

Texas Business Today

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**Tom Pauken, Chairman
Commissioner Representing Employers**

Barbara Morrison, director of human resources for Suddenlink, is one of the employers benefitting from Texas Workforce Commission's new jobs initiative, *Texas Back to Work*.

TEXAS
WORKFORCE SOLUTIONS



Putting *Texas Back to Work*

- How to navigate employees' military leave •
- Establishing rules for cell phone use at the workplace •

New programs aim to help unemployed, veterans

Nearly three years after the crisis that put our national economy into a downward spiral, Americans have yet to see the fast recovery they were expecting. Despite modest gains in production, many experts have toned down growth estimates for the near future, largely on account of the lagging rebound in the housing industry and a less-than-expected GDP growth rate in the first quarter of this year. Federal assistance in the form of the Stimulus has had only minimal impact with regards to fueling job-creation in the private sector – and, as funds dry up in the coming months, the national growth rate is expected to be negatively impacted. More importantly, employment continues to lag at a pace preceded only

Chairman's Corner

by the Great Depression, signaling that this recovery has followed a different path from that of previous recessionary cycles.

Fortunately, by applying sound fiscal principles and fostering an environment conducive to private sector growth, Texas has averted much of the pain experienced by other states. Under the leadership of Gov. Perry and our State Legislature, Texas' unemployment rate remains well below the national level, and, in 2010, the rate of job creation has been double that of fellow large state, California. Nevertheless, the ripples of the national recession have had a significant impact, hampering growth and raising the state's unemployment rate to the highest level since September of 1987. Just as "a rising tide lifts all ships", the converse also applies to the impact a sinking national economy can have on a single state.

Unemployment, particularly if experienced for long durations of time, comes at a high cost to a labor force's career and social development. As businesses make technical changes to remain competitive in their industries, those without work face the serious risk of seeing their current skill sets deteriorate or become quickly outdated. Any efforts to preserve knowledge and skills among the workforce will pay off in dividends with regards to economic growth for the state and personal growth for citizens. This is why the State Legislature has funded \$15 million for the Texas Back to Work program to provide incentives for employers who hire qualified, out-of-work Texans for a defined trial period. Administered by the Texas Workforce Commission (TWC) and its 28 local workforce development boards, the program helps to allay market fears among apprehensive employers, while returning much-needed funds to the private sector.



Texas Workforce Commission (TWC) Chairman Tom Pauken speaks at a recent TWC Skills Development Fund presentation. Pauken says the new *Texas Back to Work* program will help allay market fears among employers and return much needed funds to the private sector. *Texas Workforce Commission photo*

More importantly, Texas Back to Work maintains the integrity of our workforce by providing immediate labor experiences that could easily become permanent careers.

One group the State of Texas has committed to assisting is comprised of our veterans returning from foreign wars. For a number of these brave men and women, making the switch back to civilian life can be more strenuous than expected – potentially impairing opportunities for success in the labor market. For this reason, in April 2008, Gov. Perry and I announced the creation of the Texas Veterans Leadership Program at TWC to serve as the model for the nation in welcoming home our veterans of Iraq and Afghanistan as they return to civilian life. Run by returning veterans, as of this June, our Veterans Resource and Referral Specialists (VRRS) have helped over 4,500 veterans connect with services including health care, education, and career development. Recently, TVLP leaders have started to contact currently deployed members of the Texas National Guard with information about the program and its benefits. "Before

they even return, we want to make sure our veterans know where to turn for help readjusting to civilian life and getting ready for employment,” says Jason Doran, a Retired Marine Gunnery Sergeant who heads the program for TWC.

For those who served this nation so bravely, I can think of no greater reward than the opportunity to work and provide for one’s self and family. A wise man once said, “Freedom is the greatest fruit of self-sufficiency.” By putting Texans back to work we strengthen this ideal of freedom, while fostering the pride and confidence that made this nation great.

In this issue of Texas Business Today, our labor experts explain in detail the specifics of the law, including how it applies to employees on active military duty. 



Sincerely,
Tom Pauken, Chairman
Commissioner Representing Employers

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Cover image: Photo by Texas Workforce Commission staff

Putting *Texas Back to Work*

New program offers incentives to hire unemployed

Providing employment opportunities for unemployed Texans and rewarding employers who hire them are benefits of a new Texas Workforce Commission (TWC) initiative called *Texas Back to Work*. The program offers up to \$2,000 in incentives for employers in the form of wage subsidies. Private employers can receive subsidies for hiring unemployed workers and keeping them on their payrolls in full-time positions (at least 30 hours a week) for at least 30 to 120 days.

An Overview

“Businesses can earn *Texas Back to Work* incentives to expand their operations and offer new opportunities to unemployed Texans,” said Lt. Governor David Dewhurst. “All Texans should have the opportunity to provide for their families.”

Lt. Gov. Dewhurst was a proponent of legislation during the 2009 Texas legislative session, which allocated \$15 million to fund the program over the next two years. In addition, TWC has been able to leverage additional funds for the program from the Temporary Assistance for Needy Families (TANF) Emergency Contingency Fund grant from the U.S. Department of Health and Human Services. To date, the program has received an additional \$24.3 million to offset the wages of more Texas workers.

In order for job seekers to qualify employers for the subsidies, they must have been receiving unemployment benefits or have used up those benefits before being hired, and have earned up to \$15 per hour before in their previous jobs.

“*Texas Back to Work* will help employers defray some of the costs



Shonda Mack of Austin was pleased to land a job doing medical billing and collections work. Her new employer, Financial Corp. of America, will be able to collect *Texas Back to Work* incentives as a result of hiring her and keeping her on their payroll. Photo by Texas Workforce Commission staff

associated with hiring and training new workers,” said TWC Chairman Tom Pauken. “It also gives employers

a reason to consider hiring from the pool of qualified unemployed Texans.”

Large and small employers can benefit from the savings. By mid-June, 863 employers statewide had already signed on to take advantage of the program, which kicked off in February, and more than 2,000 unemployed workers had found work as a result.

One of those who found employment was Raul Godoy of El Paso, a trained HVAC technician who had been working as a maintenance technician at Ft. Bliss before being laid off.

"I applied everywhere, but the employers always told me I needed more experience. How can I get experience if no one will hire me?" Godoy said. "All I want is a shot."

Ray Baca of Monterrey Asset Management (MAM) gave him that shot and gained a valuable worker along with the opportunity to receive the *Texas Back to Work* wage subsidies.

"As an employer I find it useful to have programs that help subsidize training expenses," said Baca, who hired Godoy shortly after the program launched. Godoy was selected from applicants for MAM's maintenance technician opening due in part to the fact that he met the qualifications for the *Texas Back to Work* program.

"Without this program, I probably would not have been hired," Godoy said.

Shonda Mack of Austin also was hired by Financial Corp. of America (FCA) due, in part, to her eligibility for the program. Mack, a medical billing and collections processor, had been laid off by her previous employer where she was doing the same type of work and was very pleased to have found her new job.

"We heard about the program and then took a look at our applicants to see which ones were unemployed," said Cheryl Fleming, human resources administrator for FCA. "I was unemployed at one time myself, so I know what that is like. I would always rather hire someone who really needs a job so that we can give them the opportunity to go back to work."

The program is administered



Raul Godoy, new maintenance technician for Monterrey Asset Management, is one employee who is benefitting from Texas Workforce Commission's new jobs initiative *Texas Back to Work*. Photo by Workforce Solutions Upper Rio Grande

through the 28 workforce development boards across the state, which also provide employers with recruitment assistance, pre-screening of qualified applicants, and training programs.

"The workforce center will screen the individuals and send you the qualified candidates, so it's really like having your own HR recruiting agency working for you for free," said Bonnie Best, human resource manager for Nestle Waters North America Inc., located in Hawkins. "If the new employees are successful and stay for a certain number of weeks, you get paid back. You would be crazy not to [participate]."

Local workforce board representatives currently are promoting *Texas Back to Work* to employers in their regions.

"*Texas Back to Work* will give

employers a reason to take a harder look at unemployed applicants and hopefully encourage other employers to consider hiring again," said Cathy Ballard, Workforce Solutions Concho Valley director of planning.

Concho Valley resident Carlos Tanguma Jr. was hired by White's Custom Cabinets, which will benefit from the hiring incentives. Owner Wendell White uses Workforce Solutions Concho Valley for all of his hiring needs. He said that makes the hiring process seamless for him and stated that he would use the \$2,000 subsidy to reinvest in his company.

Employers who are interested in learning more about *Texas Back to Work* should contact their local workforce board for information. 🇹🇽

Key legal issues for military leave clarified

These days, more and more employers are seeing employees either undergoing military training, leaving for active duty, or returning from military service. It is important to know the basic legal issues associated with employees on

An Overview

military duty. Following is a survey of the most important things to remember.

The Basic Law

The main law governing the employment rights of employees on military duty is the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), found in Title 38 of the United States Code starting at Section 4301. The law does several things:

- Employers must hold open the jobs of employees on military duty and may not otherwise discriminate against them because of their military service.
- The law gives that protection to every type and variety of employee.
- Upon returning from military duty, a veteran or employee who is still in the military is entitled to whatever position he or she would have attained with reasonable certainty if the military service had not occurred. In narrowly defined situations, a veteran may be given a comparable position as long as the seniority, pay, and



Upon return from military duty, a veteran or employee who is still in the military is entitled to whatever position he or she would have attained with reasonable certainty if the military service had not occurred. In narrowly defined situations, a veteran may be given a comparable position as long as the seniority, pay, and status remain the same. *Stockbyte/Thinkstock*

- status remain the same.
- A veteran may not be discharged or subjected to adverse employment action for one year after the date of reinstatement, except for cause; the same rule applies to service in the Reserve or National Guard.

- Employers must provide up to 18 months of health plan coverage to employees when they are absent for military duty. When the veteran returns, the employer must immediately cover the veteran under the employer's health plan, assuming the veteran was covered prior to the duty.
- Seniority under an employer's pension plan must continue to accrue while the employee is on military duty. To the extent that the employer funds the plan, the employer must continue to fund the employee's participation in the plan.
- In general, if a benefit having to do with length of service would have accrued with reasonable certainty, had the veteran been continuously employed by the employer, the employer must award the benefit as if the veteran had been continuously employed.

One can see that the overall thrust of the law is to guarantee the veteran's job during the military duty and to make military-related absences irrelevant for most intents and purposes. In general, the employee who returns from military duty must be in the position that he or she would have been in had there been no military service.

The U.S. Department of Labor (DOL) has a very detailed fact sheet on employers' responsibilities under USERRA on its Web site at <http://www.dol.gov/vets/programs/fact/vet97-3.htm>. Employers may also call the Veterans' Employment and Training Service for Texas at (512) 463-2814 for assistance with USERRA issues.

Duty to Pay Wages?

USERRA does not guarantee benefits or compensation that would not have been paid in any event to

An employer does not have to continue to allow an employee on military duty accrue paid vacation or sick leave, as long as other employees do not accrue such benefits while out for other reasons. Paid leave accrual should be tied to months worked on the active payroll.

any employee who was absent for other reasons. For instance, the law does not require an employer to pay an employee on military leave for the time off. Section 4303(2) contains the provision concerning the question of pay during military leave. Basically, there is no obligation for an employer to pay an employee who is absent for military duty. However, a salaried exempt employee who misses work due to military duty must be paid the full salary for the week if he or she works any time during that week (see below). Under Texas law, government employees must be paid their full wages for up to 15 days in a year, but that law does not apply to private employers. Of course, the employee on military leave could always choose to apply available paid leave to the absence.

Where USERRA can come into play is in the situation of a company that treats its military-duty employees less favorably than other employees with regard to pay practices. Example: a salaried exempt employee leaves for military training in the middle of the week, and the company requires him or her to apply available paid leave to the part of the week not worked, but does not impose the same requirement on another salaried exempt employee who goes on jury duty in the middle of a workweek. Such disparate treatment would violate USERRA. Similarly, military duty employees who are not salaried exempt do not have to be paid anything for time not worked due

to military duty, but should be allowed to apply paid leave on the same basis as any other employee who misses work.

Duty to Continue Benefits?

An employer does not have to continue to allow an employee on military duty accrue paid vacation or sick leave, as long as other employees do not accrue such benefits while out for other reasons. Paid leave accrual should be tied to months worked on the active payroll. If the leave policy provides that paid leave does not accrue during any month in which an employee performs no work, it would be permissible to stop the accrual of paid leave during an employee's military duty. Strategic tip: in general, accrue paid leave if the employee works any time at all during the month, but none if the employee performs no work at all during the month.

FMLA Leave for Returning Veterans

DOL issued an important policy memorandum on July 22, 2002, pertaining to military veterans and their rights under the Family and Medical Leave Act (FMLA). According to DOL, the hours that they *would have worked* but for the military duty must be added to their total actual work hours in order to determine whether they worked at least 1,250 hours during

the 12-month period preceding the FMLA leave. Further, the time they spend serving military duty must be counted as time spent with the employer for purposes of determining whether the employees have worked at least 12 total months for the employer. DOL indicated that in most cases, the calculation of hours worked would be based upon the schedule the employee had worked in the period before going on military leave. In other words, the employer must count the hours that the employee would have worked toward the 1,250-hour requirement, and it must count the actual number of weeks or months spent in such duty toward the 12-month service requirement. Thus, whenever an employee returns from military duty, the result will most likely be that he or she will be eligible for FMLA leave if they need such leave upon their return.

Under the National Defense Authorization Act for FY 2008 (NDAA), which became effective on January 28, 2008, two important new provisions were added to the FMLA in support of active duty servicemembers and their families:

- Added to the list of qualifying events for FMLA leave is “any qualifying exigency” associated with the employee’s spouse, child, or parent being on active military duty, or having been notified of an impending order to active duty status, in support of a contingency operation (see DOL regulation 29 C.F.R. § 825.126). DOL has made a poster on the new law available at <http://www.dol.gov/whd/fmla/NDAAAmndmnts.pdf>.
- A new form of FMLA leave that amounts to military caregiver leave: up to 26 weeks of paid and/or unpaid leave during a year is available to an employee whose spouse, child, parent, or “next of

kin” (nearest blood relative) is recovering from a serious illness or injury suffered in the line of duty while on active military duty. NDAA also put an outside limit of 26 weeks for all types of FMLA leave in a “single 12-month period” - see <http://www.dol.gov/whd/fmla/NDAAAmndmnts.pdf> and DOL regulation 29 C.F.R. § 825.127.

State Military Service

Although USERRA by its terms does not apply to National Guard service under state control (deployment ordered by the governor in support of state disaster or other emergency relief operations) or to Texas State Guard service, the same basic protections apply to such state military service under Government Code Sections 431.006 and 431.017.

How About Salaried Exempt Employees?

If a salaried exempt employee goes on military duty, whether for training or as a result of being called up to active duty, special issues arise due to state and federal wage payment laws. It is best to consider this along with the other special rules for making deductions from an exempt employee’s salary. Please see the discussion below.

Deductions from Exempt Employees’ Salaries

The rules for making deductions from an exempt employee’s salary for time missed from work are very tricky - here are the basics:

- 1) Partial-day deductions from salary are allowed only for FMLA leave or for disciplinary suspensions for violation of a safety rule of major significance. Partial-day deductions from leave and compensatory time balances

are acceptable, according to multiple DOL wage-hour opinion letters issued since 1993.

- 2) Full-day deductions from salary are allowed only for:
 - (a) full days missed due to personal business of the kind that would normally be covered by a paid vacation day;
 - (b) full days missed due to medical reasons of the kind that would normally be covered by a paid sick leave day, if the employer has a sick leave pay policy in place, or a general policy that provides paid leave in case of sickness or other medical problems; and
 - (c) full days missed due to a disciplinary suspension for violation of a safety rule of major or workplace conduct rules that apply to all employees.
- 3) Point #2 means that partial-week deductions for any other reason are not allowed. Accordingly, an exempt salaried employee who misses only part of a week due to jury duty, witness duty, military duty, business closure (furlough, temporary shutdown, bad weather day, and the like), or a disciplinary suspension for a reason other than violation of a safety rule of major significance would have to be paid the full salary for the entire workweek.
- 4) If such an employee misses an entire workweek for any reason, his or her salary may be docked a week’s worth of pay.
- 5) If allowed as noted in points 2 and 4, the deductions must be in units of a day at a time, or a workweek at a time; doing



If a salaried exempt employee goes on military duty, whether for training or as a result of being called up to active duty, special issues arise due to state and federal wage payment laws. It is best to consider this along with the other special rules for making deductions from an exempt employee's salary. *Jupiterimages/Creatas/Thinkstock*

a 1 1/2-day or 1 1/2-week deduction would necessarily involve a partial-day or partial-week deduction and would exceed the guidelines.

- 6) For employers in the private sector, any deduction from the salary for time not worked must be authorized in writing by the employee under the Texas Payday Law.
- 7) Paid leave can be used to cover any absence at any time. However, since the Texas Payday Law makes paid leave promised in a written policy an enforceable part of the wage agreement, an employee must ensure that the paid leave policy is clearly written and mentions the various circumstances under which paid leave can or must be used.
- 8) It is not generally recommended that leave balances be docked at all if the

employee's total hours amount to at least 40 in a workweek, or whatever the employer considers full-time for the salaried exempt employees - rationale. If a salaried employee exempt misses a couple of hours here and there, but puts in 50, 60, or 70 hours in a workweek in any event, why should the person have to use any leave time at all? Although difficult to quantify, morale and turnover issues definitely matter.

Note: points 1-5 are found in the salary definition regulation, 29 C.F.R. 541.602; point 6 has to do with the Texas Payday Law (Chapter 61 of the Texas Labor Code); point 7 is covered by the wage and hour opinion letters noted above and by the Texas Payday Law; point 8 is derived from common sense and practical realities.

While the Fair Labor Standards Act (FLSA) allows a pay deduction, it doesn't mean that an employer

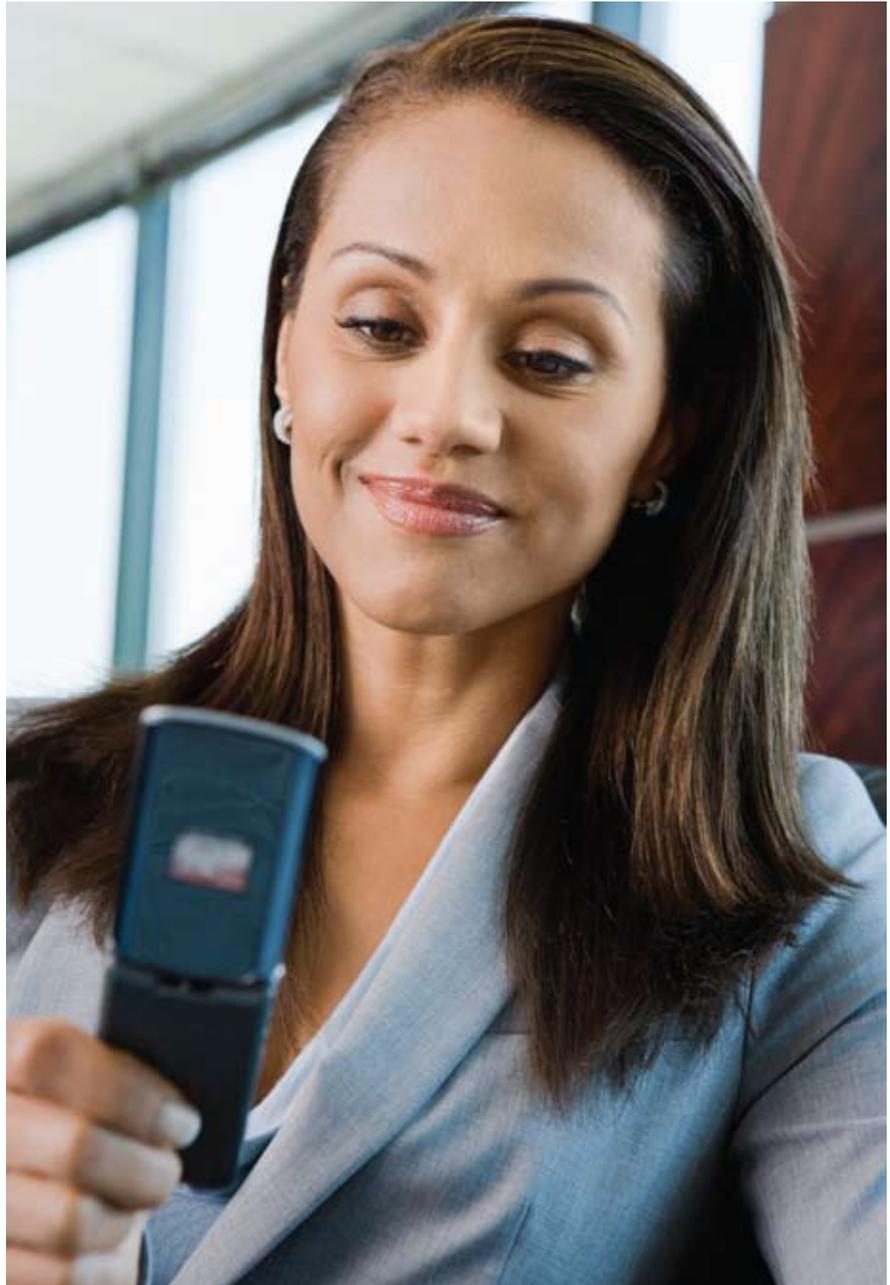
can take advantage of it. Under the Texas Payday Law, any deduction that is not ordered by a court or required by a state or federal law must be authorized by the employee in writing. Thus, the legal deductions noted above must all be authorized by the employee in writing. That can be done at the beginning of an employee's employment by having the worker sign a wage deduction authorization agreement authorizing the employer to deduct from the employee's pay an amount of money corresponding to any time missed from work that is not covered by paid leave. Once that's been authorized, then verify that the deduction in question is one of those that is allowable under FLSA as noted above. There also should be a reference to that in the paid leave policies as well. 🇹🇽

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Chairman Tom Pauken*

Policies regarding cell phone usage scrutinized

The increasing use of cell phones and other types of personal electronic devices raises potentially difficult issues for employers. The following are some of the considerations employers should keep in mind when developing policies to deal with such issues:

- Employers may ban the use or possession of such devices in the workplace, but reasonable limitations are common.
- Company-issued cell phones can have any limitations the employer cares to impose.
- No law requires employers to allow employees to make or receive personal phone calls during working hours.
- Most employers allow some use within reasonable limits, but provide that excessive personal calls can lead to corrective action.
- Excessive personal calls/texting/other costly activities on company cell phones can be billed to an employee, but wage deductions need to be authorized in writing.
- There are solutions for excess company cell phone charges. The Texas Payday Law allows for recoupment of wage advances or deduction of such excess charges. Even simpler, do away with company-issued cell phones and pay each employee a set amount per month for reimbursement of business-related use of their own phones. The disadvantage is that the company loses some control over how the employee uses the cell phone.
- An employer should advise employees to use common sense



Excessive personal calls/texting/other costly activities on company cell phones can be billed to an employee, but remember that wage deductions need to be authorized in writing. *Creatas Images/Thinkstock*

and discretion when using cell phones. For example – leave personal phones in their purse

or desk and let personal calls go to voice mail, return calls only during breaks, and use discretion

when discussing company business over the phone.

- With camera phones or other types of image-capturing devices, extra precautions are advisable. Advise employees that pictures are allowed only with prior supervisory permission, and indicate that no cameras whatsoever are allowed in private areas. The risks of unsupervised use of cameras include invasion of privacy, theft of company secrets, and improper photography (see below).
- Sexual harassment claims have been filed based on coworkers' use of cell phone cameras and other image-capture devices.
- Tell employees that a violation of the policy will lead to the loss of phone privileges or other disciplinary action, up to and possibly including termination.
- In matters of safety – tell employees to not use cell phones while driving, pull off to the side of the road to use the phone, use hands-free equipment for any use of the phone while driving or using machinery or equipment, and that any violations of the law or liability from accidents incurred while using a cell phone is in violation of the policy will be the sole liability of the employee.
- Aside from cell phone cameras, employers must also be concerned with other data-storage technology such as digital cameras, digital movie recorders, iPods™ and similar personal music devices, and flash memory drives (“thumb” drives).
- Since offensive pictures of coworkers in private, embarrassing, or intimate situations can be taken and sent via e-mail or the Internet to other people and locations (“improper photography”, as defined in Section 21.15 of the Penal Code, is a felony in Texas), and such

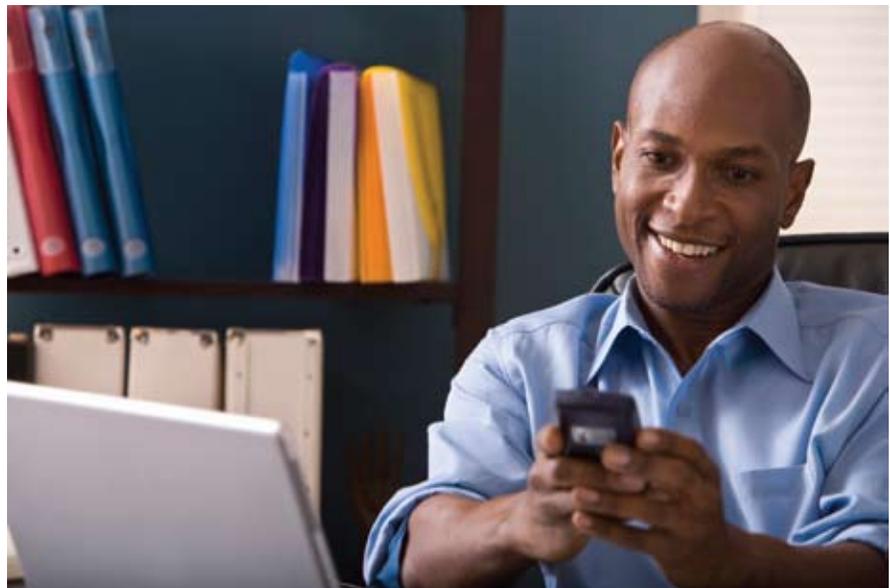
technology can be used to quickly and efficiently conduct industrial espionage by photography, video recording, or copying company files, many employers are now banning the use of such devices in the workplace unless the employee has been given express permission by the company to use them for the performance of job duties.

- Prohibiting such devices and their use can be one tool in preventing harassment claims from employees who feel their privacy has been invaded.
- Employees should also be warned that they may face both civil and criminal liability for misuse of imaging devices against coworkers and the company, or for unauthorized copying or transmitting of company information.
- The company policy should make it clear to employees that the employer reserves the right to physically and digitally search any devices with storage or memory capabilities that they might bring to work and to make copies of any

files found therein (see “Internet, E-Mail, and Computer Use” policy at <http://www.twc.state.tx.us/news/efte/internetpolicy.html> for an example).

- Employees who object to such a policy may be instructed to leave their electronic devices at home.
- The cell phone usage policy should also remind employees that submission to searches is a condition of continued employment and that if they bring such devices to work, but refuse to allow searches provided for in the policy, they will be subject to discharge - do not include such a provision in the policy unless the company really means it!
- Finally, have all employees sign a copy of the policy – keep the signed copy in the employee's file, and give a copy to the employee. 🇹🇽

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Advise employees to use common sense and discretion. For example, advise them to leave personal phones in their purse or desk and let personal calls go to voice mail, return calls only during breaks, and use discretion when discussing company business over the phone. *Comstock Images/Thinkstock*

New employee materials best addressed at hiring

The best time to obtain employees' agreement to something, or to get them to sign required government documents, is before they are hired, or at the very start of employment. A good way to handle this is to have an appropriate staff member, such as the office manager or a human resources department employee, meet with the new employee before any work begins and have the new hire fill out the various forms. Following is a list of the required and optional documents that companies most commonly include in the new hire packet.

Required:

- I-9 form - this is needed for all new hires in order to document that they are authorized to work in the United States (download the form at <http://www.uscis.gov/files/form/i-9.pdf>). This needs to be completed within the first three business days after hire.
- W-4 form – this form is for obtaining basic payroll tax information from an employee and enables the company to know how many exemptions to use when computing withholding tax for IRS purposes (download the form at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>).
- Notice of workers' compensation coverage – whether the company carries workers' compensation insurance or not, it must notify new hires one way or the other (download the notices and other workers' compensation forms at <http://www.tdi.state.tx.us/forms/form20numeric.html>).
- Consent for background checks, if not already obtained – the



In addition to the paperwork, there are other steps that the employer needs to take at the time or right after an employee starts work. *Brand X Pictures/Thinkstock*

best time to obtain this is prior to hiring someone, so the check can be done before making the hiring decision. Prior notice of background checks and consent are required under the Fair Credit Reporting Act, if the check is done by an outside, for-profit service.

Optional, but recommended:

- acknowledgement of receipt of policy handbook
- consent for drug testing/consent to search policy
- consent for video surveillance
- agreements regarding pay, benefits, schedule and work location (with employment-at-will disclaimers)

In addition to the paperwork, other steps that the employer needs to take at the time or right after an employee starts work are:

- Enter the employee into the

payroll system. For employee ID purposes, try to use an alphanumeric identifier other than a Social Security number – both government agencies and private-sector experts advise employers to minimize the use and publication of SSNs for anything other than wage reporting and payroll tax purposes.

- Make the new hire report within 20 days of hire. It can be done online at <https://portal.cs.oag.state.tx.us/wps/portal/employer>.
- Enroll the employee for any insurance or other benefits the company may offer.
- Issue the employee any ID or access cards needed to use company facilities.
- Issue company equipment, uniforms, and other items and consider using a property return security deposit agreement to minimize the risk of damage or non-return of such property. 🇹🇽

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Nursing mothers' rights clarified

The federal health care reform bill signed on March 23, 2010 contained an amendment to the Fair Labor Standards Act (FLSA) (new section 207(r)(1)) requiring employers to give breaks to nursing mothers while on the job.

Under the new FLSA provision, an employee is entitled to a "reasonable break time" to express breast milk for her nursing child, each time the

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employee needs to express the milk, for up to

one year following the child's birth.

A nursing mom also has the right to a private, non-bathroom area where the employee will not be disturbed while expressing the milk.

Unlike ordinary coffee or rest breaks, nursing/breast-pumping breaks do not need to be compensated, so the company can have a policy requiring employees to clock out and then back in for such breaks. In terms of total work time for the shift, the employee may need to either arrive earlier or stay longer to work a certain number of hours, or else experience a slight reduction in pay due to having unpaid nursing/breast-pumping breaks during the day and not being able to arrive earlier or stay later to make up the time.

Employers with fewer than 50 employees are excused from this requirement if compliance would cause them undue hardship, with the burden of proof on the small employer.

The federal law notes that state laws are not preempted; thus, in Texas the following laws are important to be aware of:

- a. Texas Health & Safety Code, Sec. 165.002. A mother is entitled to breastfeed her baby in any location in which the mother is authorized to be.
- b. Texas Health & Safety Code, Sec. 165.003. "(a) A business may use



A nursing mom has the right to a private, non-bathroom place where the employee will not be disturbed while expressing the milk. *Stockbyte/Thinkstock*

the designation 'mother-friendly' in its promotional materials if the business develops a policy supporting the practice of worksite breastfeeding"

Reimbursements 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 have to be made to bring an injured employee back to work in a modified duty or alternate duty capacity.

You are an eligible employer if you:

- Are a small employer that employed at least two, but not more than 50, employees each business day of the previous calendar year
- Purchase workers' compensation insurance in Texas
- Have an employee who has a job-related injury that was accepted as compensable by your workers' compensation insurance carrier
- Paid for any workplace modifications, purchase any special equipment, tools, furniture or devices, or paid 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. 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 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.

Employers be cautious of working interviews

“Working interviews” are often misnomers and can possibly get an employer in trouble under certain circumstances. They are not the same as prehire interviews at which an interviewee might demonstrate how he or she would carry out a sample task. A “working interview” is one during which the worker performs actual work and receives what most companies would call “on the job” training or orientation to the company. A company must pay at least minimum wage for such training time, satisfy all of the usual new-hire paperwork requirements (W-4, I-9, and new hire report), and report the wages to the Texas Workforce Commission and IRS.

If what the employer is trying to do is establish whether an applicant’s skill level is sufficient for the position, it can have the applicants demonstrate their skills with job-related tests or demonstrations during an interview. Preemployment tests or examinations must be job-related and non-discriminatory, i.e., required of all applicants in that job category. If administered consistently, such skills



If the employer is trying to establish whether an applicant’s skill level is sufficient for the position, it can have the applicants demonstrate their skills with job-related tests or demonstrations during an interview. *Comstock Images/Thinkstock*

tests are permissible, and often are the best way to determine whether an applicant’s claims of expertise in a certain type of work are true, untrue, or perhaps merely a bit inflated. The time spent taking such tests or performing demonstrations is not payable, since the applicant has not been hired, and no productive work was accomplished.

Be careful with inflated or unrealistic self-assessments. It is common among applicants to overestimate their own skills. That does not prove misconduct or dishonesty, but does demonstrate the need for employers to verify claims of a particular level of skill. Physical agility tests often used by police and fire departments when screening applicants are not considered medical examinations under the Americans

with Disabilities Act. Such tests may be given at any point in the hiring process, but they must be administered to all applicants in that job category; and, if they to screen out individuals with disabilities, the employer must be able to demonstrate that the tests are job-related and consistent with business necessity, and further, that no reasonable accommodation is possible that would enable people with certain disabilities to meet the requirements of the test. 🇺🇸

*William T. Simmons
Legal Counsel for
Chairman Tom Pauken*

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