had more than 450 messages in the month of August 2002 and only 57 of them were work-related. Many of the messages were sexually explicit and sent both on and off duty. Individuals who had communicated with Quon also had filed a claim against the city. The U.S. Supreme Court ruled that review of Quon’s pager transcript was reasonable because it was motivated by a legitimate work-related purpose and was not excessively intrusive. The Court stated that any reasonable privacy expectations were most likely limited by the city’s written computer policy. In addition, because of this policy, the individuals who sent messages to Quon could not win on their argument that the review of messages violated their own Fourth Amendment rights.

The Supreme Court has given public employers flexibility in the law to search their employees’ offices and files, and this case widens that ability. However, how does this case affect private employers? While the court’s decision focused on public employers, there was a concurring opinion by Justice Scalia arguing that the “reasonable expectations” of employees using company-issued electronic devices should be addressed generally and not limited to public employees. Even though this case was not a clear win for private employers, the Quon decision suggests that employers should create and distribute policies stating employees have no expectation of privacy in company-owned equipment or in communications they have using company-provided equipment and systems such as text messages, e-mail, social media, and other technology media. As for personal cell phones, employers can create

a search policy stating that no employee should ever bring anything to work or store anything at work that he or she would not be prepared to show and possibly turn over to company officials and/or law enforcement authorities. In addition, the search policy should also state that employees should not expect a right to privacy with the items they bring into work. However, the employer should, like the employer in Quon, have a legitimate business reason for the search (e.g., an employee claiming receipt of harassing or sexually explicit text messages from another employee).

In addition to texting, Facebook may also have a legal impact on employers. As yet, federal law has nothing to say about employers monitoring Facebook and other social media in the workplace. While the First Amendment bars the government from infringing on citizens’ freedom of speech, it does not stop private employers from limiting their employees’ speech. However, if employees express their negative feelings towards their employer on Facebook or anywhere online, it is arguably the same as holding up a poster on a corner for the public to see. The bottom line is that there is no Texas law that would prevent a company from taking disciplinary action toward an employee for negative comments the employee may post on Facebook or anywhere on the internet, even though he or she does it after hours using their personal computer. However, California, Colorado, New York, and North Dakota have passed laws limiting an employer’s ability to terminate (and in some instances failure to hire or for discriminating against an employee) based on lawful activity (e.g. posting comments on Facebook) conducted outside of working hours and away from the employer’s premises (see California Labor Code sections 96(k) and 98.6(a); Colorado Revised Statute section 24-34-402.5; New York Labor Code section 201-d; North



In addition to texting, Facebook may also have a legal impact on employers. As yet, federal law has nothing to say about employers monitoring Facebook and other social media in the workplace. *Digital Vision/ Thinkstock*

Dakota). Employers should always be aware of state laws in which business is conducted.

Since a Texas employer can terminate or discipline an employee for their off-duty conduct: can an employer be liable for an employee's activities on Facebook or anywhere on the internet? Yes, because there may be issues of vicarious liability for situations employers knew or should have known about. In *Blakey v. Continental Airlines, Inc.*, a 2000 New Jersey Supreme Court case, co-workers posted harassing, defamatory, and false statements about a female employee on Continental's "on-line computer

bulletin board called the Crew Members' Forum." The court found that just because the harassing remarks were posted by employees on the Internet Forum and not necessarily made at the physical workplace, the airline might be liable and have a duty to stop that harassment. The main issue in *Blakey* was whether the forum was considered public or part of the workplace. If the site is considered to be a part of the workplace, then the company has a duty to monitor it and take appropriate action if an employee is harassed on the site. This kind of situation can easily happen in a Facebook context. For example, a court can be faced with

deciding whether or not a company-sponsored computer network or Facebook group was sufficiently related to the workplace to hold an employer liable for harassing comments towards employees. Alternatively, a situation could arise where an employee's personal Facebook page was used to post harassing comments about co-workers. However, an employee's personal Facebook page, with no connection to the workplace, would probably not be considered sufficiently related to the workplace in order to hold the employer liable, but the employee can face personal liability. Nevertheless, if it could be shown that the employer was aware of the harassment (e.g., an employee told the employer or the employer saw the harassing comments on an employee's personal Facebook page) and did not take corrective action, a court may find the employer should have done more to stop the harassment and therefore find the employer liable.

Therefore, the next question is: does this mean that employers have to monitor all their employees' activities on Facebook or on the internet, in general? In *Blakey*, the court specifically held that Continental did not have an obligation to monitor the posts on the Forum. The court considered the fact that employees did not have to use the Forum for work and that a limited number of employees had access to the Forum, which made the determination on whether the Forum was part of the workplace unclear. The court further stated that "employers do not have a duty to monitor private communications of their employees; employers do have a duty to take effective measures to stop employee harassment when the employer knows or has reason to know" of harassment.

Therefore, here are policy suggestions, applicable to private employers, for drafting a cell phone policy and Facebook policy.

Policy Suggestions for Employee-Owned Cell Phone Use

- **Subject to Search** - Create a search policy stating all items brought into the workplace will be subject to a search for any work-related purpose (e.g., alleged harassment or hostile work environment).

- **No Expectation of Privacy** - In the search policy, state that employees do not have a right to privacy in anything they bring into the workplace (e.g. personal cell phones). Be sure to state that the “no expectation of privacy” policy cannot be altered or limited by anyone in the company.

- **Harassment & Hostile Work Environment** - Include guidelines from your workplace harassment

policy. Employees should immediately report to human resources or management if they feel harassed through text messages sent from a co-worker’s cell phone or in any other way involving a cell phone (e.g., inappropriate pictures sent through a cell phone).

- **Texas Law** - Remind employees that they may be held criminally liable under section 33.07 of the Texas Penal Code, as mentioned above.

- **Billboard Rule** - Remind your employees that if they would not want their messages to be posted on a billboard, then they should not send it.

Other Suggestions to Consider for Employee-Owned Cell Phone Use:

- **Camera Use** - Most cell phones have cameras; therefore, consider

restricting your employees from taking their cell phones into restrooms or dressing rooms, for example. This will reduce the possibility of employees sending inappropriate pictures of other employees. You may also want to consider forbidding cell phones near the vicinity of private documents or financial activity to reduce the chances of any confidential or propriety information from ending up in an employee’s phone.

- **Drivers** - If you have employees who serve as drivers for your company, you should ban texting and talking on their cell phones while they are driving during work hours and especially in a company-owned vehicle. This also should apply while your employees are operating heavy machinery. Be sure to know your local laws, such as ordinances, regarding texting while driving.

Policy Suggestions for Employer-Issued Cell Phone Use

- **No Expectation of Privacy** - Create a search policy that states employees do not have a right to privacy when issued a company-owned cell phone. Be sure to state that the “no expectation of privacy” policy cannot be altered or limited by anyone in the company.

- **Keep Ownership** - Include language in your policy that establishes the company is the owner of the issued cell phones. This will further establish that the employee cannot expect privacy.

- **Formal English** - Require employees to use formal English when texting on a company-issued phone. For example, do you know what this says: “OMG, btw my boss is a PITA. TTFN.” Its translation is: “Oh my god, by the way my boss is a pain in the ---. Ta-ta for now.”

- **Review Monthly Charges** - State that monthly charges will be reviewed. If employees know their bills are being reviewed regularly, the less likely you will have overages and purchases of games, ringtones, etc. This will also help prevent employees from sending inappropriate text messages.

- **Billboard Rule** - Same as Employee-Owned Cell Phone Policy. See above.

Other Suggestions to Consider for Employer-Issued Cell Phone Use:

- **Lost or Damaged** – Require your employees to notify you when a company-issued cell phone is lost or damaged. Be sure to explain who



Most cell phones have cameras. Consider restricting employees from taking cell phones into restrooms or dressing rooms, for example. This will reduce the possibility of employees sending inappropriate pictures. *Jupiterimages/ Thinkstock*

Remind your employees that their confidentiality responsibility extends to online activities; therefore, they should not disclose any information about your company online.

bears the financial burden on lost or damaged cell phones.

- Texas Law – Same as Employee-Owned Cell Phone Policy. See above.
- Camera Use – Same as Employee-Owned Cell Phone Policy. See above.
- Drivers – Same as Employee-Owned Cell Phone Policy. See above.

For more information regarding cell phone use at the workplace, please see the following link from our *Especially for Texas Employers* book: http://www.twc.state.tx.us/news/efte/cell_phones.html. For a sample Search Policy, see: http://www.twc.state.tx.us/news/efte/search_policy.html.

The following policy suggestions can be used, not only for social networking sites like Facebook, but also for internet sites like Twitter, MySpace, blogs, chat rooms, message boards, and any websites that involve sharing information with others.

Policy Suggestions for Social Media (e.g., Facebook) Use:

- No Expectation of Privacy - Be sure to state in your policy that employees have no expectation of privacy in regards to their online activities. Define “online activities” (e.g. Facebook, blogs, MySpace, etc.). Be sure to state that the “no expectation of privacy” policy cannot be altered or limited by anyone in the company.
 - During Work Hours - State in your policies that employees are not allowed to use social media (e.g., Facebook, blogs, etc.) during working time.
 - After-Hours Social Media

Activity - Be sure to state that the company respects the rights of its employees and what they do on their own time; however, remind employees to be mindful of any after-hours online activities that would violate your company’s code of conduct or a company policy. Be sure to state that any online conduct that occurs after-hours which the employer becomes aware of, may be considered for discipline, termination, or any action the employer deems appropriate.

- Respect Online & Offline - Remind employees that their actions online and offline should remain respectful because they should assume others (e.g., co-workers) will become aware of their activities. Employees should respect the privacy of others online and offline. Employees should not disclose others’ personal information (e.g., medical information, sexual orientation, marital status, or other personal information).

• On Behalf of Company - Be sure your employees understand that they cannot speak on behalf of the company online, unless specifically authorized to do so by an authorized employer representative. Specifically state who can give permission.

- Maintain Confidentiality - Remind your employees that their confidentiality responsibility extends to online activities; therefore, they should not disclose any information about your company online. Employees should also avoid disclosing even public information about the company without permission from an authorized company representative. Specifically state who can grant permission.

• Managers/Supervisors as

Online “friends” - Be sure to remind your employees and managers about becoming “friends” on social networking sites like Facebook. Remind both of them to use good judgment before becoming friends online. Do they really want to know about each other’s personal lives? Inform employees and managers that they are not obligated to be online friends.

Every policy will be different for every employer. Policies will depend on the nature of the employer’s business. For example, do employees need to use their personal cell phones in order to conduct business? If so, you may consider flexibility in allowing non-work-related communications. Or, do your employees need to conduct business on the internet? Once again, it will depend on your business necessities. These are merely suggestions to consider when drafting your policies.

For more information regarding social media, please see the following link from our book, *Especially for Texas Employers*: http://www.twc.state.tx.us/news/efte/social_media_issues.html. For a sample Social Media policy, see: http://www.twc.state.tx.us/news/efte/social_media_use_policy.html.

For a list of sample policies, visit our online book, *Especially for Texas Employers*, at: <http://www.twc.state.tx.us/news/efte/tocmain2.html> and click on “THE A TO Z OF PERSONNEL POLICIES.” 



Every policy will be different for every employer. Policies will depend on the nature of the employer’s business. *Polka Dot/ Thinkstock*

Tip-Pooling and Tip-Sharing

Important legal issues with tip-pooling agreements

A notable exception to the general rule that minimum wage must be paid at \$7.25 per hour for all time worked is found in Section 203(m) of the Fair Labor Standards Act, providing that "tipped employees" (defined as those who earn at least \$30 per month in tips) may be paid a cash wage as low as \$2.13 per hour, as long as they get to keep their tips. Many employers with tipped employees, especially restaurants, have arrangements providing for such employees to share their tips with each other and even with other employees who may not directly receive tips. This article outlines the most important legal issues to keep in mind with tip-pooling / tip-sharing agreements.

- The U.S. Department of Labor's position is that tip-pooling / tip-sharing arrangements are permissible as long as the employees sharing in the tips have somehow participated in serving the customers who left the tips. Courts cases regarding tip-sharing arrangements focus on whether the employee interacted with the customer, assisted in providing the customer with a pleasurable dining experience, and/or provided "direct table service" before or during the meal, while the customer was seated. It is a good practice to put the tip-sharing policy in writing and have everyone acknowledge it.

- DOL regulation 29 CFR 531.54 – "Tip pooling. Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of sections [203(m)] and [203(t)]. Similarly, where an accounting is made to an employer for his

information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act."

- DOL Field Operations Handbook § 30d04: Tip pooling.

a. The requirement that an employee must retain all tips does not preclude tip-splitting or pooling arrangements among employees who customarily and regularly receive tips. The following occupations have been recognized as falling within the eligible category:

- 1) waiters
- 2) bellhops
- 3) counter personnel who serve customers
- 4) busboys/girls (server helpers)
- 5) service bartenders

It is not required that all employees who share in tips must themselves receive tips from customers. The amounts

retained by the employees who actually receive the tips, and those given to other pool participants, are considered the tips of the individuals who retain them, in applying the provisions of sections [203(m)] and [203(t)].

b. A valid tip-pooling arrangement cannot require employees who actually receive tips to contribute a greater percentage of their tips than is customary and reasonable. For enforcement purposes, Wage and Hour will not question contributions to a pool where the net amount of



The U.S. Department of Labor's position is that tip-pooling/ tip-sharing arrangements are permissible as long as the employees sharing in the tips have somehow participated in serving the customers who left the tips. *Photodisc/ Thinkstock*

tips contributed (after return of any tips from the pool) does not exceed 15 percent of the employee's tips. However, only those tips that are in excess of tips used for tip credit (e.g., where the maximum tip credit is taken, those in excess of 40 percent of the minimum wage) may be taken for a pool. If such requirements are met, it is not necessary that the pooling be voluntarily consented to by the employees involved (notwithstanding Reg. 531.54).

c. Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip pooling arrangements. The following employee occupations would therefore not be eligible to participate:

- 1) janitors
- 2) dishwashers
- 3) chefs or cooks
- 4) laundry room attendants

However, it does not appear that Congress ... intended to prevent tipped employees from deciding, free from any coercion whatever ..., what to do with their tips, including sharing them with whichever co-workers they please. Tips given to such co-workers as are listed in this subsection may not, however, be used as a tip credit.

d. In the case of host/hostesses, head waiters, or seater/greeters and other employees not referred to above, facts should be developed showing the practices regarding their sharing of tips in the locality and type of establishment involved.

• Two DOL opinion letters address this issue:

1) Customer-greeting chefs are tipped employees and may share in tip pools: http://www.dol.gov/esa/whd/opinion/FLSA/2008/2008_12_19_18_FLSA.htm.

2) Barbacks are tipped employees and may share in tip pools: http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_15_12_FLSA.htm.

• Gratuities charged by an employer are not tips – see http://www.ora.org/Government/Tech/tech_tip_pooling.htm - "A gratuity is not considered tip income within the control of the regularly tipped employee. A gratuity is a charge that is directly added for services rendered as determined by management, e.g. adding an 18% gratuity for parties over 10 people. This amount is considered wages, and is within the control of the employer, not the employee. Employers may distribute a gratuity at their discretion."

• Two interesting cases from California:

1) *Budrow v. Dave & Busters of Calif., Inc.*, 90 Cal.Rptr.3d 239 (Cal. Ct. App., 2nd Dist., Mar. 2, 2009) - Bartenders who poured or mixed drinks that were brought to restaurant patrons at their tables could participate in tip pools established pursuant to statute making gratuities property of employees to whom they were paid, even if bartenders did not personally bring drinks to tables.

2) *Etheridge v. Reins International*, 91 Cal.Rptr.3d 816: The court explained that "[t]ip pools exist to minimize friction between employees and to enable the employer to manage the potential confusion about gratuities in a way that is fair to the employees."

• Hosts are tipped employees: *Kilgore v. Outback Steakhouse of Florida, Inc., a/k/a FMI Restaurants, Inc.*, 160 F.3d 294 (6th Cir. 1998): "an employer must inform its employees of its intent to take a tip credit toward the employer's minimum wage obligation." Further: "Hosts at Outback are "engaged in an occupation in which [they]

customarily and regularly receive[] . . . tips because they sufficiently interact with customers in an industry (restaurant) where undesigned tips are common." The same court added: "... One court has held that a tip pool that benefits a maitre d' is permissible under the FLSA. In *Dole v. Continental Cuisine, Inc.*, 751 F. Supp. 799 (E.D. Ark. 1990), the district court upheld a mandatory tip pool where servers tipped out solely to a maitre d' who 'receives no tips directly from customers' and whose responsibilities included setting up the dining room, greeting and seating customers, serving the first drink to customers, and assisting servers in serving customers as needed."

• For tipped employees, it would not be legal to make deductions from tips toward a "breakage" fund (losses of glasses, utensils, plates, and other business inventory may not take an employee below minimum wage). See the following two cases:

1) *Chisolm v. Gravitas Restaurant Ltd.*, 2008 WL 838760 (S.D. Tex. 2008) and

2) *Bursell v. Tommy's Seafood Steakhouse*, 2006 WL 3227334 (S.D. Tex. 2006).

Thus, an employer whose tipped employees are subject to a tip-pooling policy should give advance written notice to employees about the policy and ensure that the policy is fair and consistent with industry standards, that it includes only those employees who can be credibly explained as participating in the customer experience (direct interaction with customers), and that it distributes enough tips to the waitstaff that they feel adequately compensated, i.e., the server's share should be high enough to be an incentive to stay. 

William T. Simmons
Legal Counsel for
Chairman Tom Pauken

Reimbursements may be available for return to work

Employers in Texas may be reimbursed by the Texas Department of Insurance, Division of Workers' Compensation, for up to \$5,000 for the costs of workplace modifications, equipment, tools, furniture or devices, or other related costs that you have paid for to bring an injured employee back to work in a modified duty or alternate duty capacity.

Are you an eligible employer?

- Are you a small employer that employed at least 2, but not more than 50, employees each business day of the previous calendar year?
- Do you purchase workers' compensation insurance in Texas?
- Do you have an employee who has a job-related injury that was accepted as compensable by your workers' compensation insurance carrier?
- Did you pay for any workplace modifications, purchase any special equipment, tools, furniture or devices, or pay any other related costs to bring your injured employee back to work in a modified or alternate duty capacity?

If yes, you may be eligible to receive a reimbursement, a preauthorization, or even an advance from the Return to Work Reimbursement Program for Employers.

There is no guarantee that if you have paid for workplace modifications, you will receive reimbursement. However, applying for the reimbursement gives your company the opportunity to be considered for the program.



Employers in Texas may be reimbursed by the Texas Department of Insurance, Division of Workers' Compensation, for up to \$5,000 for the costs of workplace modifications, equipment, tools, furniture or devices, or other related costs that you have paid for to bring an injured employee back to work in a modified duty or alternate duty capacity. *Photos.com /Thinkstock*

Call (512) 804-5000 or e-mail rtw.services@tdi.state.tx.us for more information or to obtain an application form. A wealth of general resources for returning injured employees to work is available at <http://www.tdi.state.tx.us/wc/rtw/index.html>.

The reimbursement program is for private sector employers. Agencies of the State of Texas and political subdivisions of the State are not eligible to participate in the program.

Top companies for employment of veterans

The Military Times EDGE, a supplement to the Air Force Times, Navy Times, Marine Corps Times and Army Times, has published its "Best for Vets: Employers 2010" survey of the nation's top companies in terms of military recruitment and policies. Companies that responded to the

Business Briefs

survey were ranked according

to four main criteria: recruiting, training and mentoring, reserve policies, and corporate culture. Several companies either based or with significant operations in Texas were in the top 50, such as Boeing, the top-ranked aerospace company; USAA in the insurance industry and number two overall; BNSF Railway and American Airlines in the transportation sector; Waste Management in services; Sears and Walmart in the retail sector; and Nustar Energy and Pioneer Natural Resources in the energy sector. Said Boeing's Rick Stephens, senior vice president of Human Resources and Administration, a former U.S. Marine Corps officer: "Veterans at all levels bring leadership skills that are as valuable as the technical knowledge they offer us." Other companies with Texas operations made the list as well. The full list, together with links to the companies' Web sites, is at http://www.militarytimesedge.com/projects/bestforvets_employers_2010/.

Over 20,000 Texas Non-Profit Organizations May Be At Risk

According to an article posted at <http://www.tano.org/losestatus/>, 23,898 small Texas non-profit organizations may lose their tax-exempt status unless they file a Form 990 by October 15, 2010. The alert is based on a notice on the IRS Web site at <http://www.irs.gov/charities/article/0,,id=225705,00.html> - there is a link on both sites listed above to download the database showing which non-profits are on the IRS list as being at risk of non-profit status denial. One of the reasons that maintaining tax-exempt status is important for non-profit organizations is that the tax-deductibility of donations to such organizations depends upon the donees' tax-exempt status being valid. Any non-profit organization potentially affected by the IRS alert should visit the sites listed above for further information.

small non-profit organizations are not liable as employers if they have fewer than four employees. If they lose their tax-exempt status, they could be liable as employers if they pay at least \$1500 in wages in a calendar quarter to even one employee. Non-profits that reimburse their unemployment costs instead of paying quarterly unemployment taxes, and then lose their tax-exempt status, could also lose their status as a reimbursing employer following such a change in status. More information about being a reimbursing employer is available

at <http://www.twc.state.tx.us/ui/bnfts/employer8.html>.



The Military Times EDGE, a supplement to the Air Force Times, Navy Times, Marine Corps Times and Army Times, has published its "Best for Vets: Employers 2010" survey of the nation's top companies in terms of military recruitment and policies. Companies that responded to the survey were ranked according to four main criteria: recruiting, training and mentoring, reserve policies, and corporate culture. *Comstock/ Thinkstock*

There could also be an unemployment-related impact for employers that lose their tax-exempt status. Many

at <http://www.twc.state.tx.us/ui/bnfts/employer8.html>.

“Green Cards” have been redesigned

The U.S. Citizenship and Immigration Services (USCIS) bureau of the U.S. Department of Homeland Security announced that it has redesigned the Permanent Resident Card - commonly known as the “Green Card” - to incorporate several major new security features. The new card incorporates several advanced technological features to enhance security and discourage counterfeiting, such as tamper-proof features, RFID authentication, and printing techniques not seen before in major identity card systems. State-of-the-art technology prevents counterfeiting, obstructs tampering, and facilitates quick and accurate authentication of the card via RFID technology. The advanced features include optical variable ink, a holographic image, an embedded radio frequency identification device (RFID), a laser-engraved fingerprint, a unique background design, a tamper-resistant border, optical media for storage of all digital files (including biometrics), and micro-image, high-resolution pictures of state flags and U.S. presidents. Since May, 2010, USCIS has been issuing all green cards in the new, more secure format. For more information, visit the USCIS Web site at www.uscis.gov/greencard and click on the link for “Fact Sheet: USCIS To Issue Redesigned Green Card” on the right side of the page under “News”.

New FLSA recordkeeping requirements

Recordkeeping requirements for employers under the FLSA may be changing in the very near future. DOL has issued a notice of proposed rulemaking indicating that it will begin requiring employers to conduct an analysis of any position for which the worker is not counted as an employee, showing that under the economic reality test, the worker is not in the company’s employment. In addition,



DOL has issued a notice of proposed rulemaking indicating that it will begin requiring employers to conduct an analysis of any position for which the worker is not counted as an employee, showing that under the economic reality test, the worker is not in the company’s employment. *Creatas/ Thinkstock*

the company will have to show that it informed each such worker of its analysis and of the worker’s rights under the FLSA. The new rules may also require employers to furnish their employees with information regarding the hours worked and wage

computations. The DOL’s press release on the proposed rulemaking is at <http://www.dol.gov/regulations/factsheets/whd-fs-flsa-recordkeeping.htm>. Employers should visit www.dol.gov/whd/ often to stay up with developments in this area of the law. 🇺🇸

Please join us for an informative, full-day conference to help you avoid costly pitfalls when operating your business and managing your employees. We have assembled our best speakers to discuss state and federal legislation, court cases, workforce development and other matters of ongoing concern to Texas employers.

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Urban Legends of Texas Employment Law and the Basics of Hiring, Texas and Federal Wage and Hour Laws, Employee Policy Handbooks: Creating Your Human Resources Roadmap, Unemployment Insurance Hearings and Appeals, and Independent Contractors. The registration fee is \$85.00 and is non-refundable. Seating is limited, so please make your reservations early if you plan to attend.

For more information, go to www.texasworkforce.org/events.html

Upcoming Texas Business Conferences

- The Woodlands March 25, 2011
- Austin April 29, 2011
- El Paso..... June 10, 2011
- San Marcos August 12, 2011
- Waco September 16, 2011

please print

Seminar choice: _____

First name	Initial	Last name
------------	---------	-----------

Name of Company or Firm _____

Street Address or P.O. Box _____

City	State	ZIP	Telephone
------	-------	-----	-----------

Make checks payable and mail to:

Texas Business Conference • Texas Workforce Commission • 101 E. 15th Street, Room 0218 • Austin, Texas 78778-0001

Texas Business Today

Texas Business Today is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be a comprehensive legal analysis of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

Texas Business Today is provided to employers free of charge. If you wish to subscribe to this newsletter or to discontinue your subscription, or if you are receiving more than one copy or wish to receive additional copies, please write to:

Commissioner Representing Employers
101 East 15th Street, Room 630
Austin, Texas 78778-0001

or else send an e-mail to employerinfo@twc.state.tx.us

For tax and benefits inquiries, e-mail tax@twc.state.tx.us.

Material in *Texas Business Today* is not copyrighted and may be reproduced.

Auxiliary aids and services will be made available upon request to individuals with disabilities, if requested at least two weeks in advance.

Telephone: 1-800-832-9394 (512) 463-2826
FAX: (512) 463-3196 Web Site: www.texasworkforce.org
E-mail: employerinfo@twc.state.tx.us

Printed in Texas  on recycled paper

PRSR STD
US POSTAGE
PAID
AUSTIN, TEXAS
PERMIT NO. 11144

TEXAS WORKFORCE COMMISSION
Tom Pauken, Chairman
Commissioner Representing Employers
101 East 15th Street, Room 630
Austin, Texas 78778-0001

OFFICIAL BUSINESS

ADDRESS SERVICE REQUESTED