

Texas Business Today

Fall 2011

Tom Pauken, Chairman
Commissioner Representing Employers

TEXAS
WORKFORCE SOLUTIONS

Federal and State Legislative Update

- Compliance Posters Available for No Cost
- Temporary Staffing Advantages for Employers

Texas' economic trends a model for national economic growth

In the 12-month period preceding August, more than 253,000 new jobs were created in Texas—or one out of every five new jobs created nationwide. This employment growth occurred entirely in the private sector which has added jobs at twice the rate of the nation as a whole, and well above the private sector growth rates of the remaining 10 largest labor market states. Even as more and more people relocate to Texas to find work, the statewide unemployment rate remains below the national level, while Census data indicate Texas has led all other large states in wage growth between 2005 and 2010.

Nonetheless, while Texas has led the charge in job-creation among the states, the U.S. economy remains

Chairman's Corner

massive government stimulus programs designed to get the consumer to spend us out of this nasty national recession, and it has failed. The nationwide unemployment rate currently stands at a staggeringly high level of 9.1 percent, with 43 percent of those out of work for 27 weeks or longer. This summer, the housing market hit recessionary lows not seen since the time of the Great Depression. Moreover, dismal GDP growth estimates have given little encouragement about future expectations to business owners who, accordingly, have postponed hiring decisions.

Meanwhile, the current administration continues to pursue the same Keynesian policies aimed at “stimulating demand” in a debt-ridden economy by spending hundreds of billions of dollars we do not have. Needless to say, persistent rising prices and record long-term unemployment leave little doubt that American consumers have been stretched to their limits in terms of spending capacity.

The most recent proposal from the Obama administration is to spend an additional \$457 billion that includes temporary cuts to the payroll tax. This attempt to stimulate the economy with revenues that are intended for the Social Security Trust Fund is yet another quick fix which is unlikely to lead to long-term economic growth. U.S.-based businesses are now being asked to finance the plan through higher taxes and will have little incentive to hire new workers. This fiscal stimulus proposal won't do anything substantively to reduce the trade deficit which

mired in the most serious national recession since the Great Depression. The “solution” for Washington policymakers has been



Texas Workforce Commission Chairman Tom Pauken speaks at a recent Skills Development Fund grant presentation. *Texas Workforce Commission photo*

amounted to nearly \$600 billion over the last 12 months. In addition, the proposal does little to address much-needed job-creation in our declining manufacturing sector where employment has fallen over the last decade by nearly one-third, primarily due to an onerous corporate tax system which exports prosperity and American jobs abroad.

A large contributor to Texas' success in creating jobs is its reputation for being a positive tax and regulatory environment for businesses. We also have developed positive initiatives here at the Texas Workforce Commission to take people off the unemployment rolls and put them back to work. Under our *Texas Back to Work* program, we provide incentives to Texas employers to hire people who have lost their jobs through no fault of their own. It is a win-win situation for job-seekers and taxpayers who contribute to the unemployment trust fund.

A real plan to create jobs here in America would take a page from the Texas playbook by eliminating the onerous corporate income tax on American businesses and replacing it with a revenue-neutral, border-adjusted

consumption tax. Such an approach to taxation would level the playing field with our trading competitors who now enjoy, on average, an 18 percent tax advantage over U.S.-based businesses. For example, Germany has a 19 percent tax advantage over us on all exports and imports of produced goods that are traded between the two nations.

Let's start investing in America with a business tax system that rewards capital investment and employment here in the USA. Bring the jobs home, rebuild our manufacturing base, and start growing the economic pie again! In the words of the late John F. Kennedy and Jack Kemp, "a rising tide lifts all boats." 🇺🇸

Tom Pauken

Sincerely,

Tom Pauken, TWC Chairman
Commissioner Representing Employers

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Temporary staffing offers potential advantages for employers

Companies sometimes need additional workers on a temporary or seasonal basis when things get busy. Temporary employees hired directly by a company are the company's employees and can file unemployment claims when the job runs out. Depending upon the level of wages reported by the company, and the time that a former temporary employee files an unemployment claim, the unemployment benefits can be costly and result in a higher state unemployment tax rate. In addition, the paperwork burden and administrative overhead involved in responding to and managing unemployment claims can be quite considerable.

An alternative is to hire temporary employees through a temporary help service. In such a case, the temporary help service is the employer and will deal with any unemployment claims from such employees. While the hourly labor cost will usually be higher, at least there will be no unemployment claims to worry about as long as it is clear that the temporary staffing firm was the employer. That having been said, cooperating with the staffing firm to supply firsthand witnesses in the event of a disputed unemployment claim can help the staffing firm keep the client company's costs lower, depending on what kind of arrangement the two firms have.

The official definition of a temporary help firm appears in Section 201.011(21) of the Texas Unemployment Compensation Act, which is online at <http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.011>. Here is the relevant wording:

"Temporary help firm" means



Companies sometimes need additional workers on a temporary or seasonal basis when things get busy. Temporary employees hired directly by a company are the company's employees and can file unemployment claims when the job ends. An alternative is to hire temporary employees through a temporary help service. Digital Vision/Thinkstock

a person who employs individuals for the purpose of assigning those individuals to work for the clients of the temporary help firm to support or supplement a client's work force during employee absences, temporary skill shortages, seasonal workloads, special assignments and projects, and other similar work situations.

If a company meets the criteria in that definition, it can be considered a temporary help firm for purposes of the unemployment compensation program. A temporary employee is defined in Section 201.011(20) as "... an individual employed by a temporary help firm for the purpose of being assigned to work for the clients of a temporary help firm."

A similar definition for temporary help firms is found in Section 91.001(16) of the Staff Leasing

Services Act (see <http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.91.htm#91.001>):

"Temporary help" means an arrangement by which an organization hires its own employees and assigns them to a client to support or supplement the client's work force in a special work situation, including: (A) an employee absence; (B) a temporary skill shortage; (C) a seasonal workload; or (D) a special assignment or project.

Section 201.029 provides that "For purposes of this subtitle, a temporary help firm is the employer of an individual employed by the firm as a temporary employee." That provision is online at <http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.029>.

Led by the Texas Association

of Staffing (www.texasstaffing.org), the temporary staffing industry itself has a remarkable record of success in safeguarding the interests of its members. It is difficult enough to fend off legislation and policy changes that make it harder for a business to operate, but the association has been able to advocate two specific changes in the unemployment compensation law that help control unnecessary costs in that program:

1. There is a three-day grace period during which a temporary employee from a staffing firm may not file an unemployment claim once an assignment is complete. That provision is in Section 201.091(f) (online at <http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.091>), which states the following: “For purposes of this subtitle, an individual who last worked for a temporary help firm is not considered to be unemployed until three business days have passed since the date the individual's last assignment ended.”
2. If a temporary help firm has a policy requiring employees who complete their assignments to check back with the staffing firm regarding their availability for new assignments, and the policy warns that failure to report back can result in unemployment benefits being denied, a temporary employee who completes an assignment and files an unemployment claim without first checking to see whether another assignment is available can be disqualified from receiving benefits. That disqualification is covered in Section 207.045(h) (online at <http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.207.htm#207.045>). Here is what that subsection provides:

“A temporary employee of a temporary help firm is considered to have left the employee's last work voluntarily without good cause connected with the work if the temporary employee does not contact the temporary help firm for reassignment on completion of an assignment. A temporary employee is not considered to have left work voluntarily without good cause connected with the work under this subsection unless the temporary employee has been advised: (1) that the temporary employee is obligated to contact the temporary help firm on completion of assignments; and (2) that unemployment benefits may be denied if the temporary employee fails to do so.”

One area in which temporary help firms can be particularly helpful is in avoiding potential problems with misclassification of workers. Companies sometimes make the mistake of assuming that because a worker is needed for only a short time, or on a seasonal basis, the worker can be hired as an independent contractor, a “1099 employee”, or “contract labor.” Using temporary employees from staffing firms to cover temporary and seasonal needs ensures that the client company can avoid the issue of misclassification, because the worker will be the employee of the temporary help firm, which will assume the various responsibilities of an employer with respect to the worker.

Not only are the presumptions under various Texas and federal employment laws on the side of temporary and seasonal workers being in employment, this is a subject on which state and federal agencies are increasingly focusing. The practical realities are that since most employment laws are designed to help workers, and taxes paid on

wages to employees help support employment-related programs, the agencies have an incentive to enforce the employee classification laws as strictly as time, agency staffing, and resources will allow. As Littler employment law attorney George Reardon has put it, “Revenue-seeking governments are increasingly targeting misclassified independent contractor relationships, which are widespread and which pose serious risks for companies who use them. Companies accumulate these contractor relationships as end users import them through payables and purchasing departments instead of through HR. Staffing firms can provide some solutions to these situations, by employing the would-be contractors as W-2 employees, by educating managers on the risks and the qualification rules, by managing the contractor populations for clients, or by brokering the services of properly classified contractors.”

Do not overlook the impact of other employment laws. Under joint or co-employment rules, temporary employees can be considered employees of both the client company and the staffing firm for purposes of wage and hour statutes, discrimination protection, and other laws. It would be important to cover this issue in any service agreement that your company signs with a staffing company. Things to take into account would be responsibility for personnel actions, whether and to what extent liability for claims and lawsuits will be shared, indemnity, duration of the staffing relationship, what happens if the company wants to hire the temporary employees for its regular staff, and what happens in the event of premature cancellation of the service agreement.

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Legal briefs: what you need to know

Non-compete agreements, social media, wage claims and interns

Good News for Texas Employers Regarding Non-Compete Agreements

On June 24, 2011, the Texas Supreme Court delivered their opinion on *Marsh USA Inc. and Marsh & McLennan Cos. Inc. vs. Rex Cook*, a non-compete agreement case many employment law attorneys were watching. Essentially, the Texas Supreme Court has made non-compete agreements easier to enforce. In our Winter 2011

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issue's non-compete agreement article (here's the link to our Winter 2011 issue: <http://www.twc.state.tx.us/news/tbt/tbt0211.pdf>), we discussed how non-compete agreements are enforceable, in Texas, when the consideration "gives rise" to the employer's interest in preventing the employee from competing. For example, proprietary information is consideration that, like the court in *Light* stated, "gives rise to the employer's interest in restraining the employee from competing" because it is in the employer's interest to keep the employee from competing when it gives an employee such information. Now that *Marsh* has been decided, the Texas Supreme court has eliminated *Light's* "give rise to" requirement. Under *Marsh*, consideration that is "reasonably related to an interest worthy of protection" will be enough to enforce a non-competition agreement. In *Marsh*, the employee, Rex Cook, signed a non-compete agreement which gave him the right to exercise stock options in exchange for signing a non-solicitation agreement. The agreement stated that if Mr. Cook left the company within three years after exercising the stock options, then for a period of two years after termination, he would not solicit or accept business of the type offered by Marsh nor solicit any of Marsh's employees for the purposes of competing with the firm. In less than three years, Mr. Cook exercised the stock options and resigned from Marsh and began working for another employer in the same industry, and Marsh sued him for violating the non-solicitation agreement (i.e., he had solicited and accepted business from clients and prospects of Marsh who were assisted by Mr. Cook).

The law before this was that a valid non-competition agreement could not be protected by the payment of money alone and the argument was that stock options were similar to money. However in *Marsh*, the court linked the stock options that were provided to Mr. Cook as being reasonably related to encouraging him to develop goodwill (i.e., establishing good relationships with Marsh's customers). Even though *Marsh* is a significant

win for Texas employers, some points need to be made about employers enforcing non-competition agreements:

- Employers should still try to give trade secrets and confidential information as consideration in non-competition agreements in exchange for the employee's return promise not to disclose that information.
- Employees should consider connecting a financial component to the employees as reasonably related to trying to get employees to develop goodwill for the business. For example, incentive bonus plans, education tuition reimbursement, salaries, and introduction to key client relationships are just a few examples that Texas courts may consider given the outcome in *Marsh*.
- Employers should still be as specific and reasonable as possible when drafting their non-competition agreements.

Social Media Update from the NLRB

On August 18, 2011, the National Labor Relations Board's (NLRB) Office of General Counsel, Division of Operations-Management, released a report (see <https://www.nlr.gov/print/1480>) discussing the outcome of 14 social media cases they have investigated (e.g., involving the use of Facebook, blogging, Twitter, etc.). These cases

involved employees who were disciplined and/or fired for violating the employer's social media policy. In four of the cases involving use of

Facebook, the department concluded that the employees were engaged in "protected concerted activity" (see definition in 29 U.S.C. Section 157 at: <http://nlrb.gov/national-labor-relations-act>) because the employees were discussing conditions and terms of employment with co-workers. While the report does not give employers hard and fast rules about social media, looking at it as a whole, the report does give employers some guidelines to keep in mind when dealing with social media issues at the workplace.

The following are examples of what may *not* be considered "protected concerted activity" (i.e., employers can probably discipline and fire employees for these type of actions):

- Inappropriate or offensive comments (e.g., profanity) about an employer's clients will not be



protected activity. In one case, a reporter made inappropriate tweets about the employer's clients on a work-sponsored Twitter account (see this case on page 12 of the report).



- Simple complaints about working conditions especially directed to non-coworkers, were found to not be protected activity under the National Labor Relations Act (NLRA). For example, the NLRB found that a bartender who made negative comments about his employer's tipping policy on Facebook in response to a nonemployee's comment, was not engaged in concerted activity because he directed his comments to a non-coworker, and made them by and on behalf of himself only (see this case on page 14 of the report).

The following are examples of what *may be* considered "protected concerted activity" (i.e., employers may not discipline and fire employees for these types of actions):

- In general, posts/comments will be considered protected concerted activity if they: (1) involve the terms and conditions of employment; (2) constitute an "outgrowth" of an earlier discussion about the terms and conditions of work among coworkers; and (3) involve or are directed to coworkers to invite or induce further action.
- Even inappropriate comments can be considered protected activity. For example, in one case an employee used profanity when referring to the company's owners and questioned the employer's ability to do paperwork correctly (see page 9 of the report).
- Twitter or Facebook posts that could be considered a "direct outgrowth" of earlier employee discussions or complaints are more likely to be seen as protected concerted activity. For example, if the employee's social media discussions (e.g., employee posts comments on Facebook) were preceded by in-person discussions or shared concerns about working conditions can be considered protected concerted activity.

While the NLRB's Office of General Counsel's report has given some guidance to employers in understanding the limits on employer and employee rights regarding the usage of social media, it is important to consider each situation's facts carefully. Essentially, the law is still not clear on how exactly to deal with social media usage in the workplace; therefore, it is advised that employers continue to ensure that they are not violating the NLRA.

Easiest Ways to Lose a Wage Claim

The Texas Payday Law is very detailed and technical, and it can be difficult to comply with even for companies that are careful. However, there are certain things that are especially risky and almost guarantee a losing position if a wage claim is filed:

- Rely on an oral pay agreement – "gentlemen's agreements" are a thing of the past in light of the "best evidence" rule – use written wage agreements signed by each employee.
- Fail to pay in accordance with what the wage agreement was – not only should the wage agreement be followed exactly, but paying employees in a manner or amount other than what is in the written agreement allows the claimant to argue that the written agreement is not the best evidence of what the real agreement was.
- Engage with the claimant in a scheme to conceal taxable wages from the IRS (such as by treating wages as "expense reimbursements," or by treating employees as "contract labor") – this should be a no-brainer, but the agency sees cases like this and generally gives the benefit of the doubt to claimants, even when it is apparent that both parties tried to evade their tax liabilities.
- Assume that an oral agreement is good enough to authorize a deduction from wages – it is not. Wage deductions that are not ordered by a court, or required or specifically authorized by a law, must be both lawful and authorized by the employee in writing to be valid.

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The Texas Payday Law is very detailed and technical, and it can be difficult to comply with even for companies that are careful. Relying on an oral pay agreement is a thing of the past; use written wage agreements signed by each employee. *Martin Poole/ Stockbyte/Thinkstock*

Frequently-asked questions on topics impacting your business

The following questions were compiled from recent Texas Business Conferences around the state.

Wage and Hour Issues

Q: How much notice does a company have to give when changing paydays?

A: There is no Texas or federal law governing the exact timing of the notice for such a change, other than the general principle that any change in pay, pay method, or pay schedule should be done in such a way that no retroactive cut in pay occurs. Generally, it is best to give as much advance notice as possible of any change in pay or benefits. Most companies try to give notice of such a change at least one pay period in advance of the effective date.

Q: Is it true that you pay employees overtime in excess of 80 hours in a two-week period or do you pay overtime for hours worked in excess of 40 hours in a workweek?

A: In general, overtime should be paid at time and a half for any hours worked over 40 in a workweek. However, under section 207(j) of the Fair Labor Standards Act (FLSA), a residential care facility employer (e.g., a nursing home or hospital) can use a two-week period for overtime pay calculations as long as overtime pay is at time and a half and is paid on all hours worked in excess of 80 hours in a fourteen-day period or in excess of eight hours in a single workday. The cited law can be found in our book, *Especially for Texas Employers* (EFTE), at: http://www.twc.state.tx.us/news/efte/hours_general.html. The U.S. Department of Labor (DOL) regulation interpreting that section of the law is 29 C.F.R. Section 778.601, which is online at the following link: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.2.38&idno=29#29:3.1.1.2.38.7.185.2>.

Hiring Issues

Q: Is it legal to hire only non-smokers?

A: In Texas, there is no statute that specifically protects the rights of smokers to be free of job-related discrimination. Some states do have laws protecting such rights, but Texas is not among them. Therefore, it is legal to prefer non-smokers in hiring and other employment decisions. An alternative that might be preferable to a flat hiring ban would be telling candidates that the company enforces a strict non-smoking policy that allows no

smoking at all during the workday, including break times, and prohibits coming to work with an odor of tobacco smoke about oneself. Here's more information from our book regarding employees who smoke: http://www.twc.state.tx.us/news/efte/smoking_breaks.html.

Q: Can someone who only had a working interview (i.e., trying to see if the applicant can perform the job duties) at our company file for unemployment benefits?

A: Yes, an unemployment claim can be filed after a working interview, if any productive work is performed by the applicant/employee for which pay must be given. An employer would not want to let anyone perform such work until and unless the employer has completed the I-9 process for them and obtained full W-4 information from them. Be sure to report their wages from the working interview to TWC and IRS and pay any appropriate payroll taxes on the wages. A better alternative might be to not conduct working interviews at all, but rather do simple, non-working interviews during which the applicants demonstrate their knowledge and abilities in skills tests that are directly related to the jobs for which they are applying, without performing any productive work that will or can be resold to customers of your business, or to your business itself. In other words, invent things for them to do that do not result in anything useful for your company. Remember that you want to see if they can do what they say they can do and for that, you do not need them to do any actual work for the company that could or would be done by an actual employee.

Medical-Related Laws

Q: I know that the American Disabilities Act applies to employers that have 15 employees or more, but does that include PRN employees (i.e., on-call, as-needed)?

A: Per 42 U.S.C. Section 12111(5), the American Disabilities Act covers employers with 15 or more employees on the payroll for each working day of 20 or more calendar weeks in the current or preceding calendar year. Therefore, PRN employees would be included if they worked for you in the time prescribed.

Q: Does an employer have a right to verify an employee's suspicious doctor's note? For example, the note does not have a date or a doctor's signature and she continues to be absent for medical reasons.

A: An employer has such a right. If the note fails to

include such basic information as a date and signature, the company could require the employee to return to the doctor's office and obtain a note with that information included. Let the employee know that without a proper note from the doctor, there will be no basis for considering the absence to have been related to a doctor's visit, if that is indeed what the employee is telling you caused her to be absent. Please see this link in our book for suggestions on how to handle frequent medical absenteeism: http://www.twc.state.tx.us/news/efte/medical_absence_warnings.html.

Unemployment Insurance

Q: What is the difference between emergency unemployment and unemployment benefits?

A: Unemployment benefits currently take three forms. "Regular unemployment benefits" or "state benefits" are the first kind that are paid out to claimants who meet the qualification and eligibility requirements. "Emergency unemployment benefits" are available to those who have exhausted their regular state unemployment benefits. "Extended benefits" are available to those who have exhausted their regular state benefits and their emergency unemployment benefits. Employers can find a chart showing the time limits on the three kinds of unemployment benefits at the following links from our website: <http://www.twc.state.tx.us/ui/bnfts/uiadditionalweeks.pdf> & <http://www.twc.state.tx.us/ui/bnfts/benefitextensions.pdf>.

Q: How long does someone have to work for an employer before they can file for unemployment?

A: There isn't a set amount of time that someone has to work in order to file and qualify for unemployment insurance benefits. Generally, anyone who is no longer working for pay may file an unemployment insurance claim and try to draw benefits, but must meet various requirements. The first requirement requires a claimant to be monetarily eligible. In order to be monetarily eligible, an employee must have a minimum level of earnings during the "base period". For more information about the base period, go to this section of our book: http://www.twc.state.tx.us/news/efte/how_ui_claims_affect_employers.html#dateofinitialclaim. In addition, information about other unemployment insurance requirements can also be found in our book: http://www.twc.state.tx.us/news/efte/ui_law_eligibility_issues.html. 

*Marissa Marquez
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Compliance posters free for employers

The Texas Workforce Commission (TWC) urges employers to be aware of unscrupulous business operators who may try to coerce employers into purchasing required workplace posters. Obtaining these compliance posters through TWC, as always, is free.

All workplace compliance posters required by law can be obtained free of charge from the TWC website at <http://www.twc.state.tx.us/ui/lablaw/posters.html>. Employers do not need to purchase these posters from private vendors. Furthermore, government-issued compliance posters do not have to be laminated to satisfy an employer's regulatory obligation. Employers should never pay for a government service that is free.

TWC has investigated reports of vendors claiming to be state contractors, inferring that employers are not in compliance with state law and urging employers to buy the posters from the vendor. TWC advises employers to disregard these vendors and consult with TWC directly to determine which posters are needed.

The number of workplace compliance posters required to be displayed can vary from one employer to another. Posters can be printed directly from TWC's website or by following links to the U.S. Department of Labor, where they can also be printed free of charge. Employers needing information about which posters they need to display should call TWC's Labor Law Department at (512) 475-2670.

All Texas employers must display posters containing information on the Texas Payday Law, the Workers' Compensation Program, the Uniformed Services Employment and Reemployment Rights Act, the Fair Labor Standards Act, the Employee Polygraph Protection Act, and the Occupational Safety and Health Act. Also, every employer with 15 or more employees, and smaller employers with federal grants and contracts, must post the notice entitled "Equal Employment Opportunity Is The Law," which contains information about the Equal Employment Opportunity/Americans with Disabilities Act laws.

Employers also may obtain a combined Texas Payday Law and Unemployment Compensation Act poster, and a list of other required posters by calling the agency's tax department at (512) 463-2747. Those posters can also be obtained online via the Unemployment Tax Services website at <http://www.twc.state.tx.us/ui/tax/emtaxinfo.html>.

To report inappropriate vending of posters, call the TWC Fraud and Program Abuse Hotline at (800) 252-3642. 

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- Assume that a policy advising employees they will bear financial responsibility for certain problems is enough to authorize a deduction from wages.
- Pay cash without obtaining a signed receipt from the employee.
- Fail to maintain required records of time worked, deductions made, and wages paid – good record keeping is not so much a legally required hassle as it is a good way to defend the company against allegations that the company violated wage and hour laws.
- File an appeal from an adverse ruling before getting a good idea of whether an appeal would likely result in a higher wage amount owed. The author has seen dozens of employer appeals result in increases as high as 1,000 percent or more from the amount that was appealed; in other words, know when to leave well enough alone.

Increased Scrutiny from DOL Regarding Interns

In the current economy, use of interns paid below minimum wage or nothing at all has increased noticeably. Such a practice is permissible if the intern meets the U.S. Department of Labor’s (DOL) six-part test for “trainees”, but violates the minimum wage and overtime laws if those criteria are not met. DOL has signaled that detection of unlawful internship programs is an enforcement priority. Thus, companies that employ interns would be well-advised to review their internship programs in light of the DOL criteria for trainees:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school. *The closer it is to a classroom or educational setting, the easier it will be to consider the individuals to be trainees. The arrangement might also result in a training certificate that could be listed as a job qualification on subsequent job applications. It would also help if the individual and the entity providing the training could first develop an individualized training plan that would be tailored to help the individual qualify for a specific job or range of jobs with a variety of companies via the training course.*
2. The training is for the benefit of the trainees. *This would be an easy argument to make in the case of individuals participating in welfare-to-work programs, but also in any training or internship programs that tend to increase their "hireability" in the open job market.*
3. The trainees do not displace regular employees,

but work under close observation. *This would also be an easy argument to make, especially in the case of a training “academy” run by a company, but also for a work experience program sponsored by a governmental entity. In the latter case, the government agency would be able to show that were it not for the work experience program, the activities in question would not be taking place. In a true training environment, the trainees are not going to be trusted to do much actual work for the company; the actual production would presumably be done by regular employees, who of course are already trained.*

4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion his operations may actually be impeded. *This goes hand-in-hand with item # 3 above. It would be important here to document the training process and the before and after figures for comparison. Again, the actual productive work will be done by regular employees; any productive work done by trainees would have to be insubstantial in nature and amount and secondary to the training process.*
5. The trainees are not necessarily entitled to a job at the completion of the training period. *Again, this is related to #3 above. The work would not be done at all, or at least certainly not on the schedule that exists, were it not for the existence of the training school or program under which the individuals receive training. The courts find it important to have a written agreement to the effect that trainees have no expectation or guarantee of employment upon completion of the training.*
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training. *The courts find it important that there be a written agreement to the effect that payment for the services is neither intended nor expected.*

These criteria, plus additional information, appear in the book *Especially for Texas Employers* at http://www.twc.state.tx.us/news/efte/advanced_flsa_issues.html#interns_trainees.

Regarding an intern’s ability to file an unemployment or wage claim once the internship is over, since either type of claim would have to be based upon the claimant having “worked” for the employer, and criterion 4 above presumes that the intern was not actually working, it is doubtful that the intern could list the internship as the “last work” on an unemployment claim, or else file a wage claim. 🇹🇽

*Marissa Marquez and William T. Simmons
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Temporary staffing advantages (cont.)

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If your company decides to use workers assigned from a temporary help firm, keep the lines of demarcation as sharp and clear as possible to minimize the risk of co-employment liability or non-recognition of the staffing relationship. It would be best to use a staffing firm that recognizes the importance of maintaining the boundaries between itself and your company in managing the temporary employees assigned to your company. Among other things, the following responsibilities would be advisable for your company to insist that the staffing firm fulfill:



Obtaining temporary workers through a temporary help firm may not always be the only solution; however, it is definitely something that can help a client company control certain costs and minimize the paperwork associated with hiring regular employees. *Hemera/ Thinkstock*

- Reserve the right in the client service agreement to exercise as many of the prerogatives of an employer as possible, at least on paper, i.e., hiring, firing, reassignment, training, pay, benefits, and so on.
- Have employees fill out employment applications with the staffing firm.
- Run all new temporary employees through the I-9 process.
- Report them to the Texas Attorney General's office as new hires of the staffing firm.
- Do at least minimal background/reference checks.
- Get W-4s filled out.
- Give workers' comp coverage notices (Notice 5 for non-coverage, Notice 6 for coverage).
- Give the assigned employees company policy handbooks from the staffing firm and have them sign clear acknowledgement of receipt forms listing the staffing firm as the employer.
- Any benefits should be administered in the staffing firm's name.

- Pay stubs (earning statements) should identify the staffing firm as the employer.
- Give all statutorily required notices for unemployment purposes (Section 207.045(h)).
- Report wages and pay unemployment and other payroll taxes to TWC and IRS.
- Upon commencement of health plan coverage, termination of the employment relationship, and other qualifying events, give COBRA notices to the ex-employee and affected beneficiaries when applicable.
- Give reminders of who the employer is throughout the employment relationship and at the conclusion of the assignment, along with clear written instructions on how to recontact the staffing firm for reassignment.

For your company's part, do not let the assigned employees appear in the company's internal employee email distribution groups, employee rosters, or mailing lists. If they must wear ID badges, they should be noticeably different from those worn by regular employees. Any meeting announcements should be sent separately to assigned employees,

or better yet, have the staffing firm advise the temporary employees of the need to attend any client company meetings. Finally, assigned employees from a temporary staffing firm should not be eligible for the client company's gift or bonus program. In general, it is best to avoid including assigned employees in any company activity if such inclusion could make it appear that the client company considers them to be part of its regular staff.

While obtaining temporary workers through a temporary help firm may not always be the only solution, it is definitely something that can help a client company control certain costs and minimize the paperwork associated with hiring regular employees, as long as the client company and the staffing firm properly manage the relationship as noted above.

Note: Portions of this article appear in the topic "Alternatives to Hiring Employees Directly" in the book Especially for Texas Employers, online at http://www.twc.state.tx.us/news/efte/alternatives_to_hiring.html. 

*William T. Simmons
Legal Counsel to
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Legislative update: recent and pending legislation impacting your business

During the most recent general session of the Texas Legislature, legislators passed many employment-related bills that were signed into law by the Governor. In this article, you will find the bills that will impact the majority of employers in Texas, along with brief comments on selected items (affected employers should carefully review each bill that pertains to them).

Texas Legislature: Pay and Benefits

- **HB 438** - relating to health benefit plan coverage for orally administered anticancer medications. Effective 09-01-11.
- **HB 1456** - relating to the waiver and release of a mechanic's, contractor's, or materialman's lien or payment bond claim and to the creation of a mechanic's, contractor's, or materialman's lien for certain landscaping. Effective 01-01-12.
- **HB 2559** - relating to commercial motor vehicle installment sales - auto retailers may not include wage assignments in installment payment contracts for vehicle sales. Effective 09-01-11.
- **SB 1024** - relating to the prosecution of the offense of theft of service - partial payment of wages alone is insufficient to negate an employer's intent to avoid payment for a service. Effective 09-01-11.

Texas Legislature: Workers' Compensation

- **HB 528** - relating to the provision of pharmaceutical services through informal and voluntary networks in the workers' compensation system. Effective 06-17-11.
- **HB 625** - relating to notice of staff leasing services company workers' compensation claim and payment information. Effective 09-01-11.
- **HB 2089** - relating to the resolution of overpayment or underpayment of income benefits under the workers' compensation program. Effective 09-01-11.
- **SB 809** - court appeals in medical fee disputes must be filed within 45 days of the final agency decision. Effective 09-01-11.
- **SB 1714** - makes it clear that non-subscribers' employees may not, prior to an injury, waive the right to sue for job injuries. Effective 09-01-11.

Texas Legislature: Unemployment Compensation

- **HB 14** - receipt of severance pay disqualifies claimant for unemployment insurance for period covered by the severance pay amount; amounts paid for releases/waiver agreements or under collective bargaining agreements do not constitute severance pay. Effective 09-01-11.
- **HB 2579** - partial safe harbor from unemployment tax penalties for misclassification of workers. Effective 09-01-11.
- **SB 439** - benefits paid to someone who is laid off because they were replaced by a returning veteran due to the employer's compliance with USERRA will not be charged to the employer's account. Effective 09-01-11.
- **SB 458** - for UI claim purposes, the "last work" is an employer for which claimant worked at least 30 hours in a week, or else a covered employer. Effective 09-01-11.
- **SB 638** - in business acquisition situations, successors have access to surplus credits earned by predecessors. Effective 09-01-11.

Texas Legislature: Open Records and Privacy

- **HB 300** - relating to the privacy of protected health information - this could pertain to employers trying to obtain medical documentation with regard to an employee's absences. Effective 09-01-12.
- **HB 2463** - employment discrimination claim information is not public information. Effective 09-01-11.
- **HB 2538** - career school information is not public information. Effective 09-01-11.
- **SB 76** - permits TWC to obtain driver records to investigate unemployment fraud. Effective 09-01-11.
- **SB 563** - job-matching service information is not public information. Effective 09-01-11.

Texas Legislature: General Employment Law

- **HB 1178** - relating to employment protection for members of the state military forces - mandatory reinstatement of employees who missed work due to training or duty in the state military forces of Texas. There are no express exceptions for layoffs or changed circumstances, but the defense that the termination was not “because of” the military service is available. Enforcement by the Texas Workforce Commission under a new subchapter K of Chapter 431 of the Texas Government Code; right to file court action; full range of injunctive, equitable, compensatory, and punitive damages is available, plus expert and attorney fees. Effective 06-17-11.
- **HB 1610** - requires termination of a teacher who is convicted of or receives deferred adjudication for a felony “as soon as practicable.” Effective 09-01-11.
- **HB 2609** - expansion of the list of disqualifying convictions for employment at certain facilities serving the elderly or persons with disabilities to include obstruction or retaliation against a public servant, witness, or informant, and cruelty to animals. Effective 09-01-11.
- **SB 192** - relating to patient advocacy activities by nurses and certain other persons - prohibits adverse actions toward employees who make good-faith reports of violations of nursing and other medical care standards. Effective 09-01-11.
- **SB 221** - facilitates background checks and sharing of information relating to criminal history of employees engaged in elder or disabled care. Effective 09-01-11.
- **SB 223** - relating to the licensing and regulation of home and community support services agencies and of the administrators of those agencies – requires immediate discharge of an employee found to have been convicted of certain crimes. Effective 09-01-11.
- **SB 321** - relating to an employee’s transportation and storage of certain firearms or ammunition while on certain property owned or controlled by the employee’s employer - makes legal the possession of a legally possessed firearm in a locked private vehicle parked on company property, except in vehicles owned or leased by the employer; no liability for employer for incidents with firearms stored that way. Effective 09-01-11.
- **SB 431** - using false military service credentials in employment would be a criminal offense; does not specifically address using false credentials in order to obtain a job in the private sector. Effective 09-01-11.
- **SB 894** - allows direct employment of doctors by small community, rural, and critical access hospitals. Effective 05-12-11.
- **SB 1178** - relating to the regulation of certain shelter day care facilities, child care facilities, and individuals providing child care services. Effective in part on 09-01-11 and in part on 09-01-12.

Texas Legislature: Workforce Development and Regulation

- **HB 434** - relating to the minimum standards for licensed child care facilities and registered family homes. Effective 06-17-11.
- **HB 3547** - relating to enforcement by a local government of fire safety standards at certain child care facilities. Effective 09-01-11.
- **SB 76** - relating to certain providers of subsidized child care. Effective 09-01-11.
- **SB 260** - relating to minimum training standards for employees of certain child care facilities - requires 24 hours of initial training within the first 90 days of employment for anyone with less than two years of experience, eight hours of which must be completed before the employee is given responsibility for a group of children; 24 hours of annual training for each employee (30 hours annually for the director); facility orientation w/in first seven days. Effective 09-01-11.
- **SB 264** - relating to certain information provided by local workforce development boards regarding certain child care providers. Effective 09-01-11.
- **SB 265** - relating to training for employees and operators of certain child care facilities. Effective 01-01-12.
- **SB 327** - relating to including certain veterans service organizations as small businesses for the purpose of state contracting - covers non-profit community-based veterans service organizations. Effective 06-17-11.
- **SB 436** - relating to the authority of a county to inspect day care centers and group day care homes. Effective 06-17-11.
- **SB 471** - relating to public school, child-placing agency, and day care center policies addressing sexual abuse and other maltreatment of children. Effective 06-17-11.

Continued from page 13

Federal Legislation

Elected officials in the nation's capital have not just been focusing on the nation's budget and debt situation. They have also filed several bills that, if enacted into law, would substantially impact how employers manage and compensate their employees. The following are the ones that will likely be of the greatest interest for most employers:

- **HR 42** - Issa (CA) - Health Care Incentive Act - certain health care benefits could be a credit toward minimum wage
- **HR 98** - Dreier (CA) - Illegal Immigration Enforcement and Social Security Protection Act of 2011 – sets up an Employment Eligibility Database and requires Social Security cards to include a machine-readable electronic data strip to enable quick employment authorization checks by employers
- **HR 190** - Woolsey (CA) - Protecting America's Workers Act – amends OSHA to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for high-gravity violations, to adjust penalties for inflation, and provide rights for victims or their family members
- **HR 312** - Myrick (NC) - Securing the Homeland Through Agency Reporting Enhancement Act - would establish procedures for the issuance by the Commissioner of Social Security of "no match" letters to employers, and for the notification of the Secretary of Homeland Security regarding such letters
- **HR 321** - Cohen (TN) - Equal Employment for All Act – would amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions
- **HR 477** - Braley (IA) - Back to Work Extension Act of 2011 – extension of the HIRE Act through December 31, 2011
- **HR 483** - DeFazio (OR) - Electronic Employment Eligibility Verification and Illegal Immigration Control Act – to create an electronic employment eligibility verification system to ensure that all workers in the United States are legally able to work, and for other purposes
- **HR 589** - Lee (CA) - Emergency Unemployment Compensation Expansion Act of 2011 – additional extension of emergency unemployment benefits
- **HR 631** - Edwards (MD) - Working for Adequate Gains for Employment in Services (WAGES) Act– minimum cash wage for tipped employees would increase to \$3.75/hour 90 days after enactment, go up to \$5.00/hour one year after that, and a year later would be set at 70% of the current minimum wage, with a minimum rate of \$5.50/hour
- **HR 677** - Holt (NJ) and Petri (WI) - Lifetime Income Disclosure Act – amends ERISA to require retirement plan sponsors to let participants know the monthly income they could anticipate at retirement
- **HR 1493** - Norton (DC) - Fair Pay Act of 2011 – amends the Equal Pay Act of 1963 to require equal pay for equivalent jobs – “The term ‘equivalent jobs’ means jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.” This bill would put the burden of proof on the employer to justify different pay for men and women performing equivalent jobs, introduces extensive new recordkeeping requirements, and allows compensatory and punitive damages for violations. DOL, EEOC, courts, and attorneys would need to develop parameters for determining equivalency of jobs. (See also S 788 by Sen. Harkin of IA)
- **HR 1745** (see also S. 904) - Camp (MI) - JOBS Act of 2011 – would give states more flexibility with respect to temporary unemployment insurance benefit allocations; strengthens job search requirements; claimants without high school diplomas would need to enroll in a GED program; states would have more flexibility in designing innovative reemployment programs (see also S 904 by Sen. Hatch of UT)
- **HR 2501** - DeLauro (CT) - Fair Employment Opportunity Act of 2011 – would prohibit job discrimination against unemployed individuals (see also S 1471 by Sen. Blumenthal of CT)
- **HR 2775** - Sherman (CA) - would repeal NLRA Section 14(b) (29 U.S.C. § 164(b)), which states that the NLRA does not authorize union-shop agreements that otherwise violate state right-to-work laws. The effect of this change would be to potentially complicate the enforcement of right-to-work laws around the nation.
- **S 770** – Brown (OH) – Payroll Fraud Prevention Act – will increase enforcement of laws against misclassification of workers
- **S 797** - Mikulski (MD) - Paycheck Fairness Act of 2011 – unequal pay between male and female employees must be justified by evidence that the inequality is not based on gender, is job-related, and is required by business necessity; compensatory or punitive damages available; employers may not retaliate against employees who share salary information with other employees.
- **S 1507** - Hatch (UT) - would protect employees' rights to select or refrain from selecting representation by a labor union. 

William T. Simmons

Legal Counsel to TWC Chairman Tom Pauken

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