

Texas Business Today

Commissioner Ron Lehman

Texas Workforce Commission



Employment Law 101



INTRODUCTION

Texas employers should have a working knowledge of Texas employment law. The attorneys in our office spend a great deal of time talking to employers about employment issues. It is clear that many employers are not aware of the various laws that impact employment in our state. This is probably caused by the fact that Texas has been adding new employers at an astonishing rate. During the month of October 1998, the Texas Workforce Commission (TWC) added 3000 new employers to its tax rolls. Similar numbers have been posted in the preceding and following months. While this is fantastic news for the Texas economy, it also means many new employers will learn about employment law in the school of hard knocks. I hope this article will prevent at least a few of those hits. While many existing employers may be familiar with general employment law, a good review never hurts.

AT-WILL EMPLOYMENT

Texas is an at-will employment state. This means that either party to an employment relationship can, in the absence of an employment contract, end the relationship with or without cause and with or without notice. However, terminating an employee for reasons other than cause (misconduct) means that the TWC may pay out benefits to a worker who files a claim for unemployment insurance. An unemployment claim carries the potential for higher unemployment insurance payroll taxes. In addition, there are numerous exceptions to at-will

employment that have to be considered in any termination situation. Employers should not confuse the concept of at-will employment with the fact that Texas is a right-to-work state. Right-to-work refers to collective bargaining and union issues.

HIRING PROBATION

Many employers mistakenly believe that implementing a hiring probation time frame will magically protect them from lawsuits, discrimination claims, unemployment claims and wage claims. Our office suspects that misinformation about unemployment law has led to this widespread fallacy. When an unemployment claim is filed, wages from the calendar quarter in which the claim is filed and wages from the calendar quarter that precede the filing quarter are excluded from determining the claimant's monetary entitlement to unemployment. It is the four calendar quarters that precede these two excluded quarters that are used to calculate benefits (and which expose an employer to the potential risk of tax rate increases). Thus, many employer think that a 90 day hiring time frame means an unemployment claim or other claims can't be filed or that such claims cannot affect them. This simply is not true. Depending on why the employee was terminated and when that former employee chooses to file an unemployment claim, an employer may or may not be subject to a rate increase. However, it is true that the more wages an employer pays to an employee the greater the potential rate increase. For this and other reasons, it doesn't hurt to have a hiring probation time frame. Just remember it doesn't bar unemployment claims, discrimination complaints, lawsuits, etc.

CONTRACT LABOR

Another common misconception involves the issue of “contract labor”. The fact that a person is hired on a temporary basis does not also necessarily mean that individual is an independent contractor. A person can be an employee even if they only work an hour (or less). To be an independent contractor, the person must be free from the employer’s direction and control. Most workers are employees, not independent contractors. Failure to properly classify workers as employees can lead to tax problems with the TWC and the IRS, as well as potential wage claims with TWC and DOL.

EMPLOYMENT DISCRIMINATION

Employers should also be aware of many common employment law provisions, both state and federal, that prohibit employment discrimination. Generally speaking, the law prohibits discrimination in hiring, firing and other terms and conditions of employment on the basis of race and color, national origin, age, gender, religion and disability. Claims involving these issues can be filed with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission. The TWC does not adjudicate these claims. In some circumstances, very small employers are exempt from such claims. However, there are many ways to skin a cat and to get to the

courthouse door. Don’t discriminate, regardless of size. The Texas Commission on Human Rights can be reached at 512-437-3450. The Equal Employment Opportunity Commission can be reached at 1 800-669-4000.

WORKERS’ COMPENSATION

Unlike most states, workers’ compensation is optional in Texas. However, going “bare”, whether by choice or because of financial circumstances, can seriously change an employer’s legal rights. Employers who choose to opt out of the system must give notice to the Texas Workers’ Compensation Commission and to their employees. Employers who choose to be nonsubscribers to the system should seriously consider providing other types of insurance benefits to their employees. This will be help to deter lawsuits and can offset damages if an employee sues for personal injury.

EXCEPTIONS TO AT-WILL EMPLOYMENT

There are numerous less known exceptions to the doctrine of at-will employment. Generally speaking, it is bad practice to fire or discriminate against employees for exercising their rights. For example, the law prohibits termination under the following circumstances; filing a workers’ compensation claim, serving on a jury, being called to military duty, voting or taking

time off to vote, attending a political convention, joining or participating in a union, exercising minimum wage and overtime compensation rights, refusing to take a polygraph exam, refusing to commit an illegal act, etc.

OTHER TYPES OF EMPLOYMENT LITIGATION

There are other types of employment related lawsuits that employers need to know about. For example, it can be risky to make false and prejudicial statements about former employees when giving employment references to other employers. Many attorneys recommend giving nothing more than dates of employment, job title and salary. This cuts down on the risk of being sued by a former employee for defamation of character (libel or slander). On the other hand, always seek references from new applicants and try to obtain information from their former employers. This may protect you against lawsuits for negligent hiring. Negligent hiring can occur when you hire an employee without doing an adequate background search. Then, while working for you that employee later assaults and injures someone.

Employees are entitled to an expectation of privacy unless you advise them that certain things at work are not private. Advise employees in writing in advance if you plan to do any monitoring of phone calls, email, voicemail, etc. Don’t continue to

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monitor a phone call once you know the call is personal. Don't search an employee's desk, locker, purse, etc. unless you have given them advance notice through company policy of your right to do so. Try to have them present if you must perform a search.

It should be just common sense, but a few rogue employers don't seem to know that it pays to treat employees with courtesy. Outrageous treatment of employees can lead to claims of intentional infliction of emotional distress.

WAGE CLAIMS

Wage claims have become more common since the Texas Legislature gave TWC extensive enforcement powers over this area of the law several years ago. The Texas Payday Law allows employees to file claims for unpaid wages. TWC enforces the Texas Payday Law, the Texas Minimum Wage Act and the federal Fair Labor Standards Act (FLSA). Basic provisions of these laws require that exempt employees be paid at least once per month and that non-exempt employees be paid at least twice per month. Terminated employees must be paid within 6 calendar days. Employees who resign must be paid by the next regularly scheduled payday following the resignation date. Federal minimum wage is \$5.15 per hour. Almost every employee is covered by the federal minimum wage. Overtime at the rate of time and one-half the regular pay rate is due when an employee

works in excess of 40 hours per week. Exempt employees must be paid a salary and be a professional, executive or administrative employee (I recently attended a seminar at which a high ranking Department of Labor (DOL) official said that the vast majority of employees designated as administrative exempt do not qualify for that exemption). Questions about wage laws can be directed to TWC's Labor Law Department at 1-800-832-9243 or your nearest DOL Wage and Hour Division Office. DOL's web site address is <http://www.dol.gov>.

CHILD LABOR

TWC also enforces child labor laws. In most cases, children under the age of 14 may not be employed. Children between the ages of 14 and 15 can work only restricted hours and duties. Children between the ages of 16 and 17 can work only restricted duties. The DOL also enforces child labor laws and is getting more aggressive about protecting our children. Information on child labor laws can also be obtained from TWC's Labor Law Department or from the DOL, at the number and web site addressee listed in the preceding paragraph.

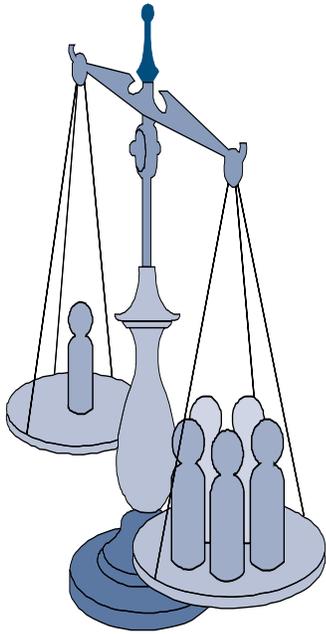
CLOSING

In summary, Texas remains a great place to do business. After reading this article I'm sure some employers will bemoan the fact that there are numerous ways for an employer to get in trouble. Nevertheless, when you compare Texas to other states, things are still pretty good. Most out of state employers who call our office are amazed at the lack of governmental intrusion in the employment arena.

The basics of employment law in Texas have been with us for many years. It is just a matter of knowing the law and using common sense to stay out of trouble. If in doubt, contact the appropriate government agency or your own attorney.

*Aaron Haecker
Legal Counsel to Commissioner Lehman*

Observations from the Dais



Each Tuesday, as part of the Commission Docket, I defend the interests of employers as we Commissioners debate, and then vote, on a variety of Unemployment Insurance appeals. Over a period of months, I've noticed several tendencies occurring with increasing frequency. If you, as employers, will avoid these types of situations, you may not only improve the consistency of your personnel policies, but you may improve your chances of prevailing in an unemployment insurance claim.

One trend I've noticed occurring more often is when an employer postpones disciplinary action, contrary to their own policies. When they finally did administer the disciplinary action, the timing of the discipline was judged to be too remote in relation to the infraction. In one case, a truck driver, who was judged uninsurable due to two recent DWI convictions, was required to stop driving the employer's vehicles, but then was allowed an unspecified period of time to find another assignment within the company. After seeking another assignment for almost four months without success, the employee was terminated. The Commission ruled two to one, with me dissenting, that the employer's disciplinary action was too remote in time relative to the employee's violation of employer policy.

The challenge, of course, is to communicate your policies thoroughly, ensure your employees understand them, and then administer them fairly, consistently, and on a timely basis.

Commissioner Ron Lehman

**World Class
Workforce**

**Employer
Driven**

**Single Point of
Contact for
Employers**

**Market Ready World Class Workforce
Workforce**

Single Point of Contact for Employers Market Ready Workforce

**Competitive
Edge**

“Employer driven, market ready workforce, single point of contact for employers, world class workforce, competitive edge.”

These are terms and phrases first coined with the initial creation and enactment of Texas Workforce legislation in 1993. The studies that supported the development of this legislation cited findings that included broad declarations such as, “The economic future of the state and the prosperity of its citizens depend on the ability of businesses in this state to compete effectively in the world economy.” The studies went on to suggest that “empowering local business, labor, and community leaders to take a more active role in their communities’ economic and workforce development will enhance the quality, efficiency, and responsiveness of these programs.”

This established the backdrop for my involvement and role as chair of the Tarrant County Workforce Development Board, a 29-member board that represents business and community leaders in Tarrant County. I am privileged to be invited to be the first featured columnist for *Texas Business Today* and excited about sharing some of the accomplishments of the Tarrant County Workforce Development Board (TCWDB), the workforce

system now known as Work Advantage. Hopefully, this communication will assist you in exploring ways you can work with your local workforce boards to better meet your immediate workforce needs and also to trigger ideas for more long-term strategies necessary to sustain those efforts.

Initially, one of the features that really excited me about this legislation was the opportunity to truly create and tailor a system to meet the needs of Tarrant County. As a board and a community, we took this role very seriously and spent many hours seeking input from customers and employers throughout the county. What we learned and later designed as part of our strategic planning process can be directly linked to those very informal but enlightening conversations. We gleaned a great deal of information on what is important to our customers and what employers determine as their very real needs and concerns. Not surprisingly, we also learned that things like governance and structure do NOT rank high on an employer’s list of things most needed. Results, quality, efficiency, and ease and simplicity of access were far more important than the name on the door or who reports to whom.

Integral to the development of a quality workforce is providing the employers of Tarrant County with quality applicants from which to choose. Employers have stated that they must be able to rely on the

quality of service, both to them and to the applicant, in order to be partnered with the Workforce Development system in Tarrant County. Primarily, employers seek professional interaction when placing an employment need. This means interacting with individuals who understand the differences in particular jobs skills and who work with the employer as an active participant to achieve the most effective employment process.

In this article, I hope to highlight our most unique and meaningful findings and how we put many of these ideas into play, specifically, sharing examples of innovations which have been the most useful for the business community.

In an effort to ensure a single point of contact and to avoid the confusion previously associated with a somewhat fragmented system (particularly for employers), Tarrant County created a Corporate Services Unit (CSU). By creating the CSU and hiring experts in the field of corporate growth and development, the TCWDB is maximizing the efforts of government, business and education to provide a workforce development system that results in a highly skilled and productive workforce.

The philosophies inherent in an “employer-driven” system were sincerely embraced and demonstrated by the TCWDB in its creation of the CSU. The unit’s primary goals are twofold: 1. To serve as an authentic, designated single point of contact for employers, and 2. To act as brokers with regard to special projects requiring coordination.

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Texas Workforce Commission Introduces New Tax Information System On-line

Whether you're a sole proprietor or a large corporation, you may now register to use the TWC Tax Information System to access a password-protected file which contains the tax accounting records for your particular account. Employer Information On-line was designed to provide you with ready access to current information about your account including a tax rate summary, current quarter detail and summary chargeback information.

Address and phone number changes and/or the addition of the federal identification number can easily be submitted. For your convenience, you may request pre-printed quarterly report forms, a statement of balance due and a tax rate notice to be mailed directly to you, or a federal certification for credit against the Federal Unemployment Tax to be sent to the IRS. If you have ceased doing business in Texas or the business was acquired by a successor, you may request that your account be closed. (NOTE: To access current information on-line, you must be an active reporting employer filing tax forms with the Texas Workforce Commission).

To register as an on-line user, you must obtain a logon ID and password. This request can be made by phone, Fax, mail, or email. Upon verification, TWC will mail an ID and password to the employer's address of record. You may register with the Tax Department at their email address: tax-dept@twc.state.tx.us, or Fax that department at (512) 463-2754. To register by phone, please call (512) 463-2699.

Pilot Internet Job Order System Takes Shape

In January 1999, the Texas Workforce Commission began piloting employer-oriented features of its Internet-based labor exchange system, currently under development. This system will allow Texas employers to list a job opening (which can immediately be cross-posted to America's Job Bank), and to search against a database of over one million potential job candidates coded by knowledge, skills, abilities, and experience.

Approximately 25 Texas employers from across the state are currently participating in the pilot phase. These employers represent various industries, sizes, and interests. Once the pilot phase is completed, the system will be available for all Texas employers.

As a part of the same project, TWC is also developing means through which job seekers may enter and code their application/resume on-line as well. By improving access to its systems, TWC hopes to expand and improve the quality of its job order and job seeker databases. Look for more information about this exciting project on the TWC Website at <http://www.twc.state.tx.us>.

Handbook Now Available on the Internet

"Especially for Texas Employers," a 130-page book of valuable information on workplace issues for Texas employers, is now available on the Internet. Simply find the TWC Home Page at <http://www.twc.state.tx.us> and click on "Employer Services." You'll find "Especially" about halfway down the page. This is one of our most popular and frequently requested publications. 

Renée M. Miller, Legal Counsel to Commissioner Ron Lehman

HEADS UP TEXAS EMPLOYERS: FIFTH CIRCUIT HOLDS THAT AT WILL EMPLOYMENT CAN BE A "CONTRACT"

A recent ruling by the federal appeals court with jurisdiction in Texas holds that while an employee may be fired at will, the relationship between the employer and the employee still amounts to a contract. The court then went on to reinstate the former employee's claim of race discrimination brought under a Reconstruction-era law prohibiting bias in making and enforcing contracts. *Fadeyi v. Planned Parenthood Association of Lubbock, Inc.*, No. 97-11310, Fifth Circuit Court of Appeals (November 11, 1998).

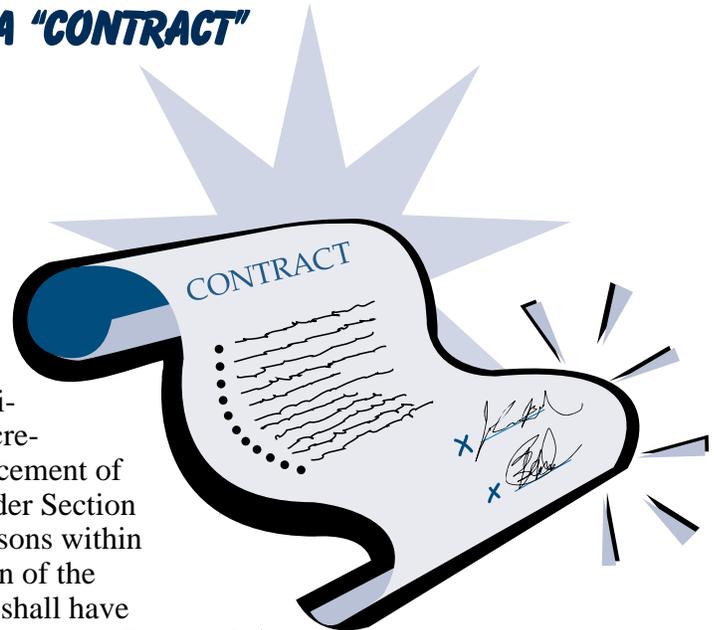
THE FACTS

Ms. Lamarilyn Fadeyi, an African American woman, worked for Planned Parenthood in Lubbock for seven years. She filed charges with both the Texas Commission on Human Rights and the Equal Employment Opportunity Commission alleging that she had been unlawfully discriminated against during her tenure with Planned Parenthood. She made a number of allegations, including a claim that the office director gave her and another African American worker an "application" to join the Ku Klux Klan (which was supposed to be a joke). Because Planned Parenthood did not have at least 15 employees, both agencies dismissed Ms. Fadeyi's charge. She was fired not long thereafter.

THE LAW

After being fired, Ms. Fadeyi filed suit under a federal law (called "Section 1981") prohibiting racial discrimination in the creation or enforcement of contracts. Under Section 1981, "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens." This measure was adopted during the Reconstruction era after the Civil War in an effort to prevent discriminatory treatment against African Americans.

At trial, the judge dismissed Ms. Fadeyi's lawsuit, ruling that because she had been an at will employee, there was no contract upon which to base her claim. Ms. Fadeyi then appealed to the Fifth Circuit, which reinstated her lawsuit. The federal appeals court had no trouble holding that even at will employment is contractual in nature. The court ruled that just because either party could end the relationship at any time, with or without cause, did not mean that a contract did not exist between



the parties. The court pointed out that the Texas Supreme Court has recognized that even at will employment relationships are contractual by holding that employees at will cannot be fired solely for refusing to perform an illegal act (*Sabine Pilot Service, Inc. vs. Hauck*, 687 S.W.2d 733 (Tex. 1985)).

Further, the court ruled that allowing at will employees to sue under Section 1981 promotes Congress' goal of eliminating racial discrimination. The court pointed out that this statute nation. And, even employees of larger companies may decide to sue under Section 1981 in an effort to lengthen the statute of limitations for bringing their lawsuits and to avoid the limitations on monetary damages which may be recovered under Title VII.

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It is no longer enough to simply state that your company is an at will employer, and that no contracts of any sort are created by your policies, handbooks, offer letters, or conversations. You must make sure that your actions and the actions of your supervisors are truly non discriminatory, regardless of the size of your company. As in the area of sexual harassment, a zero tolerance policy in the area of racial discrimination is your best offense and your only defense.

THE BOTTOM LINE

The Fifth Circuit's ruling in this case is a clear victory for employees: not only does the decision dramatically expand the litigation options available to your employees, it also increases employers' potential exposure to race discrimination claims. Employees who work for companies which are not covered by Title VII may now sue under Section 1981 for racial discrimination. And, even employees of larger companies may decide to sue under Section 1981 in an effort to lengthen the statute of limitations for bringing their lawsuits and to avoid the limitations on monetary damages which may be recovered under Title VII.

*Renée M. Miller
Legal Counsel to Commissioner Ron Lehman*

**Texas Business Conference Dates
—Summer/Fall 1999—**

- **South Padre Island**—August 27, 1999
- **Wichita Falls**—September 10, 1999
- **Tyler**—October 22, 1999
- **Laredo**—December 3, 1999

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

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include the Texas Payday Law, Hiring, Firing, the Unemployment Insurance Hearing Process, and Workers' Compensation.

To keep costs down, lunch will be on your own. The registration fee is \$60 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend. We hope to see you in the Summer or Fall.

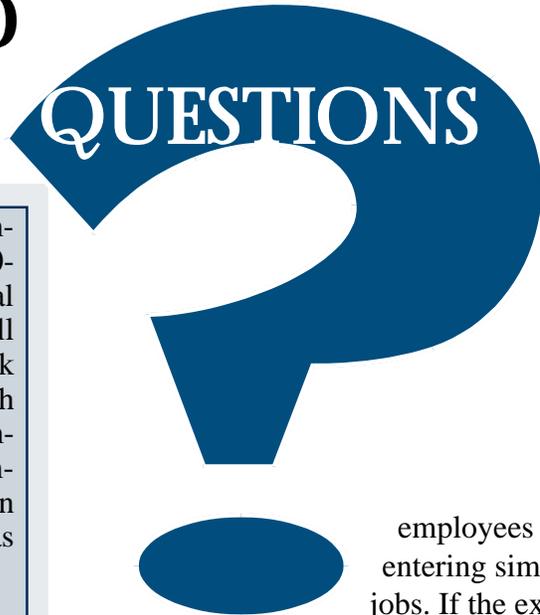
Seminar choice:

Please print:

Make checks payable and mail to: **Texas Business Conference—TWC**
Texas Workforce Commission
101 E. 15th Street, Room 0218
Austin, Texas 78778-0001

FREQUENTLY ASKED EMPLOYMENT LAW QUESTIONS

Many of Texas Business Today's readers know that Commissioner Lehman maintains an Employer Hotline (800-832-9394) at which his staff attorneys answer general questions about Texas employment law. Employers call the hotline approximately 2,000 times per month and ask a remarkable variety of questions, covering topics such as hiring, firing, wage and hour laws, unemployment compensation, and a host of other subjects. However, employers tend to ask some questions more frequently than others. This article will address the twenty questions Texas employers ask the most.



employees entering similar jobs. If the examination reveals a disability,

the employer must analyze whether the employee can still perform, with or without reasonable accommodation, the essential functions of the job before deciding to reject the applicant. This analysis should include a good faith discussion with the employee of the potential types of reasonable accommodation and whether these will in fact allow him to perform the job.

Q. What is the federal minimum wage?

A. \$5.15 per hour. Although Congress has legislation pending that would raise the minimum wage if passed, there are currently no scheduled increases.

Q. Are employers required to provide breaks?

A. No. Neither Texas nor federal laws require employers to provide breaks or meal periods, except for certain safety-related positions such as air traffic controllers and long haul truck drivers.

Q. What is the minimum period of time an employee has to work before his employer's unemployment tax account can be charged?

A. There is no minimum time an employee must work before the employer's unemployment tax account can be liable. However, a chargeback based on a short-term employee's separation is likely to have much less of an effect on the company's tax rate than the separation of a long-term employee.

Q. May an employer require applicants to pass a medical exam before offering a job?

A. No. The Americans with Disabilities Act (ADA) prohibits pre-offer medical exams. However, employers may make a conditional offer of employment based on the applicant's passing a medical examination. Such examinations must be required of all

Q. May an employer require applicants to pass a drug test before offering a job?

A. Yes. Under the ADA, drug tests are not considered medical exams. Employers may require applicants to consent to and pass a drug test as a condition of entering or continuing in the application process.

(See How long Pg. 10)

Q. How long should employers keep job applications?

A. Since job applicants have up to 300 days to file a complaint of discrimination, a good rule of thumb is to keep job applications for at least one year.

Q. How long should employers keep payroll records?

A. A good rule of thumb is to keep all payroll documents three years. Under the Fair Labor Standards Act, employers are required to keep payroll records, collective bargaining agreements, and employment contracts at least three years. There are some related documents, such as time cards, piece rate records and records of additions and deductions from wages, that employers are only required to keep two years.

Q. May employers keep employees' medical records in their regular personnel files?

A. No. Both the Americans with Disabilities Act and the Family and Medical Leave Act require employers to keep medical records confidential and to maintain them in files separate from the personnel records.

Q. Who should I call to report new hires?

A. The Texas New Hire Reporting Operations Center at 1-888-TEX-HIRE.

Q. How long may an employer wait before paying a terminated employee his final paycheck?

A. The Texas Pay Day Law allows employers six calendar days in which to pay a terminated employee.

Q. How long may an employer wait before paying an employee who voluntarily quits?

A. The Texas Pay Day Law allows employers to wait until the next regularly scheduled payday to pay an employee who voluntarily quits.

Q. Are all salaried employees exempt from overtime?

A. No. Many salaried employees must be paid overtime for any hours worked beyond forty. Under the Fair Labor Standards Act, being paid on a salary basis is one factor in determining whether an employee is exempt from the Act's overtime requirements, but there are also other requirements relating to the job type that must be considered before determining that an employee is exempt. The

largest classes of employees that are exempt from the overtime requirements are professionals, executives, and administrators.

Q. May an employer accept an employee's two-week's resignation notice immediately?

A. Yes. If the notice is for two weeks or less, employers may accept the resignation and end the employment relationship immediately. The Texas Workforce Commission will consider this a voluntary resignation and the employee would have to show good cause connected with the work for quitting before he or she will be eligible to collect unemployment benefits.

Q. If an employer accepts a two-week's resignation notice immediately, does he still have to pay the employee for those two weeks?

A. No. Employers are not obligated to pay for the remaining notice period if the employee does not work that period.

Q. What if the resignation notice exceeds two weeks?

A. If an employer accepts this resignation immediately, TWC will generally view the separation as a discharge instead of as a voluntary quit.

The employee will be eligible for unemployment benefits unless the employer can demonstrate that the employee was fired for misconduct. However, the employer can accept the resignation immediately and still have TWC regard it as a voluntary quit if the employee is paid for the entire notice period.

Q. Must an employer pay departing employees for unused vacation or sick leave?

A. The Texas Pay Day law only requires payment of vacation and sick leave pay when it is owed under a written agreement or written policy of the employer. In the absence of such a written commitment, the employer does not have to pay for unused vacation or sick pay.

Q. What constitutes “full-time” employment in Texas?

A. Generally speaking, neither Texas nor federal law establishes any particular number of hours as “full-time”. Employers may establish their own guidelines for “full-time” employment in their policies. However, employers should be aware that under the Employee Retirement Income Security Act of 1974 (ERISA),

employers cannot exclude from any company retirement plan those employees who work at least 1000 hours during a 12 month period, regardless of whether they are classified as “part-time” or full-time”.

Q. Must employers allow employees access to their personnel files?

A. In the absence of a court order or subpoena, no. Personnel files are the property of the employer, therefore employers may control access to those files. Most employers do not allow their employees to access their own personnel files, or allow such access only under tightly restricted conditions.

Q. May an employer deduct the cost of unreturned uniforms, tools and/or equipment from an ex-employee’s final paycheck?

A. Under the Texas Pay Day Law, employers can make such deductions only if the deduction has been authorized by the employee in writing and the deduction is for a lawful purpose. Additionally, employers may not take such deductions to the extent they would take the ex-employee’s wages below minimum wage. Where the Texas Pay Day Law prohibits the desired deduction, the

employer’s only option is to pay the former employee his or her full wages and seek restitution through a separate civil action.

Q. May an employer require its employees to accept wage payments through direct deposit?

A. This is not a good idea. Under the Texas Pay Day Law, employers may pay employees using direct deposit only when the employee has authorized that payment method in writing. An employer could attempt to impose this requirement as a condition of employment, but any employee who was fired for refusing to accept direct deposit as a payment method would be eligible for unemployment benefits. Furthermore, such a policy could have a discriminatory impact on some protected classes. The risks of potential litigation and higher unemployment tax rates outweigh the potential benefits of a mandatory direct deposit system.

*Mark A. Fenner
Legal Counsel to Commissioner Ron Lehman*



New Employment Legislation

(All bills effective September 1, 1999)

The 76th Session of the Texas Legislature ended on May 31, 1999. Very few proposed employment bills actually became laws. This is good news for Texas employers, since changes in employment law usually involve the chipping away of existing employer rights. One major employment law bill that did pass, House Bill 341, is actually very good for Texas businesses and is outlined below along with other pieces of legislation.

GENERAL EMPLOYMENT LAW:

House Bill 341 deals with the liability of an employer for giving employment references on current or former employees.

The bill adds Chapter 103 to the Texas Labor Code. In essence, the bill authorizes employers to disclose information about a current or former employee's performance, etc., to a prospective employer on the request of the prospective employer or the employee. Employers who disclose information are immune from civil liability for that disclosure or any damages unless it is proven by clear and convincing evidence that the information disclosed was known to be false, or was made with malice or in reckless disregard for the truth or falsity of the information disclosed. The law does not require an employer to give a reference. The law does not prevent employees or former employees from suing to claim that defamation of character has occurred.

House Bill 1324

substantially increases an employer's civil liability for terminating an employee who is called to perform jury duty.

The bill amends Section 122.002 of the Civil Practice and Remedies Code. The law formerly allowed for reinstatement to employment and damages not to exceed six months wages. The new law will grant damages of not less than one year and not more than five years' wages. In addition, the bill makes such action a class B misdemeanor and specifically authorizes a court to find an employer in contempt if they fire, threaten to fire, penalize or threaten to penalize an employee because the employee performs jury service.

House Bill 1184

amends the staff-leasing provisions of the Texas Labor Code in several ways. These amendments will be found in Section 91 of the Labor Code. Some of the changes are outlined below.

1. It redefines a staff-leasing service company to include professional employer organizations.
2. It makes all organizations that offer staff leasing services subject to the Labor Code, not just staff-leasing license holders.
3. It indicates that staff-leasing

laws in Texas do not relieve client companies of their rights, obligations and duties under federal labor law.

4. It requires a contract between the staff leasing firm and its client to provide that the staff-leasing firm shares with the client company, rather than reserves or retains, certain rights and controls. This would include the right to direct and control employees and the right to hire, fire, discipline and reassign employees.

CHILD LABOR LAW:

House Bill 160

amends child labor laws in Texas by tightening the restrictions on door to door sales solicitations by children.

The amendments, found in Section 51 of the Labor Code, make sales solicitations by children a hazardous occupation. In order for a child to be able to engage in such sales, the employer must obtain a form from the Texas Workforce Commission (TWC) and get the parent or guardian to give signed consent.

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The parents must be given a map of the sales route, the name of the supervisors and a guarantee of at least one adult supervisor for every three children. Charitable organizations, political campaigns and schools are exempted from the requirements.

UNEMPLOYMENT LAW:

House Bill 1333

changes the amount of time an employer has to respond to a Notice of Maximum Potential Chargeback.

The bill amends Section 204.023 of the Labor Code. Under current law, an employer has 14 days to respond to a Notice of Maximum Potential Chargeback. The amendment gives employers 30 days to respond. Many small employers have complained that the 14-day time frame is inadequate because they may be on vacation when the notice is mailed. They would have no reason to suspect a notice was about to be mailed because a Notice of Maximum Chargeback is the notice sent to employers who are in the base period, but who are not the last employer the claimant worked for prior to filing the Initial Application for Unemployment. Note that no

other time frames pertaining to the unemployment claim process have been changed.

Senate Bill 334

clarifies that employment does not include service in any penal institution.

The bill amends Section 201.074 of the Labor Code. It indicates that wage credits for work in any penal institution in Texas cannot be obtained or used to collect Unemployment Insurance benefits. Previously the exemption from employment applied only to prisons run by the government. With the advent of privately run prisons, the law needed to be clarified.

Senate Bill 335

attempts to clarify the concept of "partial unemployment".

The bill amends Section 201.091 of the Labor Code. As originally introduced, it would have prevented partial unemployment insurance claims for anyone who worked 40 hours or more during a given claim week. It was introduced at the request of TWC's oversight agency, the United States Department of Labor (DOL). There had been situations in which, after applying our statutory formula for

determining partial unemployment, individuals working "full-time" were able to draw partial unemployment insurance benefits because their hours had spiked during the preceding year due to overtime work. The bill was amended during the legislative process to indicate an individual couldn't be partially unemployed if they were working their "customary" full-time hours. Unfortunately, the bill does not define customary. In essence, individuals whose hours increase and then later decrease back to their normal full-time hours cannot be considered partially unemployed and eligible for unemployment benefits.

*Aaron Haecker
Legal Counsel to Commissioner Lehman*

(Continued From Page 5)

Specifically, the CSU works to fulfill the goals of the TCWDB by establishing action plans to: enhance job matching systems and methodologies; provide a clearing-house for employers current and projected skills needs and respond to those needs; provide other workforce development-related services to businesses; connect the hardest to serve populations with employment opportunities; coordinate quality improvement processes and offer customized services to employers in the areas of recruitment, placement and training.

In the short year since its creation, the CSU has already recorded some very fine examples of developing this vision of a highly integrated and employer-focused system.

Alliance Opportunity Center

Responding to the needs of Fort Worth's largest major business park, the CSU exemplified its role as a broker in bringing together a multitude of partners to create a satellite workforce center at the Alliance Airport Corridor. In partnership with our neighbor, the North Central Texas Workforce Development Board, we celebrated the opening of the center on April 30, 1998. Designed to meet the hiring and training needs of employers from both Tarrant and Denton Counties, a representative from the local junior college (Tarrant County Junior College) is also a partner and is on-site to offer assessment for applicants and computer courses for existing employees.

Quarterly Hiring Fairs

By listening to the needs of our small to mid-size companies, the TCWDB has designed a series of

quarterly hiring fairs. The intent of these special hiring fairs is to bring together small groups of companies in a well-orchestrated setting so that employer hiring needs and job seeker employment needs are assessed on an ongoing quarterly basis. The first two hours of each Quarterly Hiring Fair have been reserved for invited job seekers from the workforce centers in Tarrant County. This has allowed special targeted populations the opportunity to visit with employers on a more individualized level. Staff from the workforce system of Tarrant County has been on hand to assist with the maze of tax incentive paperwork for employer and job seekers, alike. The unique partnership of the TCWDB, the workforce centers, and three area chambers"—Fort Worth, Metro Black, and Hispanic—allowed over 800 individuals to meet with area employers at the April 1998 Hiring Fair. In addition, the local public transportation system, The T, provided 1,000 bus passes to assist in overcoming any transportation barriers for job seekers in our community.

Family Job Fairs

In our commitment to develop a workforce system that embraces the needs of the entire community and its families, the TCWDB has assisted in the planning and hosting of two annual Family Job Fairs. The 1998 Fair was held at a local mall and involved the collaborative spirit of over fifteen partners, including TWC, the Arlington Chamber, the local ISD, Goodwill Industries, and a local Human Services Planners network. Each year these events have been huge with almost 100 employers participating and over 1,000 job seekers attending. Survey results indicated Employers were

seeking to fill 3,166 positions at our 1998 fair. The uniqueness of a "Family" job fair was evident with activities for children that included caricature drawings, story time by the local library, and craft sessions. Over 35 exhibitors donated door prizes. Employers were also on hand to interview the teenagers of the families for potential summer employment.

Small Business/Minority Business Coalition

As we focus on meeting the needs of small business and minority businesses, the TCWDB staff has worked in forming a coalition to identify the obstacles and barriers of these special groups with regard to workforce development. The Coalition serves as the vehicle for small business input in the strategies and design of workforce services offered by the TCWDB.

Local Chambers of Commerce Coalition

Inherent in reinforcing the TCWDB's role as an entity committed to meeting the needs of area employers; it is a natural link to align us with the economic development activities of our community. By partnering with the twenty-three area chambers we have provided "Informational Presentations" to fourteen of these chambers and over thirty-four businesses. We have been heavily involved in corporate relocation recruitment efforts.

Welfare to Work Initiatives

Again, as brokers in the complex array of programs and services, the TCWDB has brought together a mix of partners such as Butler Housing Community (public housing), The T (public transporta

tion), the Fort Worth Chamber of Commerce, Tarrant County Junior College and the Alliance Opportunity Center. In doing so, we have been able to meet the hiring needs of two large employers—Michael's Distribution Center and the PCS Health Systems. In turn, over a dozen former welfare clients are now one step closer to self-sufficiency.

Mayor's ADA Job Fair

The TCWDB assisted in the planning of this annual event and provided Asian interpreters in response to employers' requests and to meet the needs of this targeted group of job seekers.

School-to-Careers

As we seek to meet the future employment needs of area businesses by partnering with education, the TCWDB has advanced the electronics industry in one of its school-to-careers initiatives. Major companies such as Intel, Texas Instruments, and National Semiconductor have worked with Board staff to provide feedback and guidance in the curriculum development of the electronics career concentrations.

Customer Satisfaction

Recognizing the need to provide ongoing continuous improvement in the services we provide to employers, the TCWDB has developed a survey instrument designed to capture the expectations and satisfaction indices of our employers. In March 1998, 560 employers in Tarrant County received a survey from the TCWDB. We achieved an incredible first year response rate of 37.7%. Using the findings from this study as baseline data we established benchmarks for year two survey administration. Analysis of the findings will include careful

review and consideration of employer feedback to modify and/or enhance service delivery based on their requests. A very respectable two-thirds of employers responded that they were either "Satisfied" or "Strongly Satisfied" with the applicant referrals made by the workforce centers. Our goal for this year is to increase that by 13% to achieve a three-quarters satisfaction rate.

Professional Development Seminars

To continue to enhance the development of a streamlined and efficient system for our employer customers, TCWDB coordinated a staff development training day for the job developers of our workforce centers. Primarily taught by peers within the system, training topics included Business/Employer Relations; Case Management/Placement; and Facilitation/Instruction. The involvement and interaction of staff, regardless of their "program of origin", was a huge success and resulted in feedback that more sessions like this would be highly regarded.

In addition, workforce staff has partnered with the local junior college and the Small Business Development Center to host several business workshops and seminars to accommodate the needs of the small business owner.

Employer Advisory Committees

By allowing our area businesses to plan and direct the design of their workforce centers, TCWDB staff has facilitated the growth of the center-based employer advisory committees. As ex-officio members of the committee, our staff have worked hand-in-hand with the EAC to develop goals and objectives that

support the needs of their center while coinciding with the vision and mission of the Board.

Expanded Points of Access

Aggressive outreach and extensive technical assistance efforts have resulted in expansion of points at which employers and job seekers can access the services of the workforce development system. In the past year we have grown from eight major points of access to a system of thirty.

In conclusion, the number one goal of the Tarrant County Workforce Development Board is to provide and sustain a quality workforce as defined by employers. In Tarrant County, we are intensely focused on achieving outcomes that support this goal. Being relatively young in our endeavors, we are confident that we are on the right track to building a comprehensive system that is responsive to the business community. We might even be so confident as to boldly state that we are setting the benchmark for others in our industry.

*Steve Palko, Chair
Tarrant County Workforce Development Board*

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