TEXAS GUIDEBOOK FOR EMPLOYERS

TEXAS WORKFORCE SOLUTIONS ✯ TEXAS WORKFORCE COMMISSION

Aaron S. Demerson, Commissioner Representing Employers

GOVERNOR GREG ABBOTT

Dear Texas Employer:

For generations, the State of Texas has cultivated an extraordinary economic climate allowing free enterprise to flourish through less government, low taxes and reasonable regulations that attract job creators and spur economic growth. Employers like you continue to lead the way in creating more opportunities for our hardworking job force and drawing top honors and recognition for the State of Texas' exceptional economy. In fact, *Site Selection* magazine recently recognized Texas as the leading state for capital investment attraction with their annual Governor's Cup award for the eighth year since 2004.

Despite our success, we simply cannot become complacent and rest on past accomplishments. Even in today's favorable business climate, challenges remain, and entrepreneurs and employers must operate their businesses with utmost integrity and respect for those they employ.

The State of Texas has a responsibility to provide employers with the tools required to operate a business legally, ethically and responsibly, and *Texas Guidebook for Employers* is the state's premier resource for decoding the often confusing language of state and federal employment laws. Employers across the state consistently find this publication to be helpful in day-to-day business operations and for acquiring immediate information and assistance that can be difficult to obtain or comprehend without a roadmap.

On behalf of all Texans, I want to express my sincerest gratitude for your dedication to make Texas an even better place to live, work and run a business. I hope you find *Texas Guidebook for Employers* to be a helpful and convenient resource, and I wish you all the success in your business endeavors.

Sincerely,

Greg Abbott
Governor

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GREG ABBOTT
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Dear Texas Employer:

In August, 2019, I was appointed by Governor Abbott to the Texas Workforce Commission (TWC) as the Commissioner Representing Employers. As a TWC Commissioner, I take great pride in our agency serving as a first line of resources for Texas employers, and I believe *Texas Guidebook for Employers* is one such resource. Within this guidebook, you will find valuable information on a variety of workplace issues, including important state and federal laws, key employer contact information, unemployment and tax information, and samples of resource materials as well.

As the Commissioner Representing Employers, I am committed to helping prepare businesses for today's workforce challenges, and I value the role TWC plays in providing Texas employers information regarding state and federal employment laws. Together, our agency will work as your partner so that Texas businesses can continue contributing to the economic success of our great state.

Our state's legislative leadership has put a lot of effort into ensuring that Texas businesses can successfully start, steadily nurture, and ultimately expand - right here at home. And the "secret to our success" is simple, really: in Texas, we have worked very hard to be known as a state that welcomes businesses - large and small - with open arms. As a result, Texas continues to enjoy a level of economic success that other states are hard-pressed to match.

As your representative on the Commission, I am looking forward to working with the more than 550,000 employers across our great state. Together, let's keep working to ensure that Texas remains the best state in the nation to operate a business.

Sincerely,

Aaron S. Demerson
Commissioner Representing Employers

P.S. If you would like to subscribe to our free e-mail quarterly newsletter, *Texas Business Today*, simply enter your information at https://twc.texas.gov/agency/texas-business-today. On that same page, you can download prior issues going back to 1998. If you would like to learn more about the services of the Texas Workforce Commission, please see our website at https://twc.texas.gov/.

DISCLAIMER

Texas Guidebook for Employers

Important disclaimers: This book, *Texas Guidebook for Employers*, is published as a service and a form of assistance to the employers of Texas by the office of the Commissioner representing employers on the Texas Workforce Commission, under the authority of Texas Labor Code Section 301.002(a)(2). **The information and views expressed in this book are those of the author only and do not constitute in any way an official position, policy, or pronouncement of the Texas Workforce Commission.** The book is not intended, and may not be relied upon, as legal or binding authority and does not create any rights, substantive or procedural, enforceable at law by any party in any matter, whether civil or criminal. It places no limitations on the lawful prerogatives of TWC or any other unit of government, and has no regulatory effect, confers no remedies, and does not have the force of law or a ruling of any administrative agency, court, or governmental subdivision. If you are dealing with a claim or about to do so, you cannot obtain a ruling from this book. Individual facts and circumstances make a difference, and each case is decided on its own facts. TWC does not issue advisory opinions before a claim is filed or an appeal is concluded, and only the claim investigator, appeal hearing officer, the three-member Commission, or a court of competent jurisdiction can make an official ruling in an individual case. Nothing in this book is intended as an advertisement of, or an offer to provide, any commercial goods or services by any person for any individual or entity.

The author has taken great care to provide in this book the most current and accurate information available concerning federal and Texas laws on a wide variety of employment law subjects. However, **the information found herein is not intended as legal advice** and is not a substitute for individual consultation with a labor and employment law attorney. Interpretation of the various laws, regulations, and case precedents mentioned herein is not uniform throughout the agencies and courts enforcing the laws; indeed, even agency employees and courts sometimes disagree among themselves on both major and minor points under these laws. The information appearing in this book represents the prevailing viewpoints of a majority of legal authorities. In some instances, other viewpoints will be noted. Because interpretation of laws and precedent cases is not uniform, and because each case must be decided on an individual basis, it is not always safe to assume that a particular case will result in a particular outcome. There is no substitute for individual consultation with an employment law expert. Any employer wishing detailed legal advice relating to a specific situation should regard this book as a way of conducting initial research into various topics of employment law and preparing for an individual consultation with an attorney who specializes in employment law. Using the book in this way should enable an employer to make the most efficient and cost-effective use of his or her attorney's time through awareness of important issues and what questions to ask. In those cases where an attorney is not hired, the employer should at the very least speak with the government agency involved in enforcement of the laws in question. Good general information can be obtained by speaking with a member of the TWC Employer Commissioner's legal staff to receive a more detailed answer to questions about a particular situation; the toll-free number is 1-800-832-9394, and the regular number is (512) 463-2826. Caution: the attorneys in that office do not give legal advice or make official rulings on agency matters, nor should they be cited as authorities in any matter before the agency or when dealing with agency staff about a case. Employers may also call the TWC Labor Law Department regarding the Texas Payday Law and how it relates to the Fair Labor Standards Act; the telephone number is 512-475-2670. There is no charge for the information provided by TWC via such calls. Finally, employers may contact the United States Department of Labor or the EEOC regarding various laws. Contact numbers for various employment-related agencies are found in the topic "Important Employer Contact Information".

The sample policies and forms available in the book are only examples and are furnished merely as illustrations of their categories. They are not official forms or policies and are not meant to be adopted and used without consultation with a licensed employment law attorney. Any employer in need of a policy or form for a particular situation should keep in mind that any sample policy or form such as the ones available in the book would need to be reviewed, and possibly modified, by an employment law attorney in order to ensure that it fits a particular situation and complies with the laws of Texas and/or other states of operation. Downloading, printing, distributing, reproducing, or using any policy or form in this book in any manner constitutes your agreement that you understand these disclaimers; that you will not use the policy or form for your company or individual situation without first having it approved and, if necessary, modified by an employment law attorney of your choice; and that if you use it without such consultation, you assume any risks associated with its use.

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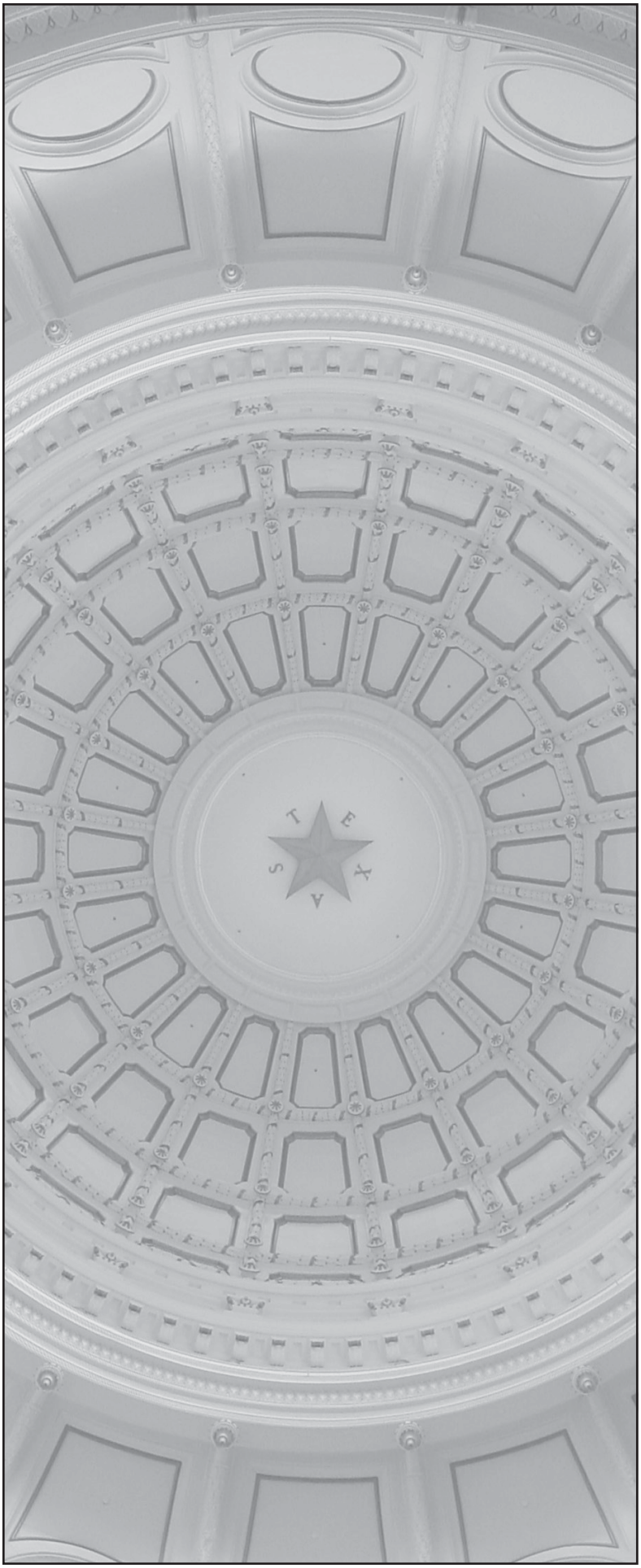
TOP TEN TIPS FOR EMPLOYERS

1. Hire for fit - train for skills - promote, transfer, discipline, or fire for documented cause.
2. Do yourself a favor - do not try to avoid payroll taxes, new hire paperwork, or unemployment claims by classifying temporary workers as "contract labor". That will only be a tax audit waiting to happen. Instead, consider hiring such workers through temporary staffing firms - that way, those firms get the unemployment claims.
3. Get as many company documents and required forms signed by employees at the time of hire as you can (it only gets harder after that), and report all new hires and rehires to the Attorney General's New Hire Reporting office within 20 days of hiring.
4. Maintain a safe and healthy workplace in compliance with OSHA rules, and whether hiring, evaluating, promoting, transferring, disciplining, or discharging an employee, keep everything as fair, job-related, and consistent as possible, and never retaliate against an employee for reporting safety hazards, workplace discrimination, or other potential employment law compliance issues.
5. Have specific, written wage agreements with each employee, and get specific written authorization for any wage deductions that are not ordered by a court or required or specifically authorized by a law.
6. Unless an employee is clearly, absolutely, and undoubtedly in an overtime exemption category, do not pay on a salary basis, but rather pay an hourly or performance-based rate.
7. Never loan or advance money to an employee without getting a signed, written receipt and repayment agreement from the employee.
8. Give as much advance written notice as possible of pay and benefit changes.
9. In order to minimize the shock and disappointment factor that so often leads to unnecessary claims and lawsuits, treat employees fairly and consistently according to known, job-related rules and standards, follow stated policies as closely as possible, and avoid exceptions whenever possible.
10. In handling unemployment claims, file timely claim responses and appeals, present testimony from firsthand witnesses, and present clear documentation of warnings, policies, and other relevant facts.



HIRING:

basic

LEGAL

ISSUES

for

EMPLOYERS

OUTLINE OF EMPLOYMENT LAW ISSUES - PART I

Major Laws Impacting the Hiring Process

The main thrust of all employment discrimination laws is to make it illegal for employers to treat employees or applicants adversely on the basis of something about themselves that they cannot change, or should not be expected to change. Such factors are called "immutable characteristics". For example, one cannot change one's race or color, gender, age, or national origin, cannot readily change one's disability status, and should not be expected to change one's religion, as a condition of getting or keeping a job. Below is a listing of the most important federal and Texas statutes relating to employment discrimination (see the note below*, as well as the article titled "Thresholds for Coverage Under Employment-Related Laws" in this part of the book for detailed information regarding employee counts).

Federal

- Civil Rights Act of 1964, Title VII – covers employers with at least 15 employees – protects against discrimination based upon race, color, gender, national origin, and religion – this law also started the EEOC
- Pregnancy Discrimination Act of 1978 (PDA) – incorporated by amendment into the Title VII statute noted above, the PDA clarifies that pregnancy and related conditions are considered to be a subset of "gender" for discrimination law purposes; the law prohibits employers from treating women with pregnancy or related conditions any less favorably than other employees who have medical conditions that place a similar limitation on their ability to or availability for work
- Age Discrimination in Employment Act of 1967 (ADEA) – covers employers with at least 20 employees – protects against discrimination based upon age against people who are age 40 or older
- Americans with Disabilities Act of 1990 (ADA) – covers employers with at least 15 employees – protects against discrimination based upon disabilities, the perception of disabilities, or association with people with disabilities
- Genetic Information Non-discrimination Act of 2009 – covers employers with at least 15 employees – prohibits discrimination on the basis of genetic information, as well as the use, gathering, and disclosure of genetic information in the context of employment relationships
- Immigration Reform and Control Act of 1986 (IRCA) – discrimination protection provisions cover employers with at least 4 employees – protects against discrimination based upon national origin or citizenship – this law also started the I-9 process
- U.S. Bankruptcy Code – Section 525 – covers any employer – prohibits discrimination based upon bankruptcy history or bankruptcy claim filing status
- Civil Rights Act of 1866 (42 U.S.C. §1981) – covers all employers with at least one (1) employee or anyone who hires another person to perform any kind of work or services for pay (thus, it covers even independent contractor situations) – protects against discrimination based upon race or color (additional cautionary note: some national origin discrimination claims can be turned into race or color discrimination claims, depending upon the circumstances)

State

Every state in the United States has one or more laws prohibiting the forms of discrimination covered in the federal laws noted above. Some states add additional protected classifications such as sexual orientation, veteran status, history of filing certain types of claims, and so on. For example, Texas has the following anti-discrimination statutes:

- Texas Labor Code, Chapter 21 (formerly known as the Texas Commission on Human Rights Act) – covers employers with at least 15 employees – protects against discrimination based upon race, color, gender, national origin, religion, age, and disability
- Texas Workers' Compensation Act – anti-discrimination provisions cover all employers – protects against discrimination based upon workers' compensation claim history - although the Texas Supreme Court has ruled that this statute applies only to employees, not to applicants, discriminating against applicants based upon workers' compensation claim history will generally be viewed by the EEOC as a violation of disability discrimination laws

* Unless the statute that creates the employee limit also expressly states that the limit is jurisdictional, an employer

with an employee count under the limit could still face liability in a claim or lawsuit unless it affirmatively shows that the limit precludes coverage in that situation - see the discussion of the *Arbaugh v. Y & H Corporation* case in "Other Types of Employment-Related Litigation" in the outline of employment law issues in part IV of this book.

Quick Basics

- A person's status is generally not a legal basis for action - do not act based upon applicants' or employees' status or who they are, but rather based upon what they can do, what they cannot do, or what they should do, but fail to do.
- The hiring process should be free of any indication that the hiring decision will be based in any way upon race, color, religion, gender, national origin, age, or disability.
- Throw a wide net for applicants – it will impress the EEOC and give you a better chance of getting a great employee; advertise the jobs with TWC (www.WorkInTexas.com) and local Workforce Solutions centers.
- You only have to take applications if you have vacancies.
- Base hiring decisions only on job-related criteria.
- Be consistent and judge applicants on qualifications, not assumptions or stereotypes.
- Verify references, employment history, and background information and document your efforts.
- Get I-9 information on all new hires within 3 business days of hiring.
- Careful with job and salary offers – do not promise more than you are willing to deliver.
- Consider alternative staffing methods in lieu of direct hiring of employees.

Job Postings and Recruitment

- No specific law obligates private employers to post jobs in any particular way.
- Advertise job vacancies in media that are likely to be seen or heard by minority applicants.
- A company's job posting system should result in a wide range of applicants.
- Try to list job openings with the state's public employment service, as administered by local Workforce Solutions centers and the Texas Workforce Commission (WorkInTexas.com), since the EEOC and the TWC Civil Rights Division consider that to be evidence of an open and fair hiring process.
- A large applicant pool increases the chance of finding a really good new hire.
- Having a written affirmative action plan is required only for certain federal contractors and grantees (under Executive Order 11246, the Rehabilitation Act of 1973, and statutes covering veterans).
- However, practicing simple affirmative action/equal employment opportunity guidelines can make it easier to defend against a discrimination claim.
- It is common to see "XYZ Company is an equal opportunity employer" in job postings and help-wanted ads.
- Avoid gender-specific job titles in job postings/help-wanted ads - while there is no Texas or federal law specifically requiring employers to avoid gender-specific job titles in job postings, it is generally recommended that employers try to use gender-neutral job titles and position descriptions whenever possible, unless there is a bona fide occupational qualification (BFOQ) that the position be filled by a man or a woman. Thus, "seamstress" could be replaced with "sewing machine operator", "tailor assistant", "clothing alterations specialist", or something similar that fits the specific duties of the position, while "busboy" could be replaced with something like "busser", "porter", "table cleaner", "waitstaff assistant", "kitchen associate", or the like. The potential problem with using gender-specific titles where there is no need to do so is that in a hiring practices claim before the EEOC or TWC's Civil Rights Division, it might give the investigator one additional thing to ask about that could needlessly complicate the case.
- Other things to keep out of job postings, unless the company is prepared to prove that such criteria are justified by business necessity, would be anything that the EEOC might consider to have a direct or indirect impact on minorities, such as "must be currently employed", "recent graduate", "no criminal record", or "must live within city limits".
- Personnel search firms ("head-hunting" firms) are covered by the same anti-discrimination laws that apply to their clients – one could hurt the other, and vice-versa, by unwise hiring practices that violate laws – both clients and their personnel search firms must work together to avoid job discrimination claims.

Job Applications

- No law requires employers to accept resumes or applications if there are no openings, but an employer should either keep all unsolicited applications, or throw them all away – "cherry-picking" can easily lead to disparate treatment claims with the EEOC or a state human rights agency.
- Job applications should solicit only job-related information.
- If a potential question for the application will not help determine who is the best-qualified applicant, do not ask it.
- Be sure to ask about hours and days of availability for work; let applicants know that if they indicate availability times that do not match the job posting or the job description, they may not be further considered for the position in question.

- It is permissible to ask about: identifying information, including contact information; prior work-related experience; prior employers, dates of employment, and rates of pay; whether the applicant is at least 18 (if the concern is to avoid child labor problems), or a minimum age such as 21 (if the concern is to determine insurability as a driver of company vehicles or operator of certain equipment); work-related certificates and licenses, including dates of issuance; work-related education and training, including dates; job reference information; job-related criminal history; and availability or restrictions as to type of work, work schedules, and work locations.
- It is permissible to ask for an applicant's birth date, SSN, and driver's license number in order to facilitate a job-related background check. However, a company should consider obtaining such information as late in the application process as possible, in order to minimize the amount of confidential information it obtains, and the risk that it might be compromised in some way.
- Unless there is a bona-fide occupational qualification or statutory or regulatory requirement involved, do not ask about an applicant's race, color, religion, gender, age, national origin or citizenship, disability, or genetic information.
- *Examples of permissible questions:*
  Are you at least 18?
  Do you have a current, valid driver's license? (for driving-related positions)
  Have you ever been involuntarily terminated from a position of employment? If so, please explain. (This question does not apply to a layoff or reduction in force for economic reasons.)
  During the past _____ years, have you been convicted of, or have you pleaded guilty or no contest to, a felony offense? If yes, please explain. (See the following topic, "References and Background Checks", for a discussion of the importance of a job-relatedness determination when using criminal history as a criterion for hiring.)
- *Examples of impermissible questions:*
  Do you have children? (This would be permissible if the job duties directly require the employee to be a parent.)
  Are you a U.S. citizen? (Ask a different question, such as "Are you authorized to work in the United States?")
  Are you a _____ (member of a specific type of religion)? (This is permitted only if the job is with that specific type of church, and the duties relate to carrying out the mission of that particular church or faith.)
  Are you married?
  What are your family plans?
  Do you have any handicaps or disabilities?
  Do you own a car?
  Do you own a house?
  Have you ever been arrested?
- At the end of the application, let applicants know that by signing and submitting the application, they give their consent for various things:
  - the employer may verify any information given on the form;
  - any wrong or incomplete information can result in the applicant not being hired or, if the problem comes to light after hire, it can result in immediate dismissal from employment;
  - the applicant agrees to submit to any job-related medical exams or drug tests that might be required; and
  - the applicant understands and agrees that if hired, employment will be at will.
- An example of such a statement might be something like this: "I certify that I have fully and accurately answered all questions and have given all information requested in this application for employment, and I understand that any wrong or incomplete information on the form may disqualify me for further consideration for employment or, if discovered after I am hired, may be grounds for my immediate dismissal. I understand that all such information is subject to verification by the Company, and hereby give my consent to the Company to investigate my background and qualifications using any means, sources, and outside investigators at its disposal. I agree to undergo any type of drug and/or alcohol testing that the Company may require at any time. Finally, I understand that submission of this application does not necessarily mean that I will be hired, and that if I am hired, my employment will be at will, and either I or the Company may terminate my employment at any time, with or without notice or reason."
- The EEOC requires employers to keep solicited job applications for at least one year – it is best to keep them at least 4 years, in order to exhaust all possible statutes of limitations for various employment law causes of action; if EEOC investigates and finds that applications have not been kept, that is not only a recordkeeping violation, but also potential evidence of intent to discriminate.
- The State of Texas uses an official employment application form (PDF) that illustrates the kinds of things that a job application should include – see http://www.twc.state.tx.us/jobs/gvjb/stateapp.pdf.

Job Descriptions

- Under EEOC rules for the Americans with Disabilities Act, what an employer puts in a job description is considered the primary determinant of what the essential functions of that position are. That, in turn, helps the employer deal with any ADA claims that might come about in the future, in case the question is whether an applicant or employee is able to perform the essential functions of the job with or without reasonable accommodation.
- A good job description makes it much easier to deal with an unemployment claim if the work separation occurred because of a claimant's refusal or failure to perform the

functions of the position. In a quit case, if the employee was aware of what the job involved prior to taking it, and later quits rather than do the agreed-upon job, the claimant would not have a good argument at all for claiming that he or she had good work-connected cause for quitting. In a discharge case, failing to do one's job can lead to a judgment of various forms of misconduct, including insubordination, avoidable negligence, failing to follow instructions, failing to do one's best, and so on.

- A good job description makes it much easier to measure an employee's performance and hold them to known standards, which is important for promotions, job transfers, raise reviews, and corrective action.
- Any good job description will be specific enough to accurately describe the job in question, yet flexible enough to include other duties as assigned. The company should make it clear to all employees that when the needs of the company or its customers dictate, their jobs will entail whatever needs to be done that is assigned by a supervisor and is within the employee's capacity to deliver.
- Be sure to include the requirement that part of each employee's job is to work the assigned schedule and comply with the company's timekeeping policy.
- For some assistance with developing job descriptions, visit the following Web sites: http://socrates.cdr.state.tx.us/iSocrates/occprofiles/profile_select.asp, and http://www.dol.state.ga.us/em/faq_em.htm#faq_06_01.
- The sites linked there will help an employer get started, but most of the detail in a particular job description will be supplied by the supervisor of the position in question and by the experienced employees who are already performing that job.

References and Background Checks

- The average telephone reference call will not yield much usable information – employers are concerned about being sued for giving unfavorable references.
- Case in point: *Frank B. Hall Company v. Buck*, 678 S.W.2d 612 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.), cert. denied, 472 U.S. 1009, 105 S. Ct. 2704 (1985)- terminated employee suspected former employer was bad-mouthing him behind the scenes - ex-employee hired private investigator to pose as a prospective new employer and call the former employer for a reference - investigator tape-recorded the employer making scurrilous and unprovable allegations about the ex-employee's character and honesty - jury decided that was defamation and awarded almost $2,000,000 in total damages to the plaintiff (note: under Texas law, it is legal for a person to tape-record a conversation without the knowledge or consent of others, as long as the person doing the recording is participating in the conversation).
- All applicants should sign a waiver and release of liability form clearly authorizing prior employers to release any requested information to your company and relieving both the prior employers and your company of all liability in connection with the release and use of the information - see the sample form for release of job information.
- Whatever information an employer releases in connection with a job reference should be factual, in good faith, and non-inflammatory! Under Section 52.031(d) of the Texas Labor Code, a truthful written job reference cannot be the basis for a defamation lawsuit.
- Similarly, it would be a good idea to restrict the release of information to whatever was requested – unless there is a compelling need to do so, try not to volunteer additional things that are not connected to the information requested by the prospective new employer.
- Texas law (Texas Labor Code, Chapter 103) gives employers important protections against defamation lawsuits based upon job references, as long as the employer does not knowingly report false information; still, employers should try to report only what can be documented.
- An employer does not have to give a reference on a former employee - see Attorney General Opinion No. JM-623, January 20, 1987.
- Employers have the right to do criminal background checks themselves using government-maintained databases, but most employers hire a service to do that - be careful, since the Fair Credit Reporting Act requires an employer to give written notice that a credit or background check will be done and to get written authorization from an applicant to do the check if an outside private-sector agency or search engine will be used (the notice and the authorization can be on the same form) – in addition, if the applicant is turned down, the employer must tell the applicant why, give the applicant a copy of the report, and let them know the name and address of the service that furnished the information.
- In-home service and residential delivery companies must perform a complete criminal history background check through DPS or a private vendor on any employees or associates sent by the companies into customers' homes (including attached garages or construction areas next to homes), or else confirm that the persons sent into customers' homes are licensed by an occupational licensing agency that conducted such a criminal history check before issuing the license. The records must show that during the past 20 years for a felony, and the past 10 years for a class A or B misdemeanor, the person has not been convicted of, or sentenced to deferred adjudication for, an offense against a person or a family, an offense against property, or public indecency. A check done in compliance with these requirements entitles the person's employer to a rebuttable presumption that the employer did not act negligently in hiring the person. See the Texas Civil Practice and Remedies Code, Sections 145.002-145.004. Recommended: do such checks on anyone who will be going into a person's home, garage, yards, driveways, or any other areas where the employee could come into

contact with people at their homes.

- With respect to applicants younger than 18, if possible, secure written permission from the child's parent or guardian to conduct background or drug tests.
- Unless a law requires such a question, do not ask about arrests, since the EEOC and the courts consider that to have a disparate impact on minorities – a company can ask about convictions and pleas of guilty or no contest – if an EEOC claim is filed, the employer must be prepared to show how the criminal record was relevant to the job in question, i.e., the employer must be able to explain the job-relatedness of the offense – see http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction and http://www.eeoc.gov/policy/docs/arrest_records.html for EEOC's position on this.
  - Conducting a job-relatedness inquiry involves treating each applicant as an individual – the employer must be able to articulate how it determined, with respect to an individual applicant, in light of the applicant's criminal history, and concerning the job in question, that hiring the person would have involved an unreasonable risk of possible harm to people or property.
  - In Texas, asking only about "convictions" will not turn up some forms of alternative sentencing - for example, under the law of deferred adjudication, if the person given such a sentence satisfies the terms of probation, no final conviction is entered on their record, and the person can legally claim never to have been "convicted" of that offense – however, they would have pled guilty or no contest to the charge (such a plea is necessary in order to qualify for deferred adjudication), so if it is necessary (job-related) to know about about convictions and guilty or no contest pleas, the question would have to be rephrased – see the discussion directly above about the job-relatedness of an offense.
  - In the case of *Kellum v. TWC and Danone Waters of North America, Inc.*, 188 S.W.3d 411 (Tex.App.-Dallas 2006), the appeals court ruled that a claimant did not commit disqualifying misconduct by indicating that he had not been convicted of a crime, where the application asked only about convictions, and he had been given deferred adjudication.
  - Sample question about criminal history: "During the past (fill in the number) years, have you been convicted of, or have you pled guilty or no contest to, a felony offense? If yes, please explain in the space below. (Answering "yes" to this question will not automatically bar you from employment unless applicable law requires such action.)"
  - Try to consider only criminal history that is recent enough to be relevant, given the nature of a particular offense, the nature of the job, and the corresponding level of risk of harm - the remoteness of an offense is a factor in the job-relatedness determination noted above.
- If an exclusion based on criminal conduct would have a disparate impact on minorities, EEOC expects the employer to develop a "targeted screen" that takes into account the nature and gravity of the crime, how much time has passed since the crime occurred, and the specific functions of the job in question. Any person excluded by such criteria would then have an opportunity for an individualized assessment to determine whether the criteria as applied are job-related and consistent with business necessity. The individualized assessment would involve notice to the individual that the criminal record may result in him or her not being hired, an opportunity for the applicant to explain why the exclusion should not be applied under his or her particular circumstances, and consideration by the employer of whether the individual's new information justifies an exception to the exclusion and shows that the policy is not job-related and consistent with business necessity in the applicant's specific situation. Detailed commentary on the EEOC standards for criminal history information is available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
- Be cautious concerning offenses that occurred too far in the past - EEOC's policy statement issued on February 4, 1987 on the use of conviction records in employment decision cites a 1977 court case as authority for requiring employers to take into account "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied." *Green v. Missouri Pacific Railroad Company*, 549 F.2d 1158, 1160 (8th Cir. 1977).
- Never ask an applicant to take a polygraph exam, unless your organization is statutorily required to do so - that would be a violation of the Employee Polygraph Protection Act of 1988, a federal law.
- An employer may require an applicant to be responsible for submission of official records, transcripts, certificates, and licenses.
- Very important: in order to position your company as well as possible against potential "negligent hiring" claims, document your efforts to verify the work history and other background information given by the applicant (see the comment above on in-home service and residential delivery companies).
- Flip side: "negligent referral" – do not ever give a false or misleading reference, even if you think you are insulating yourself from a defamation claim or doing the ex-employee a favor – a Texas employer got hit with a large damage award after giving a false reference on a former employee who had been fired for misconduct.
- If you have knowledge that an ex-employee has violent tendencies, it is best to be truthful and factual in job references – report only what you can document or prove with firsthand witnesses. Above all, do not falsely report that an employee who is known to have been violent or threatening was a "good" employee who

followed all of the rules.

- HR best practice: if possible, do not ask about criminal history until the tentative offer of employment has been made - that will lower the risk of discrimination based on criminal history for the majority of unsuccessful applicants. A number of states, and some individual cities, have enacted so-called "ban the box" legislation or ordinances under which an employer cannot ask about criminal history until the time that the company offers the job on a tentative basis. As of 2017, Texas has no such statute. Consult with qualified employment law counsel regarding the latest requirements in your company's area or areas of operation.

Interviews

- When interviewing applicants, apply the same standard that is applied to job applications – ask only about things that are directly related to the job requirements for the position under consideration.
- Watch out for tape-recording – the applicant might be tape-recording the interview without an employer's knowledge, and a video- or tape-recording of an interview would be discoverable in a discrimination claim or lawsuit.
- Tell the managers who conduct interviews to be extremely careful about note-taking during interviews – anything like that can be discovered in a claim or lawsuit – many discrimination cases have been lost due to careless and/or embarrassing comments written by interviewers.
- Test for whether something should be written down: would you feel comfortable explaining it in front of a judge and jury?
- "Working interviews" are not the same as pre-hire interviews at which an interviewee might demonstrate how he or she would carry out a sample task – an "interview" during which the worker performs actual work and receives what most companies would call "on the job" training or orientation to the company is work time – 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, new hire report, and so on), and report the wages to TWC and IRS.

Pre-Employment Tests and Examinations

- Pre-employment tests or examinations must be job-related and non-discriminatory, i.e., required of all applicants in that job category. EEOC test validation standards are outlined in "Employment Tests and Selection Procedures" at http://www.eeoc.gov/policy/docs/factemployment_procedures.html.
- Job-related skills tests are permissible if administered consistently and are the best way to confirm whether an applicant's claims of expertise in a certain type of work are true, untrue, or perhaps merely a bit "inflated".
- Be careful with inflated or unrealistic self-assessments by applicants – it is common to over-estimate one's 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.
- The ADA prohibits medical inquiries prior to making a tentative offer of employment – of course, the ADA applies only if a company has at least 15 employees – to be sure, consult legal counsel!
- If medical inquiries are made following a tentative offer of employment, the same inquiries must be made of all applicants for such a position, not just the ones who look like they may have medical problems.
- Medical inquiries should relate directly to the essential functions of the job – the "essential functions" are the main reasons for the job to exist, and should be consistent with the job description for the position.
- Requests made lawfully under the ADA for medical information must include the following genetic information notice, as per EEOC regulations pertaining to the Genetic Information Nondiscrimination Act: "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services." The notice may use alternative language, as long as individuals and health care providers are advised that genetic information should not be provided.
- The ADA requires employers to maintain any and all medical information in a separate and confidential medical records file.
- The employer must be prepared to offer a reasonable accommodation to any otherwise qualified applicant who turns out to have a protected disability.
- A "reasonable accommodation" is a change in procedures, a device, a change in duties, a shifting of personnel, or a change in the work environment that the employer could make without "undue hardship" to its business and which would enable the applicant to perform the essential functions of the job.
- "Undue hardship" can vary according to the size of the company and the nature of the proposed accommodation.
- Drug tests are not included within the definition of "medical examinations" under the ADA and may be given at any time.

- Of course, confidentiality rules apply – no one should ever learn of the test results except people with a legitimate need to know.
- If a drug test somehow reveals a disability, ADA issues arise.
- "Physical agility tests", often used by police and fire departments when screening applicants, are not considered medical examinations under the ADA and 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 tend 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.

Deciding on the Best Candidate for the Job

- Notwithstanding discrimination laws, employers may always hire the best-qualified candidate for the job.
- The important thing is to be able to explain how the one who was hired really had the best qualifications and was the best fit for the position in terms of legitimate, job-related factors.
- That, of course, requires a very close and careful look at the job applications and other information about applicants and a meticulous consideration of all factors that are relevant to the job , such as minimum qualifications, prior experience, availability, and work ethic (job reference checks can be helpful there).
- A hiring standard that results in exclusion of an applicant on the basis of race, color, religion, age, gender, national origin, disability, or genetic information is suspect and presents a risk of an EEO claim or lawsuit unless there is a bona fide occupational qualification (BFOQ) dictating that one type of person be favored over other types of people for a position; thus, leave minority status out of the hiring decision to the greatest extent possible. The burden of proving that a BFOQ exists is on the employer.
- In general, employers do not have to explain why they are not hiring a particular applicant (exception: applicants turned down due to an adverse background or credit check covered by the FCRA - see the discussion on the FCRA in the topic "References and Background Checks" for more details).
- It is usually best to restrict any explanations to short and factual, non-inflammatory statements such as "you seem to have some good qualifications. However, the one we hired better fit the requirements we had at this time. Please check back with us about any openings we might have in the future. Thank you."
- Try to avoid ever using the term "overqualified" to explain why a person is not suitable for hire - the EEOC and the TWC Civil Rights Division consider that to be potential evidence of age discrimination.

Offers of Employment and Compensation Agreements

- Any written job offer should point out that employment is "at will" – for a sample, see "Job Offer Letter" in this book under "The A to Z of Personnel Policies".
- A good job offer letter should note that hiring is contingent upon the new hire completing all of the new hire paperwork.
- An oral job offer should be matter-of-fact and to the point – skip the usual "feel-good" comments that sometimes get a company in trouble, such as "don't worry, if you work hard and follow all the rules, you'll always have a job with us" – even though the Texas Supreme Court has ruled that such comments do not by themselves destroy the presumption that employment is at will, it is possible to do just that with the wrong mix of circumstances.
- In an employment at will situation, the employer should express the compensation in terms of a weekly or biweekly pay period – annual salary offers have been held in certain cases to constitute a promise of at least one year's employment.
- The more unusual a pay method is, the more important it is to put it into writing – also, the pay agreement should be as clear as possible, since any claims under the Texas Payday Law will be based upon whatever the pay agreement says or seems to say.

New Hire Paperwork

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. The 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)
- 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)
- DOL notice re Health Insurance Marketplace (http://www.dol.gov/ebsa/faqs/faq-noticeofcoverageoptions.html)

- 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 either the notice of coverage (English or Spanish) or the notice of non-coverage (English or Spanish))
- consent for background checks, if not already obtained - the best time to obtain this is prior to hiring someone, so that the check can be done before making the hiring decision, but better late than never, since 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 (a sample form is at "Authorization for Background Check" in "The A to Z of Personnel Policies" section of this book)

Optional, but recommended:

- acknowledgement of receipt of policy handbook (a sample form is at http://www.twc.state.tx.us/news/efte/acknowledgment_of_receipt_of_employee_handbook.html)
- consent for drug testing / consent to search policy, if the company does such things
- consent for video surveillance, if the company conducts such surveillance
- agreements regarding pay, benefits, schedule, work location, and so on (with employment-at-will disclaimers (see the topic on pay agreements for an example)
- documents needed to claim tax incentives, grants, and other benefits associated with hiring applicants from certain targeted groups (see http://www.twc.state.tx.us/news/employer_incentives.pdf)

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 alpha-numeric 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.
- Sign the employee up for any insurance or other benefits the company may offer.
- Issue the employee any ID or access cards needed to access company facilities.
- Issue company equipment, uniforms, and other items – consider using a property return security deposit agreement to minimize the risk of damage or non-return of such property.

Remember that new hire orientation periods will involve compensable time worked.

I-9 Requirements

- Do not waste time getting I-9 information on all applicants – this is only required for people who are actually hired.
- The law requires employers to verify the I-9 information by the end of the third day of an employee's employment.
- Do not ask about U.S. citizenship unless required to do so by statute or regulation - ask whether the applicant is authorized to work in the U.S.
- Employers are not required to keep copies of the documents a new hire presents for the I-9 form, but keeping copies will help a company show that it tried in good faith to verify the identity and work authorization of the employee.
- I-9 records must be kept for three years following the date of hire, or for one year after the employee leaves, whichever is later – recommended: keep this and all employment records for at least 7 years after the employee leaves in order to exhaust all the statutes of limitation.

Alternatives to Hiring Employees Directly

Temporary employees

- Temporary employees hired directly by a company are the company's employees for all intents and purposes and can file unemployment claims when the job runs out. However, if a student fills a summer job and goes back to school when the next school term starts, TWC precedent cases hold that such a student would be disqualified from unemployment benefits as a "voluntary quit" (see TWC's Appeals Policy and Precedent Manual, VL 495.00, Appeal No. 983-CAC-72, for one example).
- Alternative: hire temporary employees through a temporary help service.
- In such a case, the temporary help firm is the employer and will deal with any unemployment claims from such employees.
- The hourly labor cost is higher, but at least there will be no unemployment claims to worry about.
- Temporary employees can be considered employees of both the client company and the staffing firm for purposes of wage and hour statutes and other laws under joint employment rules - cover this issue in any staffing agreement that you sign.
- "1000-hour rule" – this is a requirement under the federal pension and benefits protection law known as ERISA – it requires that if an employee works at least 1000 hours in a 12-month period, and if the company has some kind of pension or retirement benefit plan, the company must give that employee the chance to participate in the plan – that rule does not apply to other types of benefits, though (see ERISA section).

Professional Employer Organizations

- In Texas, professional employer organizations (PEOs) are considered the "employers" of workers assigned to various clients, as long as the PEO is properly licensed and certified under applicable statutes (Chapter 91 of the Texas Labor Code)
- Under Section 91.032(a)(2) of the Labor Code, a PEO is liable for unpaid wages, even if it has not been paid by the client company, but it is liable for other types of compensation that the client company may have promised to pay the employees only if it has contracted to assume such liability (see Section 91.032(c)).
- In an unemployment claim situation, a former employee of a PEO is subject to potential disqualification for voluntarily leaving work if he or she was subject to a policy requiring the employee to contact the PEO after a work separation, but such a disqualification requires the PEO to prove that the employee was given written notice of such a requirement at the time of the work separation by either the client company or the PEO (see Section 207.045(i) of the Texas Labor Code).

"Payrolling"

- With payrolling, a client company sometimes attempts to escape the obligations of an employer by assigning its employees to an outside entity known as a payrolling company for payroll purposes only – the payrolling company, though, does not act as an employer in any other way.
- Texas considers such workers to be employed by the clients, not by the payrolling entity.
- This is also the rule with "common paymaster" situations, in which separate, related companies establish an entity solely for the purpose of handling personnel and payroll matters for the members of that group, or else allow one of the members of the group to handle payroll matters for the rest of the group's members, either for an administrative fee or as a matter of convenience. The definition of "employing unit" is key to understanding the concept of payrolling; it is defined in Section 201.011(11) of the Act as "a person who … has employed an individual to perform services for the person in this state." A "person" would be an individual, a partnership, or a corporation. Section 201.046 of the Act provides that the employer is the employing unit that receives the benefit of the work performed, regardless of whether the employees are hired and paid by the employing unit or its agent. In a payrolling situation involving a common paymaster, each separate employing unit receives the benefit of the services provided by the employees working at each location. Employing units with separate identities, i.e., separate corporate charters and the like, are separate business entities and thus separate employing units. TWC's position in this area of the law is explained in Tax Letter No. 7-80, as well as in Rule 13 decisions including TD-98-066-0998 (January 5, 1999), TD-05-053-0505 (September 29, 2005), TD-08-024-0108 (August 26, 2008), and TD-09-013-0109 (May 27, 2009), holding that "payrolling companies" are not single employing units for the purposes of reporting wages and paying state UI tax, regardless of Section 3306(p) of the Federal Unemployment Tax Act (26 U.S.C. § 3306(p)), which would allow a common paymaster to be treated as a single employer under federal law under certain conditions.
- The only exceptions to that general rule are for clients of licensed PEOs (see above) and, pursuant to 26 U.S.C. § 3306(p) of the federal law, any employees who are concurrently employed by two or more related corporations, one of which is acting as the common paymaster for the other(s).
- Payrolling should not be confused with the single employer concept that may apply in other employment law situations.
- For online tips from the IRS on how to use third-party payroll service providers, see http://www.irs.gov/businesses/small/article/0,,id=176943,00.html.

Best Practices for Temporary Staffing and Professional Employer Organizations

To minimize risk that TWC will conclude that a staffing relationship is merely payrolling, the temporary staffing firm or professional employer organization (PEO) needs to act like the real employer:

- Reserve the right in the client service agreement to exercise as many of the prerogatives of an employer, at least on paper, as possible, i.e., hiring, firing, reassignment, training, pay, benefits, and so on.
- Have employees fill out employment applications.
- Run all new temps/leased employees through the I-9 process.
- Report them to the Attorney General's office as new hires.
- 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 them company policy handbooks.
- Have them sign clear acknowledgement of receipt forms listing the temporary help firm or PEO as the employer.
- Any benefits should be given in the name of the temporary help firm or PEO.
- Pay stubs should identify the temporary help firm or PEO as the employer.
- Do not let client firms include assigned employees in the client firm's e-mail distribution groups, employee rosters, or mailing lists.
- Give all statutorily-required notices for UI purposes.
- Report wages and pay UI and other payroll taxes to TWC and IRS.
- Upon termination of the employment relationship,

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 employer for reassignment.

Co-employment or joint employment; "single employer"

- Especially in the case of temporary help firms or PEOs, but also with other companies, the possibility of joint employment exists – if two independent entities jointly exercise enough of the attributes of an employer with respect to certain workers, it may be possible that the two entities will be considered "joint employers" of those workers for purposes of various employment laws.
- A similar concept is that of the "single employer", which occurs when two nominally separate companies are so closely interrelated that they form a single employing unit for purposes of various employment laws. From a 1965 Supreme Court case called *Radio Union v. Broadcast Service* (380 U.S. 255, 257), the four criteria for determining whether two companies are really a single employer for employment law purposes are: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. According to the Fifth Circuit Court of Appeals (the federal appeals court responsible for interpretation of federal law for Texas, Louisiana, and Mississippi), the most important criterion is the second one, i.e., centralized control of labor relations (see *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir.1997)). If one person or department does essentially all of the hiring, personnel administration, payroll, and firing for both companies, then there is a high probability that a court or agency will find that a single employer situation exists.
- On the important issue of centralized control of labor relations, a useful case under the FLSA is *In re Enterprise Rent-A-Car*, 683 F.3d 462, 471 (3d Cir. 2012)), which listed the following relevant factors: "1) the alleged employer's authority to hire and fire the relevant employees; 2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; 3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and 4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes."
- Franchise-based employers: to minimize co-employment liability, franchisors should separate themselves as much as possible from the personnel decisions of their franchisees, including recruiting, hiring, training, paying, scheduling, corrective actions, and work separations. Unless the franchisor is exercising more control over franchisees' employees than is necessary to protect the franchisor's trademarks and brands, state law in Texas insulates franchisors from co-employment liability (there is a higher risk under federal laws, so franchisors must exercise care when dealing with the employees of franchisees.
- *Caution:* this concept is unrelated to the situation of payrolling. Simply because two or more companies may be so closely related that they qualify as single or joint employers for purposes of discrimination, wage and hour, and other employment laws affecting workplace rights does not mean that the related companies may engage in the practice of payrolling for state unemployment tax purposes. In Texas, each employing unit should have its own unemployment tax account and report the wages of its own employees to TWC. For more information, see the topic on payrolling.

Independent contractors

- Independent contractors are self-employed – they are independent business entities in a position to make a profit or loss based upon how they manage their own independent enterprise – an "employer" of such an individual is merely one of the clients of that contractor.
- Most states and IRS use similar tests to determine whether given workers are employees or independent contractors.
- Whether the test applied is the common-law direction and control test, the ABC test, the economic realities test, or the IRS eleven-factor test, the issues are basically the same – all the tests boil down to whether the employer exercises direction and control over the performance of the services of the worker.
- All the laws presume that a worker performing services for pay is an employee – if an employer thinks otherwise, it has the burden of proof in almost any possible legal situation.

Keep these characteristics of independent contractor arrangements in mind:
- The employer generally seeks the independent contractor out, not vice versa.
- The employer has to negotiate terms with the independent contractor.
- Training is not an issue – contractors are experts and should not need training.
- The employer is buying a finished project or completed service, rather than hours of work on an ongoing basis.
- Non-competition agreement: no – such an agreement is strong proof that the worker's services are directly integrated into the primary service provided by the employer.
- Non-solicitation agreement: maybe – keep it narrowly

tailored to protect the company's relations with the clients served by the contractor – anything stronger than that will resemble a non-competition agreement.
- Non-disclosure agreement: usually OK, but be careful – keep it as narrow and tightly-focused as possible to protect the confidential information to which the contractor will have access during the project.

TWC tax examiners look for certain "red flags":
- Terms such as "1099 employees", "volunteer employees", or "contract labor"
- Having contractors wear company badges or uniforms indicating their affiliation with the company
- Giving contractors a company e-mail address or cc'ing them on company e-mails (instead, send them completely separate e-mails)
- Inviting contractors to company parties and other events using the same invitation that goes to regular employees
- Giving contractors company benefits or wage advances
- Having contractors sign company policy handbooks
- Non-competition agreements (as noted above)

In an audit situation, an employer should try to show:
- Contractors' business cards indicating how the contractors are in business for themselves
- Contractors' invoices to your company on their own stationery
- Copies of any advertisements they use for their own businesses
- Links to the contractors' websites
- Written contracts for provision of services or performance of a project, one of the provisions of which covers recourse for premature termination of the contract and non-completion of the work (that is to help show that there is not an at-will employment relationship)
- E-mails, letters, or other documentation relating to negotiating the parameters of the work

Minimizing Unemployment Tax Problems

- Report wages and pay all taxes on time – deadlines can be extended for good cause shown (Rules 815.107(b)(3) and 815.109(f)) – set up a payment plan if necessary – timely payment of taxes enables the wages to be used to compute the tax rate, which serves to keep the tax rate lower.
- Section 204.083 – that law provides for mandatory transfer of compensation experience in case of shared ownership or management between the predecessor and successor – always take this potential cost into account when negotiating the sale or purchase of another business.
- Section 204.084 - 204.0851 – a partial transfer of compensation experience is possible (one-year deadline – Rule 815.111).
- Section 204.086 – a successor entity is liable for the unemployment tax debt of its predecessor – this is another potential cost to take into account when negotiating the sale or purchase of another business
- Section 205.002 – the election to be a reimbursing employer must be timely and is effective for two years.

THRESHOLDS FOR COVERAGE UNDER EMPLOYMENT-RELATED LAWS

Not all employers are covered by all of the various Texas and federal employment laws that exist. It is important to know which laws apply to which company or organization, because coverage involves the imposition of important duties for employers to satisfy. Here are the most important employment-related statutes, along with the definition of "employer", the number of employees required for coverage*, and the definition of "employee" for each law (details follow below the chart):

# of Employees	Employer	Statute	Protection
1 worker (employee or independent contractor)	Any	Civil Rights Act of 1866	race/color discrimination
1 employee	Any employer with any employee involved in commerce	Employee Retirement Income and Security Act	employee benefit rights
1 employee	Any employer with any employee involved in commerce	Fair Labor Standards Act	minimum wage, overtime, gender-based pay discrimination
1 employee	Any employer with any employee involved in commerce	Occupational Safety and Health Act	occupational safety and health
1 employee	Any employer with any employee	Texas and federal new hire reporting laws	new hire reporting within first 20 days after hire
1 employee	Any private-sector employer	Texas Payday Law	minimum wage, overtime, gender-based pay discrimination, wage agreement, timely wages, illegal deductions
1 employee	For-profit/government	Federal and Texas unemployment laws	unemployment compensation
2 - 50 employees	Any	Small Employer Health Insurance Availability Act (Texas COBRA)	health benefit continuation – state law
4 employees	Any	Immigration Reform and Control Act	national origin/U.S. citizenship
4 employees	Non-profit	Texas Unemployment Compensation Act	unemployment compensation
15 employees	Any	Title VII, ADA, GINA, Chapter 21 (Texas Labor Code)	race, color, gender, religion, national origin, disability, age (state law), genetic information
20 employees	Any	ADEA	age discrimination (federal)
20 employees	Any, except for church and governmental** health plans	COBRA	health benefit continuation – federal law
50 employees	Any	FMLA	family and medical leave
100 employees	Any	WARN	advance notice of plant closings and mass layoffs
100 employees	Any private-sector employer	EEO-1 report	Statistical survey of employees

Note: Many of the definitions of "employee" and "employer" in the above laws have minor exceptions that are relevant only to extremely narrow segments of the workforce. Such exceptions are not discussed here, but may be found by following the links to the statutes involved.

* Unless the statute that creates the employee limit also expressly states that the limit is jurisdictional, an employer with an employee count under the limit could still face liability in a claim or lawsuit unless it affirmatively shows that the limit precludes coverage in that situation - see the discussion of the *Arbaugh v. Y & H Corporation* case in "Other Types of Employment-Related Litigation" in the outline of employment law issues in part IV of this book. The test for whether an employer "has" an employee on a certain day is whether the employee is on the payroll, rather than whether the employee works on or is paid for that day. That test is called the "payroll method", as explained in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 117 S.Ct. 660 (1997).

** Regarding health benefit continuation rights for public employees, state and local government health plans maintained by public employers with fewer than 20 employees are covered under the Public Health Safety Act - see 42 U.S.C.A. § 300bb-1 et seq.. In Texas, state and local government health plans maintained by public employers with 2 to 19 employees would be covered by the Texas COBRA law.

Federal Statutes

Civil Rights Act of 1866 (amended in 1871) (race and color discrimination) - 42 U.S.C. § 1981(a):
https://www.law.cornell.edu/uscode/text/42/1981
"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ..." This law applies to all contracts made within the jurisdiction of the United States, including contracts for personal services, and thus applies even to independent contractors. There is no minimum number of employees or contractors involved for the law to apply, so even one worker of any kind makes the employer liable under this statute.

Employee Retirement Income and Security Act (ERISA) - 29 U.S.C. § 1002(5, 6):
https://www.law.cornell.edu/uscode/text/29/1002
"(5) The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity. (6) The term 'employee' means any individual employed by an employer." Under 29 U.S.C. § 1052(a)(3)(A), the retirement benefit rights apply to any employee who works at least 1,000 hours in a 12-month period.

Fair Labor Standards Act (FLSA) – 29 U.S.C. § 203(d):
https://www.law.cornell.edu/uscode/text/29/203
"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee ..." This broad definition includes managers and anyone else directly involved with pay decisions, since they act "in the interest of an employer" toward the employees under their charge. Under § 203(e), "the term 'employee' means any individual employed by an employer." The common law test used for determining employment status in FLSA cases is called the "economic realities test".

Occupational Safety and Health Act (OSHA) – 29 U.S.C. § 652(5, 6):
https://www.law.cornell.edu/uscode/text/29/652
29 U.S.C. § 652(5) provides that "'employer' means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." Texas has not submitted a state plan to DOL for approval under 29 U.S.C. § 667. Thus, OSHA applies only to private-sector employers in Texas; it does not apply to state or local governments or government agencies. Under § 652(6), "the term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce." The common law test used for determining employment status in FLSA cases is applicable to OSHA as well. One employee is sufficient for coverage, since 29 U.S.C. § 654(a) provides that "[e]ach employer - (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards ..." and "(2) shall comply with occupational safety and health standards promulgated under this chapter."

State Directory of New Hires; Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) – 42 U.S.C. § 653a:
https://www.law.cornell.edu/uscode/text/42/653a
Under the federal law, "each employer" must report "each newly-hired employee" to the state directory of new hires. Both the state and federal new hire reporting laws have the same basic definitions: "The term 'employer' has the meaning given such term in section 3401(d) of the Internal Revenue Code of 1986 and includes any governmental entity and any labor organization." "The term 'employee' — (i) means an individual who is an employee within the meaning of chapter 24 of the Internal Revenue Code of 1986; ... ." Thus, the IRS test for determining a worker's employment status would apply.

Federal Unemployment Tax Act (FUTA) – 26 U.S.C. § 3306:
https://www.law.cornell.edu/uscode/text/26/3306
The definitions here are almost identical to those in the Texas unemployment compensation statutes. In § 3306(a)(1), "[t]he term 'employer' means, with respect to any calendar year, any person who — (A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $1,500 or more, or (B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day." In subsection (a)(3), an employer of a domestic service employee is liable if it pays $1,000 or more in wages in a calendar quarter. In subsection (i), the FUTA statute actually gives the term "employee" the same meaning that it has for Social Security (FICA) tax purposes: "... the term 'employee' has the meaning assigned to such term by section 3121(d), ..." Section 3121(d) in turn provides that "... the term 'employee' means — (1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; ... ." Thus, it is apparent that both the FUTA and FICA tax statutes use the same common law test (commonly referred to in FICA and FLSA cases as the "economic realities test").

Immigration Reform and Control Act of 1986 (IRCA) (national origin and U.S. citizenship discrimination) – 8 U.S.C. § 1324b(a)(2)(A):
https://www.law.cornell.edu/uscode/text/8/1324b
The prohibition on citizenship and national origin discrimination does not apply to "a person or other entity that employs three or fewer employees". Thus, the discrimination provision in this law applies to any employer with four or more employees. There is no distinction between full- and part-time employees, and no distinction based upon how long the employees have worked for the company. The term "employee" is not specifically defined in this statute (however, the regulation 8 C.F.R. § 274a.1(f) defines "employee" – see that regulation below). With regard to the hiring of unauthorized workers in § 1324a, it is clear from subsection (a)(4) that the prohibition on hiring an "unauthorized alien" applies to "contracts for labor", and thus the law prohibiting employment of unauthorized aliens applies to the hiring of independent contractors, similar to the way that the Civil Rights Act of 1866 applies to independent contractors as well as employees. Concerning the I-9 process, obtaining I-9 documentation from independent contractors is not necessary, according to U.S. Customs and Immigration Services guidance in the I-9 Handbook for Employers, Publication M-274, in question 6 on page 31 of the PDF version of the handbook (see http://www.uscis.gov/files/nativedocuments/m-274.pdf). The USCIS regulation regarding § 1324a offers more guidance on the relevant definitions:
8 C.F.R. § 274a.1:
http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=e096f20c2c5ca4735b6da78cdabcb167&rgn=div8&view=text&node=8:1.0.1.2.54.1.1.1&idno=8

f) The term employee means an individual who provides services or labor for an employer for wages or other remuneration, but does not mean independent contractors as defined in paragraph (j) of this section or those engaged in casual domestic employment as stated in paragraph (h) of this section;
g) The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor;
h) The term employment means any service or labor performed by an employee for an employer within the United States, including service or labor performed on a vessel or aircraft that has arrived in the United States and has been inspected, or otherwise included within the provisions of the Anti-Reflagging Act codified at 46 U.S.C. 8704, but not including duties performed by nonimmigrant crewmen defined in sections 101(a)(10) and (a)(15)(D) of the Act. However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent;
i) …
j) The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done; and determines the hours during which the work is to be done. The use of labor or services of an independent contractor are subject to the restrictions in section 274A(a)(4) of the Act and §274a.5 of this part;

Title VII of the Civil Rights Act of 1964 (race, color, religion, national origin, and gender discrimination, including pregnancy and sexual harassment) – 42 U.S.C. § 2000e:
ttps://www.law.cornell.edu/uscode/text/42/2000e

"The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year …" Thus, one would mark on a calendar for the current or preceding calendar year all days on which the company employed 15 or more employees, and then mark each week that had each working day so marked, and if the number of weeks so marked is at least 20, Title VII applies. "Employee" means "an individual employed by an employer". That would include owners and officers of corporations who perform work for pay for their corporations. Private-sector employers with 100 or more employees (50 or more if the employer has a federal contract, subcontract, or purchase order worth $50,000 or more) must file the EEO-1 report annually.

Americans with Disabilities Act (ADA) (disability discrimination) - 42 U.S.C. § 12111(5)(A):
ttps://www.law.cornell.edu/uscode/text/42/12111
"The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year …" This test is the same as for Title VII. The definition of "employee" is the same as in Title VII.

Genetic Information Non-discrimination Act (GINA) (genetic information discrimination) - (not yet codified in U.S. Code):
http://www.eeoc.gov/laws/statutes/gina.cfm
§§ 201(2)(B)(i) and 201(2)(A)(i) of GINA state that the definitions of "employer" and "employee" are the same as found in Title VII. Thus, employers with 15 or more employees are covered by GINA.

Age Discrimination in Employment Act (ADEA) (age discrimination) - 29 U.S.C. § 630(b):
https://www.law.cornell.edu/uscode/text/29/630
"The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year …" This test is the same as for Title VII, except that the number of employees is 20, instead of 15. The definition of "employee" is basically the same as in Title VII.

COBRA (federal law on health benefit continuation for 18 months in most cases) - 26 U.S.C. §4980B(d) and 29 U.S.C. §1161(b):
https://www.law.cornell.edu/uscode/text/26/4980B
https://www.law.cornell.edu/uscode/text/29/1161
COBRA applies to health insurance plans of non-governmental, non-church employers with 20 or more employees. Covered plans are defined in the Internal Revenue Code (Title 26) as follows: "This section shall not apply to (1) any failure of a group health plan to meet the requirements of subsection (f) with respect to any qualified beneficiary if the qualifying event with respect to such beneficiary occurred during the calendar year immediately following a calendar year during which all employers maintaining such plan normally employed fewer than 20 employees on a typical business day, (2) any governmental plan (within the meaning of section 414 (d)), or (3) any church plan (within the meaning of section 414 (e))." Similarly, 29 U.S.C. § 1161(b) provides that continuation coverage under the federal law "shall not apply to any group health plan for any calendar year if all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year." "Employee" is defined in subsection (f)(7) of §4980B, which refers to the definition of "employee" in 26 U.S.C. § 401(c) for ERISA pension plan purposes – that definition includes self-employed individuals who perform personal services for their entities, such as owners of proprietorships, partners of partnerships, and owners of corporate entities. For more on federal COBRA requirements, see the topic "COBRA" in part III of this book.

Family and Medical Leave Act (FMLA) - 29 U.S.C. § 2611(4)(A)(i):
https://www.law.cornell.edu/uscode/text/29/2611
"The term 'employer' ... means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year ... " This test is the same as for Title VII, except that the number of employees is 50, instead of 15. The definition of "employee" is the same as in the Fair Labor Standards Act. However, employees must be "eligible employees" in order to take FMLA-protected leave. "Eligible employee" is defined in § 2611(2) as anyone who has worked for at least twelve months for the employer, has worked at least 1,250 hours during the twelve-month period preceding the leave, works at a facility where at least 50 employees are located within a 75-mile radius, and has a qualifying family or medical leave event, including military exigencies, as defined in § 2612(a). Due to the 1,250-hour requirement, this is one of the few statutes that potentially screen out some part-time employees from eligibility (see also ERISA and the WARN Act).

Worker Adjustment and Retraining Notification Act (WARN) (advance notice of plant closings and mass layoffs) - 29 U.S.C. § 2101(a)(1):
https://www.law.cornell.edu/uscode/text/29/2901
"[T]he term 'employer' means any business enterprise that employs (A) 100 or more employees, excluding part-

time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);" Although the statute does not specifically define "employee", the term "employs" invokes the common-law direction and control test for employment.

Texas Statutes

State Directory of New Hires – Texas Family Code, § 234.101:
http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.234.htm#234.101
Under §234.102 of the Texas law, all employers must report "each newly-hired or rehired employee" to the state directory of new hires.As noted above, the new hire reporting laws on both the state and federal levels have the same basic definitions: "'Employer' has the meaning given that term by Section 3401(d) of the Internal Revenue Code of 1986 (26 U.S.C. Section 3401(d)) and includes a governmental entity and a labor organization, ..." "'Employee' means an individual who is an employee within the meaning of Chapter 24 of the Internal Revenue Code of 1986 (26 U.S.C. Section 3401(d))." Thus, the IRS test for determining a worker's employment status would apply.

Texas Payday Law – Texas Labor Code, Chapter 61 - § 61.001(4):
http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.61.htm#61.001
"'Employer' means a person who: (A) employs one or more employees; or (B) acts directly or indirectly in the interests of an employer in relation to an employee." However, § 61.003 excludes public employers from coverage under that statute. Thus, the Texas Payday Law applies to even the smallest employers in the private sector. "'Employee' means an individual who is employed by an employer for compensation." The test for employment status is the same as the one used for unemployment compensation liability - see Appendix E in the article "Independent Contractors / Contract Labor" for the twenty-factor test used by TWC.

Texas Unemployment Compensation Act (TUCA) - Texas Labor Code, Chapter 201, §§ 201.021(a) and 201.023:
http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.021 and http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.023
The definitions here are almost identical to the definitions for the federal unemployment compensation statutes. "In this subtitle, 'employer' means an employing unit that: (1) paid wages of $1,500 or more during a calendar quarter in the current or preceding calendar year; or (2) employed at least one individual in employment for a portion of at least one day during 20 or more different calendar weeks of the current or preceding calendar year.", or that "is a tax-exempt, non-profit organization under Sections 501(a) and 501(c)(3) of the Internal Revenue Code that employed at least four individuals in employment for a portion of at least one day during 20 or more different calendar weeks during the current year or during the preceding calendar year." In the case of a domestic service employee, the wage amount for liability is $1,000 paid in a calendar quarter (see § 201.027(a)). "Employing unit" is defined in § 201.011(11) as "a person who … has employed an individual to perform services for the person in this state." "Employee" is not directly defined, but the term means anyone who is in "employment", which is defined in § 201.041 as "a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact." The test for employment status is the same as the one used by TWC for payday law coverage - see Appendix E in the article "Independent Contractors / Contract Labor" for the twenty-factor test in question. Thus, a for-profit employer becomes liable for unemployment compensation with even one employee. A non-profit employer needs at least four employees for liability.

Small Employer Health Insurance Availability Act (Texas law on health benefit continuation for six months) - Texas Insurance Code, Sections 1501.002(4, 14):
http://www.statutes.legis.state.tx.us/Docs/IN/htm/IN.1501.htm#1501.002
"'Small employer' means a person who employed an average of at least two employees, but not more than 50 eligible employees on business days during the preceding calendar year and who employs at least two employees on the first day of the plan year. The term includes a governmental entity ..." "'Employee' means an individual employed by an employer.", meaning that the common-law direction and control test for employment applies in this statute. For employers with 20 to 50 employees, the six months of state health benefit continuation coverage begins after the federal COBRA period ends; see 28 T.A.C. § 3.505(b). For more on Texas and federal COBRA requirements, see the topic "COBRA" in part III of this book.

Texas Labor Code, Chapter 21 (same discrimination categories covered by EEOC laws) - § 21.002(8)(A):
http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.21.htm#21.002
"'Employer' means: (A) a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year …" This test is the same as for Title VII on the federal side. The definition of "employee" is also the same as in Title VII.

Employers should pay close attention to changes in Texas and federal laws, because the Legislature and Congress sometimes lower the number of employees needed for coverage under certain laws.

HIRING ISSUES IN UNEMPLOYMENT CLAIMS

Job applications and interviews on the one hand, unemployment claims on the other - what could be further apart? One related to hiring, the other to firing - how could they be related? They are related, more closely than most employers realize! What an employer does during the hiring process very often affects what can happen in a subsequent unemployment claim.

Following is a list of the most common problems related to the hiring process that manifest themselves in unemployment claims. How such claims turn out definitely depends upon the individual circumstances. Consider the following situations explained in detail below:

- **Falsification:** the claimant falsified the job application or lied during the interview
- **Concealment:** the claimant concealed important information during the hiring process
- **Misrepresentation:** the claimant misrepresented his or her qualifications during the hiring process
- **Drug test:** the employer hired the claimant before the results of a pre-employment drug screen came in, then fired the claimant for a positive result
- **Background check:** the employer hired the claimant before the results of a background check came in, then fired the claimant based upon an unfavorable credit or criminal history report
- **Reference check:** the employer hired the claimant prior to checking references, then fired the claimant after receiving an unfavorable reference from a prior employer

Falsification

Falsification of a job application, or lying during an interview, is generally considered disqualifying misconduct. However, that does not apply very easily if the claimant lied in answering an illegal question, i.e., a question that the employer is not supposed to be asking. For instance, the Americans with Disabilities Act makes pre-employment medical inquiries almost impossible. If your job application has a question about prior back injuries, and the applicant lies about that, the lie may not be considered misconduct. The ruling may be that whatever misconduct the claimant committed was excused by the unconscionable act of the employer in asking such an illegal question. Here is a list of questions that are usually illegal:

- Have you ever declared bankruptcy?
- Do you have any disabilities or medical problems?
- Have you ever filed a workers' compensation claim?
- What is your hair and eye color?
- What religious holidays do you observe?
- Give your date of birth:
- What was your maiden name?
- How many children do you have?
- What arrangements have you made for childcare?
- Are you a U.S. citizen?

This is just a short list. There are dozens of ways to violate various job discrimination laws by asking the wrong questions on job applications. Basically, you will have trouble with any question that gives any kind of clue whatsoever to an applicant's race, color, religion, gender, age, national origin, or disability. A good general rule of thumb for an application or interview question is whether it will help you decide whether a certain applicant is the best qualified individual for the position. If it won't help you make that determination, leave it off the application, because it can put you at unnecessary risk of a claim or a lawsuit.

Concealment

Sometimes a job applicant fails to put down complete information in response to questions. Assuming you have screened your application to get rid of illegal or risky questions (see "Falsification"), it will possibly be disqualifying misconduct for an applicant to have concealed information that should have been disclosed. Your chances of winning a UI claim in such a situation are improved if your application contained wording more or less like the following:

> ...I certify that all information I have supplied on this application is accurate and complete. I understand that any wrong or incomplete information on this application can lead to my not being hired or, if I am hired, to my termination from employment if discovered after hire...

If you hire someone and later find out there was more to their story than they told, confront them with the situation prior to termination and ask them to explain in their own words in writing what happened. Then, if termination is still appropriate, you will be able to use their written statement as valuable evidence when defending against an unemployment claim. If they do not want to give you a written statement, at least have a witness present who can testify as to any confessions the employee may give at or near the time of termination.

Claimants who are proven to have lied in order to get a job can be disqualified from benefits, but the burden is on the employer to show that the claimant lied, i.e., intentionally misrepresented the facts in order to deceive the company into

hiring him or her. That can be difficult in a case involving someone who claimed to have certain skills, but turned out not to be as skilled as the employer thought the applicant was. The difficulty lies chiefly in proving that the problem was not a simple mismatch between what the claimant believed his skills to be and the employer's perception of what the claimant was saying about his skills. A common excuse used by a claimant in a case like this is that there was simply a "mismatch", i.e., in a previous similar job, she had similar duties and seemed to satisfy the company, but the new company did things a different way, and she felt lost by the new procedures. How a company interviews for such positions is, of course, up to the company, but a way of minimizing the incidence of mismatches could be to give the interviewees, especially those who claim a certain level of experience or skills, a sample file or task and ask them to demonstrate how they would do the work. Such work-related tests are allowable under EEOC guidelines as long as they are fairly and consistently administered, and it probably would not take very long to sort the candidates out into categories pertaining to their readiness, fitness for training, and suitability for hiring.

Generally speaking, the more closely-related the applicant's information is to a minimum job qualification or job-related hiring preference of the company, the more likely it will be that the employer can prove that concealment of a fact was disqualifying misconduct, and the less closely-related the fact is to a job requirement or hiring preference, the harder it will be to persuade TWC to disqualify the claimant. Examples:

- Information of questionable relevance: "List names, supervisors, and contact information for all of your employers during the past five years." If the listing omits one supervisor's name, or has an incorrect address, that by itself probably will not serve to disqualify the claimant in an unemployment claim. It would really depend upon how well the employer explains the relevance of the omitted information.
- Ambiguous question: "What experience do you have with forklifts?" Answer: "Five years." If the employer hired the applicant on the assumption that he or she was experienced at operating a forklift, but the fact was that the five years had to do with servicing and maintaining forklifts that other employees operated, and the employer fired the new employee for concealing a lack of experience with the actual operation of forklifts, most TWC investigators and appeal hearing officers would fault the employer for having failed to pin the claimant down on exactly what kind of forklift experience resulted from those five years.
- Incomplete question: "During the past seven years, have you ever been convicted of a felony offense? If 'yes', please explain below. (Answering 'yes' will not necessarily bar you from employment, but we would appreciate an explanation of the circumstances.)" Answer: "No". If the reality was that the applicant had no actual felony convictions, but had pleaded "no contest" to a felony charge and had received a sentence of deferred adjudication, and the nature of the offense was such that it would satisfy the EEOC's criteria for a job-relatedness determination, then the company might well consider the applicant's not having mentioned the deferred adjudication issue to be adequate cause for discharging the new employee. However, since the employer's application question asked only about "convictions", instead of including pleas of "guilty" or "no contest" in the same category as convictions, TWC would most likely rule that the claimant's failure to mention the "no contest" plea did not rise to the level of disqualifying misconduct.
- Same situation, but with the inquiry phrased differently: "During the past seven years, have you ever misappropriated the property of another? If yes, please explain." Answer: "No." If the reality is that the applicant had stolen some property, had been caught, and had received deferred adjudication after pleading "guilty" to the charge, he or she might think that the lack of a final conviction allows a "no" answer to such a question. That would be wrong. Most such cases result in a misconduct finding by TWC.

Misrepresentation

Closely associated with falsification and concealment is the problem of misrepresentation. Employers who end up disappointed with new hires often end up feeling that the employees misrepresented their qualifications just to get hired. This can be a very difficult area for an employer, however. In order to prove misconduct in a "misrepresentation" case, an employer must show that the applicant actually had the intent to deceive the employer in some way as to qualifications or background for the job. Not every case in this area involves intent to deceive. Sometimes, an applicant misunderstands a question and answers what she thinks the employer is asking. That is not misconduct. Sometimes, an applicant claims to have expertise that the employer later determines is lacking. That may not always be misconduct. Job applicants are human, and most humans want to think the best about themselves. People sometimes delude themselves as to their true level of expertise. Scenario: the employer may want a secretary who is skilled enough with word processing software to help publish the firm's newsletter and product brochures. The applicant who is asked "do you feel comfortable with using a computer, and are you good with word processing?" may answer "yes" if they know how to do basic computer file management and compose letters on a word processor. Yet, the employer and the applicant have not connected on the question of expertise. Perhaps a better way to ask the question would be:

- How long have you worked with the software we use?
- How comfortable are you in learning new software?
- Have you ever used graphics programs?

- Have you ever designed original graphics?
- Do you know how to merge a database with a form letter and produce a mass mailing?
- Have you ever combined text and graphics to produce a newsletter or brochure?

Once the applicant has explained their qualifications, ask him or her to demonstrate how they would perform the kind of day-to-day task that is important for the job. Seeing the applicant in action will help confirm whether the applicant's expertise matches their words.

Drug Test

This situation arises when a person is hired pending the results of a pre-employment drug screen, but later fired when the results come back positive. This is almost always a fairly easy case for an employer to win, but documentation is of vital importance! To have the best chance of winning a case like this, be sure to have words like the following on the job application:

> ...I certify that I do not have any detectable amounts of prohibited substances in my system at the time of taking my pre-employment drug screen. I understand that if my drug screen turns out positive for a prohibited substance, I will not be eligible for hire, or if I am hired pending the outcome of such a test, I will be subject to immediate termination...

In addition to that wording on the job application, be prepared to submit a copy of your company's drug-free workplace policy; a copy of the claimant's acknowledgment of the policy; a copy of the claimant's consent for testing; a copy of the specific drug test results showing what substances were found, in what concentrations or with what cutoff levels, and what tests were performed on the sample, including confirmatory testing by the GC/MS method; and finally, a copy of the chain of custody of the sample showing who handled the sample at all pertinent times.

Background Check

Employers can win or lose cases that arise when someone is fired on the basis of an unfavorable background check, depending upon the circumstances. Make sure to comply with the Fair Credit Reporting Act, which requires an employer to get an applicant's written authorization prior to having an outside for-profit entity conduct a background check, and further requires an employer to tell an unsuccessful applicant or a discharged employee that the unfavorable report is the reason for the adverse action and to inform the individual of the name and address of the entity furnishing the report. This should be easy to comply with, since an employer is allowed to insist on the applicant signing such an authorization as a condition of submitting an application for employment. If the background report reveals information that the applicant should have supplied on the application or during the interview, but failed to, the employer will probably be able to prove misconduct, assuming that the claimant is unable to furnish a compelling explanation that the report was wrong. If the report has information that the employer did not ask about, the result will probably be that the claimant will win benefits, since the background report will presumably be about past problems of the claimant, not about anything that could be considered misconduct connected with the work from which the claimant was terminated.

Reference Check

In general, employers should make every effort to verify employment history and other references prior to hiring someone. However, that is not always possible. If a person is hired, but later fired because a late reference finally came in, the unemployment claim will probably go in the claimant's favor, unless the claimant falsified or concealed that information or otherwise tried to mislead the employer about it. The reason the claimant will probably win is that the reference will usually be about something bad that happened in the past that is not connected with the claimant's last work. Remember, disqualification for someone who is discharged is only for misconduct connected with the last work, not for something that happened before the claimant was even hired. It is up to an employer to conduct a prompt and thorough check of all information supplied on the application, and to check everything possible prior to hiring a new employee.

INDEPENDENT CONTRACTORS / CONTRACT LABOR

"Contract labor" may be the most widely used misnomer in business today. The issue is really whether a given worker is an employee or an independent contractor. In basic terms, an employee is someone over whose work an employer exercises direction or control and for whom there is extensive wage reporting and tax responsibility. An independent contractor is self-employed, bears responsibility for his or her own taxes and expenses, and is not subject to an employer's direction and control. The distinction depends upon much more than what the parties call themselves.

The Texas Unemployment Compensation Act does not directly define "independent contractor". Instead, it sets forth a broadly inclusive test, known as the "direction or control" or "common law" test, for who is an employee: "'employment' means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the Commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact". By implication, an "independent contractor" would be a person whose services do not meet the above test. To aid in application of the common-law test, TWC has adapted the old IRS twenty-factor test for use by the agency (see Appendix E to this article).

It is important to note that it does not matter that one or both parties may call their arrangement "contract labor". The above definition makes clear that the important consideration is the underlying nature of the work relationship. The law creates a presumption of employment and places the burden for proving otherwise on the employer. It sets forth the primary factor in an independent contractor relationship, namely, the absence of direction and control over the work.

In 2019, TWC adopted a regulation defining "marketplace contractors", a subset of workers who are regarded as non-employees for purposes of unemployment insurance wage reporting and taxes. The new regulation is 40 T.A.C. § 815.134(b), a clarification of how the existing 20-factor test (see Appendix E for this article) relates to "gig economy" workers / marketplace contractors. It applies to those who use digital apps to obtain projects, tasks, or assignments through a "digital network". If the digital network satisfies the three-part definition of a "marketplace platform", and the work relationship meets all nine criteria specified in subsection (b)(2), the worker can be considered an independent contractor with respect to the marketplace platform. The burden of proof is on a company wishing to assert that certain workers are not employees. PEOs and temporary help firms are excluded from the definition of marketplace platforms. The new rule applies only to UI claim and tax liability issues and does not affect definitions of employment for other laws, such as wage and hour, discrimination, and workplace safety statutes.

No less an authority than the United States Supreme Court has established a widely-accepted five-part test, known as the "economic reality" test, that helps establish whether a person is an employee or an independent contractor. In *United States v. Silk*, 331 U.S. 704 (1947), a case dealing with whether an employer owed Social Security taxes on certain workers, the Supreme Court found the following factors important:

(1) the degree of control exercised by the alleged employer;
(2) the extent of the relative investments of the [alleged] employee and employer;
(3) the degree to which the "employee's" opportunity for profit and loss is determined by the "employer";
(4) the skill and initiative required in performing the job; and
(5) the permanency of the relationship.

(quoted from *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987)). Brock, one of the leading cases from the Fifth Circuit explaining independent contractor/employee issues, goes on to state that the "focus is whether the employees as a matter of economic reality are dependent upon the business to which they render service". The same case notes further that "it is dependence that indicates employee status... the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected" that they are employees.

This emphasis on *dependence* and economic reality demands nothing more than a common sense approach. An employee who has nothing to invest in an enterprise beyond the time he puts in and who sells his services to only one "customer", the employer, is economically dependent upon that work. An independent contractor, on the other hand, is not normally dependent upon only one customer, but rather, being in business for herself and with an investment in her own equipment and supplies, has an entire customer base upon which to fall back.

The economic reality test is used by the U.S. Department of Labor and the Social Security Administration and thus is very important for FLSA and Social Security tax purposes. In 2010, DOL issued a notice of proposed rulemaking indicating that it will amend its recordkeeping requirements to require employers to conduct an analysis of any position for which the worker is not counted as an employee, showing that under the economic reality test, the worker is not in the company's

employment. In addition, the company will have to show that it informed each such worker of its analysis and of the worker's rights under the FLSA. Employers would be well-advised to visit www.dol.gov/whd/ often to stay up with developments in this area of the law.

A third way of approaching this problem is called the "ABC" test, which is used by almost two thirds of the states (not including Texas) in determining whether workers are employees or independent contractors for state unemployment tax purposes. In order to be considered an independent contractor, a worker must meet three separate criteria (some states require only that two criteria be met):

(A) The worker is free from control or direction in the performance of the work.
(B) The work is done outside the usual course of the company's business and is done off the premises of the business.
(C) The worker is customarily engaged in an independent trade, occupation, profession, or business.

Under Section 401.012 of the Texas Workers' Compensation Act, "employee" means "each person in the service of another under a contract of hire, whether express or implied, or oral or written," and "includes: (1) an employee employed in the usual course and scope of the employer's business ... ." That term does not include "an independent contractor or ... a person whose employment is not in the usual course and scope of the employer's business." In section 406.121(2) of that law, an independent contractor is defined as "a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:

(A) acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
(B) is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;
(C) is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
(D) possesses the skills required for the specific work or service."

Finally, the Internal Revenue Service uses a so-called "Eleven Factor" test for determining the coverage of various federal employment tax laws. The eleven factors are all based upon the common law, economic reality, and ABC tests and represent their various criteria either reorganized or broken down into more detail.

The Texas Workforce Commission is charged with auditing businesses to ensure that employee wages are properly reported and appropriate taxes paid on such wages. If TWC rules that an employer has failed to properly report all wages and pay taxes, it will assess back taxes and interest. Non-payment of taxes leads TWC to inform the Internal Revenue Service that the non-paying employer is not entitled to the federal tax credit with respect to the wages in question, which in turn can lead to an IRS audit. Finally, since TWC conducts a cross-match of its wage reports with the new hire database of the Child Support Division of the Texas Attorney General's office, an employer that is found to have misclassified a new hire as a non-employee and failed to report the new hire may be liable for a $25 per employee penalty for violating the new hire reporting law (see "New Hire Reporting Laws" in this book for further details). Finally, there is a $200 per employee penalty for contractors and subcontractors on public contracts who misclassify the workers doing the work as independent contractors, if the workers are really employees.

A TWC audit generally begins in one of four different ways. First, a former worker may file an unemployment claim. If no wages were reported for that claimant by the employer, the claim may be disallowed, in which case the claimant will probably appeal. The Tax Department will investigate, and such an audit has the highest priority. Second, a competitor or someone else may report that an employer is misclassifying its workers. The Tax Department will audit the employer's entire workforce and will hold the source of its information confidential. Third, TWC may perform a random audit of the employer as part of its goal of auditing 1% of all businesses every year. Fourth, TWC may decide to target a specific industry or geographical area. For instance, the hair salon industry was targeted in that way back in the late 1980s due to a high number of reports both from within the industry and from ex-workers.

Employers often confront these issues over short-term or as needed workers performing services for them. Any employer using what it considers to be "contract labor" should ask itself some questions up front:

Is the service provided by the individuals in question essential to, and an integral part of, the service the employer provides to the public? The less able an employer is to offer its primary service without the help of the people whose status is at issue, the more likely it is that they will be considered employees. Consider this: if certain services are so essential to a business that it will stand or fall based upon how well those services are performed, the business will naturally want to exercise enough direction and control over the services to ensure they are good. That amount of control can make a company an employer of such workers.

What opportunity for profit or risk of loss is there for the worker? What kind of investment, other than his or her time, does the worker have in the enterprise? An employee is paid for her time. She would not be expected to provide her own workplace, materials, tools, and supplies, or otherwise to invest her own money in the business. An employee who makes a costly mistake can be fired, but cannot legally be forced to work without pay. An independent contractor, on the other hand, is an independent businessperson with expenses of his or her own. He will be expected to provide or purchase everything he needs to do the job. If he fails to satisfy the customer, he would be required to redo the work for no additional compensation, or else face the risk of non-payment by the customer. These things create the opportunity for profit or loss.

What is the compensation arrangement? Is the compensation negotiated, or is it imposed by the employer? A true independent contractor's main concern is her own bottom line, not that of the employer. Since she is responsible for her own overhead, including the hiring of any helpers she may need, there is always an element of negotiation in any bona fide contract for services. Usually, but not always, an independent contractor is paid by the job. It is up to him to figure out how much he needs to finish the job at a profit. If he miscalculates, the loss is his.

Does the individual provide his services to the public at large? Does he advertise his services in newspapers, the Yellow Pages, or specialized journals? If a person holds herself out to the public as self-employed and available for work for any customer with whom she can negotiate an acceptable price, she is likely to be held an independent contractor. The more the worker advertises, the more it is apparent that she is in business for herself, since an independent business stands or falls based upon its business development efforts.

Is there a non-competition agreement? Generally, non-competition agreements and independent contractors do not go hand-in-hand. Such a provision in a contract is strongly indicative of an employment relationship, chiefly because it proves that the services in question are directly related to the primary service provided by the employer. If those services were not related, there would be no "competition" and thus nothing against which to guard. The power to keep a person from pursuing his or her own business interests and to force a person to sign such an agreement is typical of the power wielded by employers over employees.

Does the worker provide his services on a continuous basis? The more long-term, continuous, and exclusive the relationship is, the more likely it is to be employment. Independent contractors, on the other hand, generally perform their work one job at a time and are paid on the same basis.

Is the worker required to provide services under the employer's name? Does she represent herself to the public as being an employee of the employer? On whose behalf are the services performed? If the general public would perceive the person to be a representative of the employer because of business cards, uniforms, or other advertising, this would be more indicative of an employee than an independent contractor. An employee performs services on behalf of the employer for customers of the employer. An independent contractor performs services on her own behalf for her own customers.

Does the employer retain the right to dictate how the work should be done? Is the worker required to work a certain schedule, to notify the employer if he will not come to work, or to get the employer's approval for any helpers who are hired? When an employer contracts for outside services, it is normally interested only in the end result, not in the details of how the contractor performs the work. The employer should have no interest in how the independent contractor allocates either his time or that of his helpers. By the same token, the employer would have no interest in the contractor's right to hire his own helpers, beyond the right to contractually specify that anyone providing services on a project must be properly licensed under whatever laws apply to the work.

The above points are all general factors, but there are many details that can be helpful in determining whether given workers are independent contractors or employees:

Cash flow - how the money gets from the customer or the client to the worker is important. If the client pays the employer in general, and the employer pays the worker either by the hour, by salary, or by commission, the worker looks more like an employee. If, on the other hand, the employer pays the contract price for work completed, the worker would appear to be an independent contractor. Alternatively, if the client pays the worker, and the worker remits an agreed-upon fee or percentage to the employer, that would look more like an independent contractor situation. If the worker merely collects the pay from the client, passes it along to the employer as an agent would, and receives a share of it back, he would appear more like an employee than an independent contractor.

"Rent" - closely related to the cash flow issue is that of the compensation the worker gives the employer for the use of its facilities or equipment. Keep in mind that the opportunity for profit or loss is an important hallmark of an independent contractor. An employer normally provides its employees with everything needed to do their work. A business contracting with an independent contractor normally expects the contractor to supply what is needed to accomplish the project. If the worker uses the employer's facilities and equipment at

no cost, he looks like an employee. If the worker must pay some negotiated amount in rent or usage fees regardless of the contract price or of how much he takes in from customers, that looks very much like the kind of profit or loss opportunity any independent business that rents commercial space or equipment would have. It is important to note that this kind of compensation does not have to be separately invoiced or structured as "rent" in order to be a factor in the profit or loss equation. The price for the work in the underlying contract can simply be adjusted to reflect the reasonable value of the employer's assets used by the contractor in performing the work. Any such adjustments should be specifically noted in the contract.

Hours of work - clearly, any worker who is told to work certain hours does not have control over her own schedule, an essential component of the profit or loss equation. If the worker has a key to the facility and can work during hours outside the normal operating times of the employer, she will look more like an independent contractor. If an independent contractor wants to take time off, that should be up to her. If she can do that and still meet her contract obligations, that should not matter to the employer. That is not to say that the contract can not specify that the contractor will be available within certain guidelines for purposes of consultation or progress checks. However, the more control the employer exercises over the hours of the worker, the greater the risk is that the situation will be considered employment.

Assignments - closely related to the issue of hours of work is that of how the work comes to the workers. A worker receiving assignments from the employer as they come up is likely to be indistinguishable from a regular employee. An independent contractor, having been engaged to perform a specific job or project, derives his "assignments" from the terms of the contract and determines what his daily tasks will be in fulfillment thereof.

Insurance - if the employer provides liability insurance for the workers, the situation would likely be held to be employment, since the workers would not have ordinary business liability as a risk of doing business.

Advertising and listings - the employer should not be providing advertising for the workers. Independent businesspeople provide their own advertising, such as business cards, business stationery, Yellow Page listings, brochures, and so on. In addition, workers who are independent contractors should have their own listings in the phone book, if not also separate numbers. If they are listed in ads and directories as being associated with a particular business, the risk is that they may be considered employees, rather than self-employed businesspeople.

Benefits - an employer who provides benefits such as vacation and sick leave, health insurance, bonuses, or severance pay will almost inevitably be considered the employer of the workers. The power to award benefits carries with it the power to deny them, and that kind of power is exercised by employers. Think about it: a business that contracts to have its roof fixed would not be telling the roofers whether they could or could not go on vacation. It would be up to the roofing contractor to decide whether workers could go on vacation and still have the roof fixed by the contract deadline. By the same token, the business would not be extending its employee health plan to the roofing company's workers. The same considerations apply to any industry.

Termination of the relationship - a business that has the right to fire a worker at will is generally considered the employer of that worker. An independent contractor will usually have some kind of contractual recourse if fired before completion of the work, and the contract will generally specify conditions that must be met if the contract is to be cancelled.

These are the main types of factors TWC will consider when determining whether certain workers are employees or independent contractors. TWC's official test is a variation of the old IRS twenty-factor test (see Appendix E of this article). No one factor will determine the entire case, and not every case will involve all the factors discussed herein. Each case is decided on an individual basis after weighing all of the factors present. The bottom line in any case in this area will be whether the facts show that the worker in question is in effect an independent business entity in a position to make a profit or loss based upon how he manages his own enterprise. Employers in doubt over any of their workers are encouraged to request a ruling on the status of such individuals from TWC's Tax Department and to call their local TWC tax office for further information.

APPENDIX A

Significant Differences Between Employees and Independent Contractors in Fields Relating to Consultation Services

Employer/Employee

- Worker asserts he or she is an employee or seems unsure about such status
- Worker has no DBA or sole proprietorship, does not own his or her own company, has no client base, and/or has no business cards or independent advertising
- Worker performs services on an ongoing basis for the alleged employer
- Worker's services are directly integrated into the primary service supplied by the employer
- Pay is by hourly wage or salary, rather than by the job
- Pay is unilaterally set by the alleged employer
- Alleged employer supervises the worker in the details of the projects or assignments
- Alleged employer provides the facilities, tools, equipment, and/or supplies for the work
- Alleged employer provides office space and clerical help to the worker at no cost
- Worker uses a company e-mail address
- Worker requires training and periodic supervision
- Worker is subject to routine quality control checks
- Worker is required to furnish regular reports to the alleged employer
- Worker has no right to engage assistants to help him or her perform the contract services, or if the worker hires assistants, the alleged employer pays their wages
- Alleged employer reimburses the worker for expenses associated with the job
- Worker is covered by all or part of the alleged employer's benefits plan and liability insurance
- Worker does not determine the hours or the details of the work

Independent Contractor

- Contractor asserts he or she is self-employed, has at least a DBA, a sole proprietorship, or some kind of corporate entity, and generally maintains his or her own client list or customer base
- Contractor is usually hired locally where the alleged employer performs the overall project
- Contractor performs a service the alleged employer is not qualified or able to supply
- Work is generally performed at client's site and/or contractor's office/home
- Tools and equipment are furnished by contractor or client
- Supplies are furnished by contractor without reimbursement from alleged employer
- Contractor is highly skilled and requires no training or supervision
- Alleged employer and client are interested only in the outcome of the work, not in the details of how the work is done
- Contractor has some voice in determining the hours of performing the work
- Work is not on a continuous basis, but rather on a job to job basis
- Pay is generally by the job and is negotiated with the contractor
- Contractor invoices the alleged employer, which in turn pays the contractor's company or DBA
- Contractor does not have an e-mail address under employer's e-mail domain name
- Contractor has the right to hire assistants and to pay them out of his or her own pocket
- Contractor is not reimbursed by the alleged employer for expenses
- Contractor is not covered by the alleged employer's benefit plan
- Contractor maintains his own errors and omissions liability insurance
- Contractor is not required by the alleged employer to submit performance, cost, or progress reports other than invoices or perhaps work or progress reports verified and signed by the employer's clients

APPENDIX B

TEXAS WORKFORCE COMMISSION TAX AUDITS AND RULE 13 HEARINGS

As a taxing authority, the Texas Workforce Commission must carry out several responsibilities with regard to the state unemployment tax imposed on employers of Texas employees. Among the more important of those responsibilities are keeping track of all wages paid, reports submitted, chargebacks from benefits paid to former employees, and taxes paid by each employer; using those data to calculate employers' individual tax rates; initiating the remittance of the taxes to the Texas unemployment insurance trust fund so that they can be used to pay unemployment benefits to eligible claimants; auditing selected employers' tax accounts to determine compliance with the wage reporting and unemployment tax laws; and supporting the work of TWC's Regulatory Integrity Division in collecting delinquent taxes and enforcing other aspects of the unemployment tax laws. With the compliance tools of the Texas Unemployment Compensation Act in mind (interest and penalties on unreported wages and unpaid taxes; notice of assessment; liens; bank freeze and levy; warrant hold; posting of a bond to continue employing workers in Texas; injunction; and even receivership), it is understandable that an employer might be concerned if it receives notice of an audit from the Tax Department. Fortunately, the most that ever happens with the vast majority of compliance problems is the imposition of a simple interest charge on unpaid taxes, or else a minor penalty for late submission of a wage report. This paper explains the basics of the audit process.

A TWC tax audit generally begins in one of four different ways:

1) A former worker may file an unemployment claim. If no wages were reported for that claimant by the employer, the claim may be disallowed, in which case the claimant will probably appeal. The Tax Department will investigate, and such an audit has the highest priority; it must be completed within 30 days.
2) A competitor or someone else may report that a company is misclassifying its workers. The Tax Department will audit the company's entire workforce and keep the source of its information confidential.
3) TWC may perform a random audit of the employer as part of its goal of auditing about 1% of all businesses every year.
4) The agency may select a business for audit based upon specific criteria that include size, tax rate, decrease in the number of employees, and the audit history of the industry.

An employer receiving a notice that a tax audit will occur should try not to panic. The main purposes of an audit are to review an employer's payroll records and to try to discover misclassified wages that should have been reported and taxed. Many audits result in no finding of anything wrong and are finished within a few hours, depending upon how well the employer has been keeping records of workers and payments to workers. The process may take longer if large numbers of workers are involved, or if the employer's records are incomplete or inconsistent.

Certain records must be kept under TWC statutes and regulations. Business information required to be maintained by each employing unit includes:

1) name and address of each employing unit
2) address of the main (central or HQ) office of the business
3) addresses of the employing unit's branches and divisions in Texas
4) names and addresses of owners, partners, officers, and/or directors
5) address where business records are located
6) in the case of a group account, the address of the group representative

Records that must be kept on individuals performing services include:

1) name, address, and Social Security number
2) dates of employment and state or states where service is performed
3) wages paid in each pay period
4) dates on which wages are paid
5) remuneration in forms other than cash (this is also important in Texas Payday Law cases)
6) pay periods during which the individual works less than full-time
7) job descriptions specifying duties of each worker
8) records on workers other than "employees" (statutory non-employees, independent contractors)

Tax auditors sometimes ask for several different kinds of documentation, depending upon the nature and purpose of the audit. More documentation might be required if one of the questions to be settled is the nature of the employing unit itself, since there are some differences in taxes between corporations and sole proprietorships and partnerships. There is no real alternative to supplying the documentation. If documentation needed for a decision is not available, then the tax examiner has the authority to base the decision on the best evidence that exists, which may or may not result in a decision you like.

Specific records that an auditor might search include:

- All cancelled checks
- Time cards
- Cash vouchers
- Cash disbursement journal
- Petty cash
- Individual earnings records
- Check register
- Payroll journal
- TWC tax reports
- IRS Forms 940, W-3, and W-2
- General ledger
- IRS Forms 1099, 1096 and Master vendor files
- Chart of accounts
- Profit and loss statement
- Corporate minutes
- Corporate charter
- Federal tax return (1040, 1120, 1120S, etc...)
- Any other records which may reflect services

Some employers reading an audit notice feel as if TWC is overreaching by calling for all of those records to be made available for review. The problem is that payments to workers show up in a huge variety of places other than normal payroll records, and many of the records listed above give clues as to the status and duties of people whose names appear in the documents. Some employers worry that if they allow the TWC field tax examiner to see confidential business records, their sensitive business information will be at risk of exposure, whether through misconduct, a Public Information Act request by a competitor or newspaper, or negligence. State law prescribes serious penalties for any state employee who intentionally releases such information to unauthorized parties, and further, any employee who did such a thing would be subject to discharge. The Public Information Act does not cover an employer's business records that are furnished in connection with unemployment tax or benefit laws, so such information could never be released under the open records law. Finally, several procedures are in place to discourage accidental or negligent release of an employer's confidential business information - for example, that is why an employer must furnish suitable proof of identity and authorization in order to receive information about its tax account. Negligent release of such information is extremely unlikely and, to this author's knowledge, has never occurred.

As a practical matter, a tax examiner will not ask to see all such records. Most audits are completed within a few hours; some last less than two hours. Audits are generally short if the employer has well-organized documentation and is prepared to give accurate answers to questions about records and those who performed services for the company.

Here are the main things to remember for a TWC tax audit:

- Don't panic!
- Read the audit notice carefully.
- Organize your records – get them all located and ready to show.
- Determine who can speak for the employer.
- If there's a time conflict, notify the agency immediately and get it rescheduled.
- During the audit itself:
  - Answer only the questions asked.
  - Show only the documentation requested.
  - Do not initiate "chatting".
  - Do not volunteer information that has not been requested.
  - Practice the four "Cs": comply with requests, be calm and civil, and control any urges to do the examiner's job.

If the tax audit results in a ruling that a claimant is entitled to additional wage credits from your company, and you disagree, you may appeal such a ruling to the Appeal Tribunal through the normal unemployment appeals process, since that kind of case has to do with an unemployment claim. If it is any other type of audit, and the ruling is unfavorable for your company, you may file a different kind of appeal under Commission Rule 13 (see below).

An audit may result in a finding that back taxes and interest are owed. In such a case, installment payment plans are available simply by asking the Tax Department.

Employers do not have to simply wait to be audited. It is usually better to find out sooner rather than later if something is wrong. Employers who are in doubt about the status of their workers may request a Form C-12 from their local TWC tax office. After the completed form is submitted, a tax examiner will review the matter and make a ruling one way or the other.

An employer who disagrees with the ruling in any way has the right to request an appeal hearing under Commission Rule 13 (40 T.A.C. § 815.113). Such appeals may be requested via mail, fax, hand-delivery, or e-mail. As long as the employer alleges some disagreement with a Tax Department action other than a tax rate calculation or something similar that is based solely on a mathematical calculation, the appeal will result in a full evidentiary hearing before a hearing officer. Such hearings are usually held over the phone via teleconference. The employer may present witnesses, documentation and other types of exhibits, affidavits, legal briefs, and other forms of evidence that are relevant to the issue in dispute. TWC may present an employee of the Tax Department as an expert witness. The hearing officer places witnesses under oath and records their testimony. Any exhibits offered by the employer should be sent in advance to the hearing officer so that everyone can view them as they are offered and discussed. Procedurally, a Rule 13 hearing is an informal administrative proceeding

designed to encourage a full discussion of the issues. Since the format for the hearing does not substantially differ from the format used by TWC for appeals of unemployment and wage claims, the Hearing Officer Manual on TWC's Web site at http://www.twc.state.tx.us/ui/appl/app_mant.html can be a useful basic reference, and many specific procedures relating to Rule 13 hearings are outlined at http://www.twc.state.tx.us/ui/sphrgs/commrule13.html. After concluding the hearing, the hearing officer forwards the evidence developed at the hearing to the Commissioners, along with a recommendation as to the outcome. The Commissioners then vote on the case at a regular docket meeting.

If an employer disagrees with a tax rate, or the amount of interest or penalty, but alleges nothing other than a general statement that the rate, interest, or penalty is excessive, it is likely that no hearing will be held. Rather, the Commission will issue an on-the-record decision explaining how the disputed amount was calculated and what statutes were involved.

With either type of Rule 13 decision, if the employer is still dissatisfied, it can file a motion for reconsideration with the Commission, the deadline for which is the thirtieth calendar day following the date of mailing of the first Commission decision (if the deadline falls on a weekend or a national or state holiday on which TWC offices are closed, the deadline is extended until the next business day following the deadline).

There are two ways the case can be appealed to a court. One is by not paying the tax owed and waiting for TWC to sue, which TWC must do within three years, or else the tax debt can no longer be collected. The other is by paying the amount in dispute, petitioning for a refund, having the petition denied, and then suing TWC for its failure to refund the money.

Either way, the employer will have the chance to make its arguments in court for the proposition that certain workers were really independent contractors, or that whatever other determination the Tax Department made was erroneous in some way.

APPENDIX C

INDEPENDENT CONTRACTOR CASE STUDIES FROM TEXAS WORKFORCE COMMISSION APPEALS

TWC Case 1 - Facts:

The employer failed to report wages for a worker who had been hired to repair and otherwise maintain appliances sold by the employer's company. The claimant's initial claim was disallowed due to lack of wage credits, and the claimant successfully appealed to the Appeal Tribunal, which ruled that the claimant was an employee whose wages should have been reported to TWC. At the hearing, the employer testified that it based its belief that the claimant was an independent contractor on the facts that the claimant furnished some of the tools for the work, used his own truck, and paid for his gas. However, the evidence also showed that the claimant worked only on jobs secured by the employer, charged fees set by the employer, and that customer payments went not to the claimant, but to the employer. Also, the employer essentially paid for the claimant's work expenses. After losing at the Appeal Tribunal level, the employer appealed to the Commission, but lost again, all three Commissioners voting that the claimant was an employee, rather than an independent contractor.

Analysis: The evidence as a whole showed that the employer had sufficient control over the claimant to be considered his employer. In any case involving the issue of whether a given worker is an independent contractor or an employee, TWC looks for evidence that the worker is in effect an independent business entity in a position to make a profit or loss based upon how he manages his own enterprise. Several factors show that this claimant was not in such a position.

- The employer either determined or was responsible for almost every factor in the profit or loss equation. The employer determined the claimant's pay rate and paid him on an hourly basis. A true independent contractor would negotiate his own compensation with his own customers and be paid on a per-job basis.
- The claimant worked on jobs secured by the employer. An independent contractor would be responsible for securing his own customers.
- The claimant supplied some of his tools, used his own truck, and paid for his gas, but the employer paid him an extra hourly amount to compensate for those expenses. A true independent contractor would pay his own costs of doing business.
- The employer supplied some tools and apparently all of the major equipment needed for the work, and it did not charge the claimant for the use of those items.
- In addition, the materials used for the jobs on which the claimant worked were supplied by the employer. An independent contractor would be responsible for supplying all of the tools, equipment, materials, and supplies for the job.
- The employer determined the fees paid by the customers. A true independent contractor would set the price to be charged to the customers.
- The customers paid the employer for the work done. If the claimant had been an independent contractor, the customers would have paid him.
- If additional help was needed on a particular job, the employer hired and paid additional laborers. An independent contractor would be the one to decide whether additional help would be hired and how much to pay them.
- The claimant performed his services under the employer's name. A true independent contractor would perform the work under his own business name.
- The services performed by the claimant were directly integrated into the employer's business. Anytime a worker's services are so closely connected to those offered by a company, the company is presumed to exercise enough direction and control over his work to ensure the quality thereof.

The only aspect of the work relationship over which the claimant had a significant amount of control was that of his hours. The claimant usually determined the time of his work by agreement with the employer's customers. However, that small factor is inconsequential when taken together with the other factors discussed above.

This claimant was not in business for himself. For the reasons noted above, the claimant was an employee, and his wages should have been reported as such to TWC.

TWC Case 2 - Facts:

The employer was an accounting firm. The claimant was hired to perform contract bookkeeping services for the employer's clients who needed such services. He worked only on jobs assigned to him by the employer and was paid a commission for the work; the commission was based on fees paid by the clients to the employer, and the employer determined the level of fees. The claimant was paid on a weekly basis. He used the employer's office space, equipment, and supplies. The employer reviewed the claimant's work and returned faulty work to the claimant for corrections before delivering the work to clients.

The claimant's initial claim had been disallowed due to insufficient wage credits; the claimant appealed, and the Appeal Tribunal awarded wage credits, finding that the claimant had been an employee of the employer. The employer appealed, and the Commission unanimously ruled that the Appeal Tribunal decision was correct.

Analysis: This claimant was not an independent contractor. Several factors lead to that conclusion:

- The claimant's work was directly integrated in the primary service of the employer. A business hires an independent contractor in order to get expertise it is not in a position to supply for itself, and this business was definitely in a position to supply bookkeeping services, since it was an accounting firm.
- The claimant did not secure his own jobs, as a true independent contractor would, but rather worked on assignments given to him directly by the employer.
- The claimant had no control over the factors of the profit and loss equation, since he had no substantial investment in an independent business enterprise, but rather used the employer's facilities, supplies, and equipment. In addition, the claimant had no role in setting the price for his work or the level of his commission pay, as a true independent contractor would.
- Finally, the employer checked the claimant's work for accuracy and returned mistakes to the claimant for corrections. In a true independent contractor situation, the "employer" (who would thus be the independent contractor's customer) would be in no position to make such judgments about the accuracy of details of the contractor's work. The fact that the employer was so concerned about the accuracy of the claimant's work before releasing it to the clients strongly indicates that the employer felt it had the primary responsibility for the work in question. A true independent contractor would not only be delivering his work directly to his clients, but would also have the primary responsibility and liability for the work.

Conclusion: this claimant was an employee - the wages should have been reported.

TWC Case 3 - Facts:

The claimant was paid on an hourly basis to serve as a contract office manager; her main duties were to train the employer's employees how to do their jobs, monitor the quality of their work, and to perform clerical duties in the office. The claimant had signed a written agreement specifying that she was an independent contractor. The claimant's initial claim had been disallowed for lack of wage credits, but the Appeal Tribunal ruled that the claimant was an employee. The Commission upheld the hearing officer's ruling in a unanimous decision.

Analysis: An hourly pay rate is strongly indicative of an employment relationship, whereas most independent contractors are paid by the job or project. In this case, the claimant had no opportunity for a profit or loss, since all materials and facilities were supplied by the employer. Since the claimant's job was to train the employer's employees and monitor the quality of their work, she essentially functioned as their supervisor - it is difficult to imagine a job function that would be more directly integrated into the employer's business. In addition, the fact that the claimant also performed a number of routine clerical tasks associated with the employer's business raises a presumption that she was an employee. The fact that the claimant had agreed in writing that she was an independent contractor is irrelevant, since the facts show that she was an employee. The claimant's wages should have been reported as wages from employment.

TWC Case 4 - Facts:

The employer's company was a car rental agency in a major city, with locations downtown and at area airports. The claimant performed services as the driver of a shuttle van for the employer under a written contract specifying that he was an independent contractor. He was paid a set rate per mile plus an hourly rate for waiting time; paydays were at regular intervals. There was no evidence that he had negotiated the pay rate. He worked only on assignments given to him by the employer and did all work in the employer's name. He had to be on 24-hour call. He was told by supervisors at various levels that he would be fired if he refused to make runs as directed by the employer. The claimant worked for the employer on a continuous basis for about a year.

Analysis: The claimant was an employee based upon the following factors:

- The claimant did not negotiate the compensation for the work.
- The claimant worked only on assignments given to him by the employer, and the assignments involved the employer's customers; a true independent contractor would have received his assignments from his own customers.
- Unlike independent contractors, the claimant had no control over his own time; he had to be on 24-hour call, effectively preventing him from any attempts at developing his own business.
- The claimant performed the services in the employer's name - if he had had his own company, he would have performed the work under his company's name.
- Just like any employee, he worked for a pay rate imposed by the employer, instead of negotiating his own compensation.
- The repeated warnings by the employer that it would fire the claimant for refusal to make runs as instructed is conclusive evidence that the employer exercised direction and control over the services performed by the claimant.
- The claimant's services were directly integrated into the primary service offered by the employer, indicative of an employment relationship.

In view of the above facts, the written agreement that the claimant was an independent contractor had no effect concerning this employer's legal obligation to report the claimant's wages and pay the appropriate state UI tax.

APPENDIX D

INDEPENDENT CONTRACTOR TEST INTERNAL REVENUE SERVICE

IRS Independent Contractor Test

The IRS formerly used what has become known as the "Twenty Factor" test. Under pressure from Congress and from representatives of labor and business, it has recently attempted to simplify and refine the test, consolidating the twenty factors into eleven main tests, and organizing them into three main groups: behavioral control, financial control, and the type of relationship of the parties. Those factors appear below, along with comments regarding each one (source: IRS Publication 15-A, 2010 Edition, page 6; available for downloading from http://www.irs.gov/pub/irs-pdf/p15a.pdf). Another good IRS resource for understanding the independent contractor tests is at http://www.irs.gov/businesses/small/article/0,,id=99921,00.html.

Behavioral control

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of—

- *Instructions the business gives the worker.* An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:
  - When and where to do the work
  - What tools or equipment to use
  - What workers to hire or to assist with the work
  - Where to purchase supplies and services
  - What work must be performed by a specified individual
  - What order or sequence to follow

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

- *Training the business gives the worker.* An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- *The extent to which the worker has unreimbursed business expenses.* Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services they perform for their business.
- *The extent of the worker's investment.* An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.
- *The extent to which the worker makes services available to the relevant market.* An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.
- *How the business pays the worker.* An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.
- *The extent to which the worker can realize a profit or loss.* Since an employer usually provides employees a workplace, tools, materials, equipment, and supplies needed for the work, and generally pays the costs of doing business, employees do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss.

Type of relationship

Facts that show the parties' type of relationship include:

- *Written contracts describing the relationship the parties intended to create.* This is probably the least important of the criteria, since what really matters is the nature of the underlying work relationship, not what the parties choose to call it. However, in close cases, the written contract can make a difference.

- *Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.* The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.
- *The permanency of the relationship.* If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.
- *The extent to which services performed by the worker are a key aspect of the regular business of the company.* If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

Former IRS Twenty-Factor Test

The previous twenty-factor test used by the IRS can be seen in the test officially adopted by the Texas Workforce Commission, the agency which enforces the state unemployment tax in Texas (see Appendix E of this article). That test may be found on the Internet at http://www.texasworkforce.org/ui/tax/forms/c8.pdf. Employers may also request a copy in printed form by asking for Form C-8 from "Texas Workforce Commission, Tax Department, 101 E. 15th Street, Austin, Texas, 78778".

There is a "safe harbor" rule in Section 530(a) of the Revenue Act of 1978 that may allow some companies to classify certain workers in close cases as independent contractors, even if they might be considered employees under the IRS eleven-factor test shown here, as long as such a classification is consistent with the industry practice for such workers, or a previous IRS audit has found that such workers are not employees, or an IRS ruling or opinion letter supports the classification in question, and the worker has been treated all along as an independent contractor. The important thing to remember is that TWC takes the position that the agency is not bound by the safe harbor rule or by any particular ruling that IRS makes under the federal law, reasoning that TWC must follow its own specific Texas statute, Section 201.041 of the Texas Unemployment Compensation Act, which provides the "direction and control" test explained at the beginning of this article.

Do not underestimate the difficulty of applying these standards to specific individuals performing services. In doubtful cases, always consult a knowledgeable labor and employment law attorney.

APPENDIX E

TWC INDEPENDENT CONTRACTOR TEST

(The following version of Form C-8 is identical in content, but not in format, to the Form C-8 adopted by the Texas Workforce Commission and published in the Texas Register as part of the Payday Rules. Link: http://info.sos.state.tx.us/fids/200700686-1.pdf.)

EMPLOYMENT STATUS – A COMPARATIVE APPROACH

Under the common law test, a worker is an employee if the purchaser of that worker's service has the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done. Control need not actually be exercised; rather, if the service recipient has the right to control, employment may be shown.

Depending upon the type of business and the services performed, not all of the twenty common law factors may apply. In addition, the weight assigned to a specific factor may vary depending upon the facts of the case. If an employment relationship exists, it does not matter that the employee is called something different, such as: agent, contract labor, subcontractor, or independent contractor.

1. INSTRUCTIONS:

An Employee receives instructions about when, where and how the work is to be performed.

An Independent Contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work.

2. TRAINING:

Employees are often trained by a more experienced employee or are required to attend meetings or take training courses.

An Independent Contractor uses his or her own methods and thus need not receive training from the purchaser of those services.

3. INTEGRATION:

Services of an Employee are usually merged into the firm's overall operation; the firm's success depends on those Employee services.

An Independent Contractor's services are usually separate from the client's business and are not integrated or merged into it.

4. SERVICES RENDERED PERSONALLY:

An Employee's services must be rendered personally; Employees do not hire their own substitutes or delegate work to them.

A true Independent Contractor is able to assign another to do the job in his or her place and need not perform services personally.

5. HIRING, SUPERVISING & PAYING HELPERS:

An Employee may act as a foreman for the employer but, if so, helpers are paid with the employer's funds.

Independent Contractors select, hire, pay, and supervise any helpers used and are responsible for the results of the helpers' labor.

6. CONTINUING RELATIONSHIP:

An Employee often continues to work for the same employer month after month or year after year.

An Independent Contractor is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work.

7. SET HOURS OF WORK:

An Employee may work "on call" or during hours and days as set by the employer.

A true Independent Contractor is the master of his or her own time and works the days and hours he or she chooses.

8. FULL TIME REQUIRED:

An Employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the Employee's time.

A true Independent Contractor cannot be required to devote full-time service to one firm exclusively.

9. LOCATION WHERE SERVICES PERFORMED:

Employment is indicated if the employer has the right to mandate where services are performed.

Independent Contractors ordinarily work where they choose. The workplace may be away from the client's premises.

10. ORDER OR SEQUENCE SET:

An Employee performs services in the order or sequence set by the employer. This shows control by the employer.

A true Independent Contractor is concerned only with the finished product and sets his or her own order or sequence of work.

11. ORAL OR WRITTEN REPORTS:
An Employee may be required to submit regular oral or written reports about the work in progress.
An Independent Contractor is usually not required to submit regular oral or written reports about the work in progress.

12. PAYMENT BY THE HOUR, WEEK, OR MONTH:
An Employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week.
An Independent Contractor is normally paid by the job, either a negotiated flat rate or upon submission of a bid.

13. PAYMENT OF BUSINESS & TRAVEL EXPENSE:
An Employee's business and travel expenses are either paid directly or reimbursed by the employer.
Independent Contractors normally pay all of their own business and travel expenses without reimbursement.

14. FURNISHING TOOLS & EQUIPMENT:
Employees are furnished all necessary tools, materials, and equipment by their employer.
An Independent Contractor ordinarily provides all of the tools and equipment necessary to complete the job.

15. SIGNIFICANT INVESTMENT:
An Employee generally has little or no investment in the business. Instead, an Employee is economically dependent on the employer.
True Independent Contractors usually have a substantial financial investment in their independent business.

16. REALIZE PROFIT OR LOSS:
An Employee does not ordinarily realize a profit or loss in the business. Rather, Employees are paid for services rendered.
An Independent Contractor can either realize a profit or suffer a loss depending on the management of expenses and revenues.

17. WORKING FOR MORE THAN ONE FIRM AT A TIME:
An Employee ordinarily works for one employer at a time and may be prohibited from joining a competitor.
An Independent Contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule.

18. MAKING SERVICE AVAILABLE TO THE PUBLIC:
An Employee does not make his or her services available to the public except through the employer's company.
An Independent Contractor may advertise, carry business cards, hang out a shingle, or hold a separate business license.

19. RIGHT TO DISCHARGE WITHOUT LIABILITY:
An Employee can be discharged at any time without liability on the employer's part.
If the work meets the contract terms, an Independent Contractor cannot be fired without liability for breach of contract.

20. RIGHT TO QUIT WITHOUT LIABILITY:
An Employee may quit work at any time without liability on the Employee's part.
An Independent Contractor is legally responsible for job completion and, on quitting, becomes liable for breach of contract.

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(Source: 40 T.A.C. § 821.5, adopted to be effective June 1, 1998, as published in the Texas Register, May 29, 1998, 23 TexReg 5732.)

JOB REFERENCES AND BACKGROUND CHECKS

Chapter 103 of the Texas Labor Code (https://statutes.capitol.texas.gov/Docs/LA/htm/LA.103.htm) protects from defamation liability an employer who releases information about a current or former employee to a prospective new employer, unless "the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed." The question that most employers have is how to put the law into practice. Following are some practical tips for how to avoid liability and for how not to tempt employees to try to file lawsuits.

Point 1: Be Careful Over The Phone

As a general rule, it is not a good idea to give job reference information over the phone if someone "cold-calls" you, unless you are absolutely certain who is calling and why. The reason is that you do not know who is calling and, more importantly, why they are calling. The person could be a representative of a prospective new employer, but they could just as easily be a private investigator hired by the ex-employee to see if you say something bad about their client, a debt collector trying to track your former employee down, a stalker or identity thief, a disgruntled ex-spouse or significant other, or even a nosy neighbor. A good general practice is to respond to calls about employees with something like "I'm sorry, but we do not release information about current or former employees over the phone. However, we will be glad to furnish any information that your applicant authorizes us in writing to release to you." Then, suggest that the caller get the applicant to sign a release/authorization form like the one below, or else the sample form in the section of the book titled "The A to Z of Personnel Policies", and send it to your company.

Point 2: Just the Facts, Please

When giving a job reference, release only factual information. Factual information is something you can prove, either with witnesses or documentation. Facts do not include opinions, value judgments, or moral criticism.

Point 3: Supply Only What Is Requested

In addition, it is generally a good idea to provide only what is requested. Unless there is a compelling need to do so, try not to volunteer additional things that are not connected to the information requested by a prospective new employer.

Point 4: Tell the Truth

You may have heard that "truth is an absolute defense to a defamation lawsuit." The fact is, that's true. Tell a prospective new employer only what you know to be true. Telling true facts has been protected in the past by court decisions and is now protected by the new statute.

Point 5: Avoid Inflammatory Terms

Although embellishing a story with vivid terms and frank opinions is human nature, it should be avoided when giving job references. Inflammatory terms can make a person feel they are being unfairly attacked and can tempt a person to seek an attorney. Use points 1 and 2 above to combine facts with truth, as illustrated in the examples below:

Inflammatory: "We fired Joe for stealing."
Non-inflammatory: "We discharged Joe for failing to properly account for items entrusted to him. Items A and B were checked out to him, they turned up missing, and he failed to give a satisfactory explanation for what happened to them. Under our policy, that was a dischargeable offense."

Inflammatory: "Jane was fired for using drugs. We don't tolerate druggies here."
Non-inflammatory: "Jane failed a drug test on (date). The initial positive result was confirmed. Medical review of the result revealed no satisfactory explanation for the presence of the substance that was found. Employees who fail a drug test under such circumstances are subject to termination."

Inflammatory: "Frank was terminated for sexually harassing an employee."
Non-inflammatory: "Frank was terminated for violating our policy prohibiting harassment in the workplace."

There are many other situations in which inflammatory terms might be used and in which it might be better to tone the language down. The main thing is to express the facts in a way that gets the idea across without sounding like name-calling or moral judgment. As in most other areas of employment relations, the more an employee feels that he or she is being fairly treated, the less likely they will be to think they have to hire an attorney or complain to a government agency in order to vindicate themselves.

Use a Written Release Form

It is well-known that it can be difficult to get a usable job reference on an applicant from prior employers. Past employers are often reticent out of fear of defamation lawsuits,

or they may suspect that a person requesting information is not really a prospective new employer. It is especially difficult to get usable information out of a "cold call" to another company over the phone. Using a preprinted, fill-in-the-blank form such as the one below can help overcome the reluctance or fear often felt by people asked to give a job reference and can give you a better chance of getting a useful, candid response. See the explanatory note following the sample form.

AUTHORIZATION FOR PRIOR EMPLOYER TO RELEASE INFORMATION

Please read the following statements, sign below, and return to the Human Resources office.)

I, _____, hereby authorize my prior employer, _____, to release any and all information relating to my employment with them to _____ (your company's name). I further release and hold harmless both _____ and _____ (your company's name) from any and all liability that may potentially result from the release and/or use of such information. I understand that any information released by my prior employer will be held in strictest confidence, that it will be viewed only by those involved in the hiring decision, and that neither I nor anyone else not so involved will have the right to see the information.

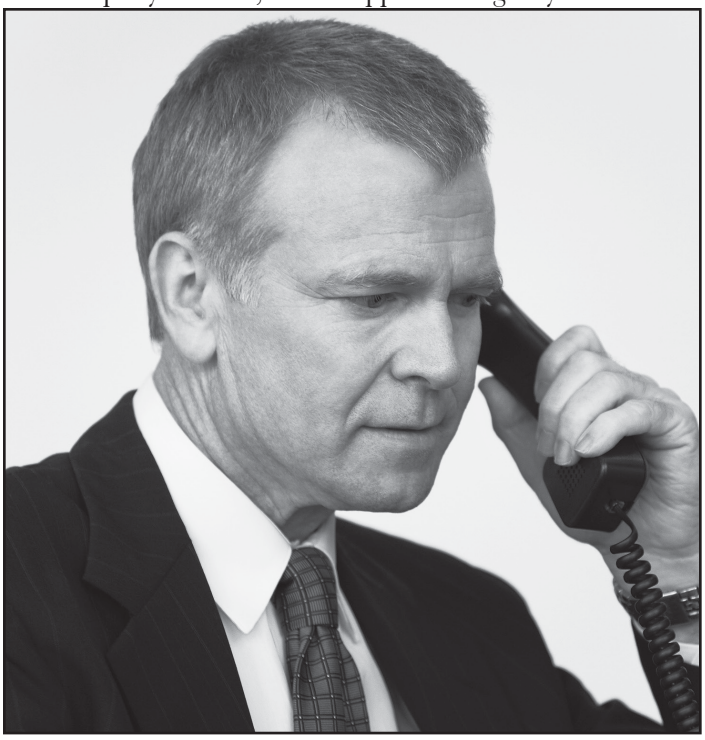
_____ _____
(Applicant's signature) (Date)

Note: Have the applicant fill out one of these forms for each prior employer from which you intend to seek job reference information. Using the form will make it much more likely that the prior employer will feel at liberty to release the information you request, or at least more than the usual work dates and salary confirmation that does not offer much of use in the hiring decision. **Also keep in mind that if anyone refuses to sign such an authorization, your company would have the legal right to refuse to consider that person any further for hiring.**

Important disclaimer: The above form is only a sample and is furnished only as an illustration of its category. It is not meant to be taken and used without consultation with a licensed employment law attorney. If you are in need of a form for a particular situation, you should keep in mind that any sample form such as the one available here would need to be reviewed, and possibly modified, by an employment law attorney in order to fit your situation and to comply with state and federal laws. Printing, downloading, using, or reproducing this form in any manner constitutes your agreement that you understand this disclaimer and that you will not use the form for your company or individual situation without first having it approved and, if necessary, modified by an employment law attorney of your choice.

Other Ways to Obtain Usable Reference or Background Information

If you are an employer that is considering hiring an applicant, sometimes you have to be like an investigator and try other techniques. In addition to using the form shown above, you can ask the applicant to give you the contact information for his or her immediate supervisor and try to talk with that person. If that supervisor has been properly trained, they will refer your call to the human resources staff, but sometimes you will find someone who is not trained that well and will give you more insight into the applicant's "real" employment history than you might otherwise get from the HR staff at that company. Second, ask the applicant to give you the name



and contact information for at least one third party (customer, vendor, government regulator) who can give a statement as to the applicant's work or expertise. Such parties will sometimes give valuable information concerning an applicant (and sometimes not - the main point is that there is nothing to lose by asking). You can also hire an outside professional investigator to do a thorough reference and background check, as long as you satisfy the formalities under the Fair Credit Reporting Act. In order to do a background or reference check under the FCRA, an employer must first notify the applicant that such a check will be done, and then must obtain the applicant's written permission to perform the check. If the applicant refuses to sign such a form, you have the option of telling the applicant that the application process is at an end, or, if you are already satisfied with what you have been able to find out, you can opt to hire the individual without a more-detailed check being done.

EEOC Issues with Background Checks

Sometimes employers will turn down an applicant as the result of a credit check or an unfavorable report on an applicant's criminal history. Aside from the FCRA concerns noted above, an employer needs to worry about the potential EEOC issues involved. Basically, EEOC takes the position that because statistical evidence shows that a higher percentage of minorities than non-minorities has had financial or criminal history problems in the past, taking an adverse job action based upon such factors has an disproportionate and unfair impact (in EEOC terms, "disparate impact") upon minorities, and the burden will be on the employer to show a legitimate, job-related reason for taking the adverse job action. EEOC expects employers, prior to turning someone down for a job or promotion who has had an unfavorable credit or criminal history report, to do an individualized job-relatedness determination. That means that before turning down someone for a job on the basis of a credit report or criminal history problem, the employer must be able to show that it considered the specific problem and determined that it would not be a good idea or prudent course of action to hire that specific person for a particular position.

NEW HIRE REPORTING LAWS

One of the easiest laws to comply with, from the standpoint of laws that make sense and can help an employer's bottom line, is the new hire reporting law, known formally as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (42 U.S.C. 653a) on the federal level, and the State Directory of New Hires Act under Texas law (Texas Family Code, Sections 234.101 - 234.104). Under that law, Texas employers must report all new hires and rehired employees (including independent contractors whose income is required to be reported on a Form 1099-MISC) within 20 calendar days of the hire, or, if the employer makes new hire reports electronically (online or with magnetic media), at least twice each month, all reports being within 12 to 16 calendar days of each other. Effective September 1, 2007, employers that knowingly fail to report new hires will be liable for a penalty of $25 per unreported employee, and a penalty of $500 for conspiring with a newly-hired employee to fail to make such a report (Section 234.105 of the Texas Family Code). The report is made to the Texas Employer New Hire Reporting Operations Center, accessible online at https://portal.cs.oag.state.tx.us/wps/portal. That agency's toll-free number is 1-800-850-6442. TWC has a good information site on new hire reporting at the following Web address: www.twc.state.tx.us/ui/tax/newhire.html.

What Information is Required in a New Hire Report?

The following information must be included in the report of new hires:

1) Company name
2) Company address
3) Company federal tax ID number
4) Employee's name
5) Employee's social security number
6) Employee's address
7) First day of paid work

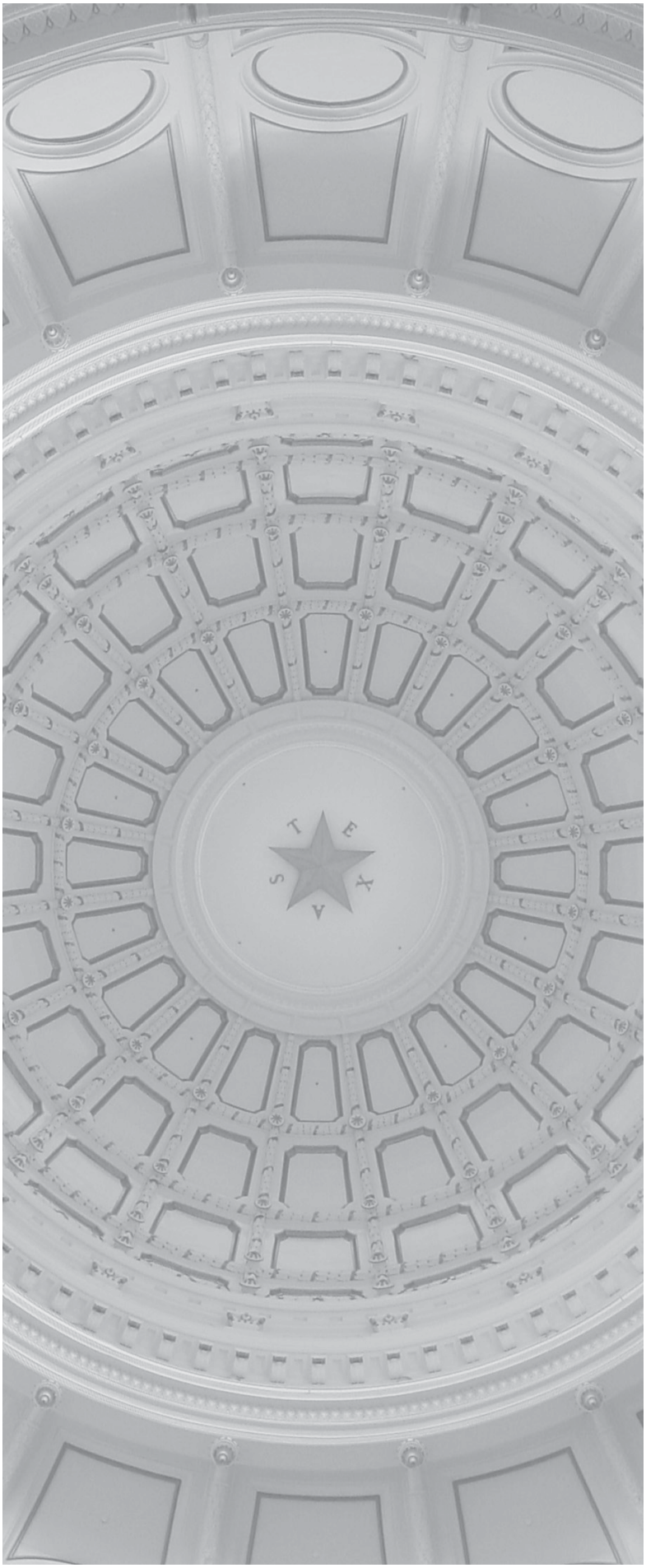
How Does New Hire Reporting Benefit the Company?

How does it make sense and help a company's bottom line to comply with such a reporting requirement? Simple: the reports are used primarily for tracking parents who owe back child support and for reducing fraud under various social programs, including unemployment benefits. Employers are a vital link in the effort to ensure payment of child support, not only through garnishment of wages, but also through the new hire reports. If your employees who are owed child support start receiving it because of someone else's new hire report, you will have a better, more focused employee. What you do can help other employers, and what they do in that regard will help you. New hire reporting also helps your company through reduction of benefit fraud. Part of the unemployment tax that every taxed employer has to pay comes from claim fraud that must be recouped somehow, and of course the "somehow" is by resorting to employers! Since a new employee's wages will not be reported to TWC for up to three or four months following their hire, the new hire report can help TWC detect UI benefit claim fraud three or four months earlier than it might normally be found. For more details, see the article titled "How Employers Can Help Reduce Claim Fraud" in the Post-Employment Problems section of this book. In addition, since the new hire reporting law absolutely requires employees to give you their social security numbers, it is one more tool to use in verifying SSNs (see the article in the next section of this book titled "Verification of Social Security Numbers"). If a cross-match turns up a problem with the SSN, you can then contact the Social Security Administration for assistance in verifying whether the number is valid. Finally, new hire reporting can help avoid the problem of employees engaging in "double-dipping" with other state or federal benefit programs, such as workers' compensation.

What If the New Hire Fails to Give a Social Security Number?

If a new hire tells you he or she does not have a SSN, due to immigration issues or to waiting for one to come through, your company is entitled to require the employee to document that they have an application in process for the number. If they state that they have not applied for one, give them the basic information on how to apply to the Social Security Administration for a number (see http://www.ssa.gov/ssnumber/) and tell them how important it is to get that task done promptly.

If a new hire refuses to give you his or her SSN or address, despite having such information, that may or may not be a sign of other problems to come, but the bottom line is that your company does not have to continue such an employee's employment. If the employee claims not to have an SSN for religious reasons, the company is entitled to require the employee to document that fact. Such documentation may consist of a statement, affidavit, or other form of attestation to the effect that the employee has opted out of Social Security due to religious objections to such a number or to participating in a welfare program, or something similar. For more details, see "Employees Without Social Security Numbers" in Part II of this book.



PAY

and

POLICY

ISSUES

OUTLINE OF EMPLOYMENT LAW ISSUES - PART II

General Issues - First Steps

General Issues

- The basic rule of Texas employment law is "employment at will", which applies to all phases of the employment relationship - it means that absent a statute or an express agreement (such as an employment contract) to the contrary, either party in an employment relationship may modify any of the terms or conditions of employment, or terminate the relationship altogether, for any reason, or no particular reason at all, with or without advance notice.
- Exceptions: other than statutes and express agreements, the only significant exception to employment at will is the "public policy" exception, i.e., no termination or adverse job action against an employee in retaliation for the employee having refused to commit a criminal act on the employer's behalf.
- Thus, in an employment at will state, and to a lesser extent in other states, employers may develop and change personnel policies, reassign employees, and change such things as work locations, schedules, job titles, job descriptions, pay, and other aspects of jobs at will.
- Texas is also a right to work state - under the Texas right to work laws (§§101.052-.053, Texas Labor Code), employment may not be conditioned or denied on the basis of membership or non-membership in a union
- In almost any kind of employment claim or lawsuit, it will help to be able to point to clear written policies and to state that employees are notified of the standards to which they will be held.
- Secret policies are useless – employees should of course have access to whatever policies will apply to them - an unknown policy cannot be used against an ex-employee in an unemployment claim or any other kind of employment-related claim or lawsuit.

I-9 Procedures

- I-9 forms do not have to be filled out on applicants, just on newly-hired employees.
- Recent I-9 rule from the U.S. Department of Homeland Security: only documents that are unexpired when shown can be used for I-9 purposes (once shown, a U.S. passport, an alien registration receipt card/permanent resident card, or a List B document does not need to be reverified, even if it expires after the employee was hired; other types of documents need to be reverified after expiration).
- An employer has up to three (3) business days following hire to get the I-9 form filled out. The employer should have the new employee complete the first section of the I-9 work authorization form at the time of hire, which means at the very beginning of employment, before any work is done, and the employer must complete section 2 within the first three days of employment (or at the beginning of employment, if the job is supposed to last three days or less).
- Follow all instructions on the form exactly - omissions or even minor clerical errors can result in potential sanctions.
- If a new hire shows the documentation listed on the form, the I-9 requirements are satisfied; the employer should not make the mistake of requiring documentation above and beyond what is shown on the I-9 form (what the government calls "document abuse").
- "Providing a Social Security number on Form I-9 is voluntary for all employees unless you are an employer participating in the USCIS E-Verify program. Providing an e-mail address or telephone number is voluntary. ... You may not ask an employee to provide you a specific document with his or her Social Security number on it. To do so may constitute unlawful discrimination." (See USCIS Publication M-274, *I-9 Handbook for Employers*, Section 3.0 - https://www.uscis.gov/i-9-central/handbook-employers-m-274.)
- Always use the latest available version of the I-9 form (download it at https://www.uscis.gov/i-9).
- If the employer makes copies of the documents shown by the employee, it should keep them in a separate I-9 file in case of a CIS (formerly known as INS) audit.
- The employer is not required to be a document-authentication expert; as long as the employer satisfies itself in good faith that the documents are genuine and satisfy the requirements, that is all that is needed.
- I-9 records must be kept for three years following the date of hire, or for one year after the employee leaves, whichever is later – recommended: keep this and all employment records for at least 7 years after the employee leaves in order to exhaust all the statutes of limitation.
- E-Verify is an optional I-9 program whose participating employers enjoy certain benefits in terms of work authorization verification and relief from sanctions - details are at https://www.e-verify.gov/.

New Hire Reporting Requirements

- All employers are required to report certain information on newly-hired employees (and independent contractors whose income is required to be reported on a Form 1099-MISC) to a State Directory of New Hires; in Texas, that office is a division of the Attorney General's office.
- Rationale for new hire requirements: reduce various types of state and federal benefit fraud and improve the collection of child support.
- Employers must report the following information within

20 days of the first day on the job for all new employees:
- federal employer identification number,
- employer name,
- employer address,
- employee Social Security number,*
- employee name,
- employee address, and
- first day of paid work.

- Employers can report the information by mail, fax, magnetic tape, diskette, e-mail, or telephone.
- $25 per employee penalty for knowingly failing to report new hires; $500 per employee penalty for conspiring with new hires to fail to make the report.
- Basic information from the U.S. Department of Health and Human Services is available at http://www.acf.hhs.gov/programs/css/employers/new-hire-reporting.
- Forms: most states will supply a new hire reporting form; employers may also design their own forms, as long as the required information is included. It is acceptable to use a W-4 form* as well.
  - employers with multi-state operations may designate a single state to report all new hires, or they can choose to report in the individual states where they have employees. Companies choosing to designate a single state for new-hire reporting requirements must notify the Secretary of the Department of Health and Human Services of their election, either online at http://151.196.108.21/ocse/, or by letter or fax to:

  Department of Health and Human Services
  Multistate Employer Registration
  Office of Child Support Enforcement
  P.O. Box 509
  Randallstown, MD 21133
  Fax: (410) 277-9325

* In the case of employees without Social Security numbers, see "Employees Without Social Security Numbers" following this outline in Part II of this book.

Personnel Files - General

- Personnel files are for all records relating to an employee's employment.
- Texas employers are not legally required to let employees view the contents of the personnel file.
- Exception: public employees may request copies of their personnel file documents under the Public Information Act.
- Only one separate file must be maintained apart from regular personnel records: medical information (including FMLA and workers' compensation records) - that is because the Americans with Disabilities Act requires that any medical records pertaining to employees be kept in separate confidential medical files.
- Still, it is a good idea to maintain other types of records in separate files as well:
  - I-9 records;
  - safety records; and
  - grievance and investigation records.
  - Develop a secure file access procedure to ensure that only those who need to see certain records can ever see them.
- Electronic records are allowed, as long as they can be accurately and legibly printed out in the event of a government agency recordkeeping audit, claim, or lawsuit.

Personnel Files - Details

- Only one type of record absolutely must be kept in a separate file apart from the regular personnel files: medical information (including FMLA and workers' compensation records) - that is because the Americans with Disabilities Act requires that any medical records pertaining to employees be kept in separate confidential medical files.
- Still, it is a good idea to maintain other types of records in separate files as well:
  - I-9 records - keep these in a separate I-9 file because it will make it easier to defend against a national origin or citizenship discrimination claim if you can show that such information is available only to those with a need to know (in other words, that those who might have made an adverse job decision were not aware of the person's national origin or citizenship status) - keep in mind that non-I-9 records found in an I-9 audit could result in reports to other governmental agencies from the auditor.
  - Safety records - this safety record file might also contain documentation relating to an employee's participation or involvement in an OSHA claim or investigation - limiting access to such documentation would make it easier to keep the information from influencing possible adverse decisions against the employee that in turn could result in retaliation claims under OSHA.
  - Grievance and investigation records - maintain a separate file for these records because they often contain embarrassing, confidential, or extremely private information about employees that could give rise to a defamation or invasion of privacy lawsuit if such facts were known and discussed by others within the company - also, making it known that investigation records will not be divulged may make it easier to persuade reluctant witnesses to give frank and honest answers in an investigation.
- The human resources department can develop a security access procedure for these various files - the company can keep an overview by cross-referencing in one file documents in another file - if a person who has access to one file wants to see another document in a separate file, he or she would have to have clearance under the file

access procedure in order to do that.

- Texas law does not require an employer to allow an employee to access his or her personnel file (exception: public employees may request copies of their personnel file documents under the Public Information Act) - however, most companies allow supervised access and copying of contents at the employee's cost - a company should never place anything in a personnel file that it would be ashamed to show other people (such as 12 average jurors) - remember, anything in any file relating to an employee is discoverable in a claim or lawsuit filed by or on behalf of that employee!
- A federal regulation under OSHA contains an exception to the general rule that an employer does not have to turn over copies of a personnel file to employees or former employees. The OSHA rule in question is 29 C.F.R. § 1904.35, which requires a company to give employees and former employees access to OSHA-required records of their work-related illnesses and injuries, i.e., those medical conditions that would be covered by OSHA recordkeeping requirements. Generally, those documents would be OSHA Log 300 and the OSHA 301 Incident Report. "Access" includes copies. The deadline for the access or copies is the end of the next business day following the request, so there is no particular requirement for a 24-hour response. As the rule notes, the first copy of a covered document is free to the former employee or their designated representative, but subsequent copies can be furnished at a "reasonable charge". OSHA's help line is at 1-800-321-OSHA (6742).
- Ownership and custody of personnel records generally pass from a predecessor to the successor in a situation involving the sale of a business.

Required Posters

- Comprehensive information and links to required posters (all free of charge) are found at http://www.twc.state.tx.us/ui/lablaw/posters.html.
- Posters should be displayed in such a way that each employee can readily see them (generally, the requirements have language such as "conspicuously placed" and "readily accessible" to employees). That would mean that employees who do not normally get to certain offices would not be served by posters displayed at those offices. The offices, or sub-offices, where those employees normally congregate would need to have the posters displayed for the benefit of the employees who are served by each such location.
- Posters and other kinds of required notices do not have to be placed in individual locations that are only temporary worksites. Example: construction workers building homes in a subdivision would not need to have posters in each house, but rather only in a company jobsite trailer for the project.
- In case of a co-employment situation, such as temporary employees assigned to client companies, the employees working at client sites are co-employed by the staffing firms and their clients under various state and federal employment laws. The notice statutes merely require the posters to be in the workplace. The enforcing agencies do not care who actually places the notices where the employees work, as long as the posters are up and visible to the employees. Thus, as long as the client companies have the applicable notices properly posted, their compliance with the notice requirements inures to the staffing firm's benefit. By the same token, if the clients do not have the notices posted, the staffing firm would be co-liable with them for non-compliance with the laws. Bottom line: the staffing firm needs to determine whether the appropriate notices are posted in the clients' locations, and if they are not posted, cooperate with its clients to get the posters displayed.
- In a virtual office situation, where the company does not maintain a physical location where employees normally congregate, assemble, or show up for work-related purposes, post copies of the posters on the company's web site section restricted to staff and send an e-mail, "read receipt requested", to all affected employees listing and identifying the posters, complete with links to the posters on the web site, reminding the employees that the posters are there for their benefit and that they should keep the e-mail archived so that they can easily find the links to the posters if needed; also include the posters as PDF attachments in the e-mail, and send printouts via regular mail.

Work Schedules

- Work schedules are up to an employer to set and enforce, i.e., scheduling of employees is entirely within the employer's control, and it is up to the employees to comply with the schedule that is given to them.
- With only extremely narrow exceptions relating to certain regulated industries or collective bargaining agreements, adults, as well as youths ages 16 or 17, may work, and/or may be required to work, unlimited hours each day (the only limits are employee morale, practical realities, and common sense in general).
- One exception to the unlimited hours rule in Texas is for employees in the retail sector. A retail employer must allow full-time employees (defined in the following statute as those who work more than 30 hours in a week) at least one 24-hour period off in seven, i.e., each week, the employee must be allowed to have a day off. See the following link for the statute in question: http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.52.htm#52.001. For an even narrower exception for employees who have been continuously employed with the same retail business since August 31, 1985, see http://www.statutes.legis.state.tx.us/Docs/LA/

htm/LA.52.htm#52.002.

- Another exception pertains to employers with 15 or more employees: due to religious discrimination laws, in the case of employees who do not want to work at a particular time for reasons related to observance of their religion, failure to allow reasonable time off for religious observances may potentially be considered an act of religious discrimination, unless the company can show that it would be an undue hardship to accommodate an employee's need for time off for the religious observance.
- Employers can require employees to work overtime, as long as the non-exempt employees are properly paid for the overtime hours they put in (keep in mind that neither Texas nor federal law require payment of "daily overtime" - overtime pay at time and a half is owed only for hours in excess of 40 in a seven-day workweek); for details on overtime hours and pay, see "Determining Hours Worked for Non-Exempt Employees" and "Calculating Overtime Pay" in this book. The only exception is for nurses (RNs and LVNs) - under Texas Health and Safety Code Section 258.003, mandatory overtime for RNs and LVNs is permissible only in disaster and other emergency situations. For purposes of this law, "mandatory overtime" is defined as work time above and beyond the normal pre-scheduled shifts (Section 258.002). Thus, while such a nurse can be required to work a schedule of 50 or more hours per week (with payment of overtime pay for any nurse who is non-exempt), they cannot be required to work beyond what they were told they would have to work, unless an emergency situation demands additional hours beyond the pre-scheduled shifts.
- Under the employment at will doctrine, an employer can change an employee's hours with or without notice. However, excessive application of flexible / just-in-time scheduling can lead to turnover – see below.
- No Texas or federal law requires advance notice of overtime or schedule changes, but as with most employee relations matters, it is a good idea to give as much advance notice as possible when informing employees of extra work or changes in their hours; sudden and adverse changes in hours, or burdensome overtime requirements announced with little or no notice, can under some circumstances amount to good cause connected with the work for an employee to resign, resulting in potential unemployment insurance eligibility for the employee who resigned. Any such employee would have the burden of proving that a reasonable employee would have resigned under the circumstances, and in addition would have to show that they gave reasonable notice to the employer that they were so dissatisfied over the schedule change that they were considering resigning from the company.
- When using scheduling software, try to avoid the downsides of flexible scheduling such as "clopenings" (the same employee works late, closes the store, and opens again a few hours later), insufficient notice of duty times (leading to unavoidable lateness), split shifts, burnout, distractions related to family concerns, and the like.
- Although some states require what is known as "show-up pay" (a minimum amount that is paid to employees who show up for work, only to be sent home early or with no work at all), no Texas or federal law requires such a payment; however, it is best to express the employer's policy on that issue clearly in a written policy, one way or the other.

Pay Issues

Pay and Benefits - General

Basic issues in the area of compensation agreements and benefits:

- Compensation agreements can be oral or written, with hourly, weekly, biweekly, semi-monthly, monthly, commission, piece, book, flag, day, ticket, or job rates, as well as other components such as bonuses or dividends.
- As noted in the section on Offers of Employment and Compensation Agreements, if unusual pay methods are contemplated, the employer should have the employee sign a written pay agreement that spells out the conditions for pay exactly in order to avoid misunderstandings and possible wage claims.
- An employer may change both the method and the rate of pay, but only prospectively, never retroactively (risk of wage payment law or breach of contract claims); always give written notice of changes in pay.
- Employee benefits such as health care, retirement plans, paid time off, and meal or rest breaks are not required under Texas or federal law; it is generally possible to have different sets of benefits available for different categories of employees (such as one set of benefits for hourly workers and another set for salaried exempt employees), but the specifics should be clear and in writing.
- Some benefits have specific rules if the company offers them, however:
  - pension or retirement benefits – if a company offers such benefits, the federal law known as ERISA provides that an employee who works at least 1,000 hours in a twelve-month period must be given the chance to elect participation in the pension or retirement plan (this is known informally as the "thousand-hour rule" – see 29 U.S.C. § 1052); and
  - health insurance benefits – if an employer has a health insurance plan, Rule 28 T.A.C. § 26.4(15) provides that an "eligible employee" is anyone who usually works at least 30 hours per week.
- Fringe benefits such as paid leave and paid holidays are taxable only after being used, not when accrued.
- Benefits that are forfeited are non-taxable (as would be the case with paid leave lost due to carryover limits or forfeiture of unused leave upon a work separation).

- Any benefits that are components of the employee's regular rate of pay, such as in-kind wages (meals and lodging, for example), are taxable along with other wages.
- Not taxable: pre-tax benefits such as certain types of flex accounts.
- Taxability of fringe benefits is complicated; employers should consult IRS Publication 15-B for details, and doubtful cases should be referred to an employment tax professional such as a CPA or an attorney.

Fair Labor Standards Act - What It Does and Does Not Do

The FLSA does cover:

- *Minimum wage and overtime* - Federal minimum wage is $7.25 per hour (it is the same level under Texas state law) - overtime is generally at time-and-a-half for all hours worked in excess of 40 in a seven-day workweek. Individual state minimum wage laws do not apply unless the FLSA does not apply - for all practical purposes, businesses can assume that all of their employees are covered under the federal wage and hour laws. An agreement between an employer and an employee that minimum wage and overtime will not be paid is void and unenforceable (even in the event of unauthorized overtime), based upon two U.S. Supreme Court decisions from the 1940s: *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945) and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946).
- *Equal pay for men and women* - Equal Pay Act - men and women who perform the same job at the same levels of skill, experience, qualification, and responsibility must be paid the same - this is not the same as "equal pay for comparable work", a rule followed by only a handful of individual states - violation of this law raises a gender discrimination issue, which is why complaints are investigated by the EEOC. For comparison purposes, all compensation for work performed is counted, including regular wages, bonuses, commissions, and so on, as well as the value of fringe benefits such as tuition assistance, paid leave, and similar benefits with measurable value. Differences in pay must be supported by business-related factors, i.e., may not be based on gender or other minority characteristics. For enforcement purposes, transgender employees would be considered according to the gender in which they present themselves. The EEOC regulations regarding equal pay are in 29 C.F.R. Part 1620.
- *Child labor* - In most situations, children younger than 14 may not work for an employer. Children ages 14 and 15 may work, but only in non-hazardous occupations and only during non-school hours; there is also a substantial limitation on the number of hours they can work each day and week. Children ages 16 and 17 may work any hours they want, but may not work in hazardous occupations. Once a person reaches age 18, there is no limitation on either hours or duties (other than whatever OSHA rules may apply).

The FLSA does not require:

Optional employee benefits and payroll practices not required under any law - this category includes such things as:

- *breaks* - Although some states require breaks, Texas and most other states do not - federal law has no break requirement, other than OSHA rules about restroom breaks for sanitation purposes (see https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=22932&p_table=INTERPRETATIONS) - the only exceptions are found in special regulations relating to highly hazardous occupations such as high-altitude steel erection workers or nuclear plant workers - most companies do allow some sort of breaks, however, in their policies.
  - Breast-pumping / nursing breaks – these are unpaid breaks – under the 2010 health care reform bill, new FLSA section 207(r)(1) requires employers to give non-exempt nursing mothers reasonable break times to express breast milk, or if children are allowed in the office, nurse their infants, during the first year after the baby's birth (for more information, see "Nursing Mothers" in this outline).
  - "Coffee breaks" (rest breaks) are paid, since they are regarded as promoting productivity and efficiency on the part of employees and thus benefit the employer - 20 minutes or less in duration.
  - "Smoking breaks" – paid breaks - smoking breaks are not required under Texas or federal law, are in the same category as rest breaks (see above), and may be controlled in any way with appropriate policies.
  - "Lunch breaks" are unpaid - defined as 30 minutes or longer for the purpose of eating a meal - employee must be "fully relieved of duties" during the meal break – if employee is answering phones, filing, or otherwise working while eating, the "break" is counted as regular work time.
- *premium, holiday, and weekend pay* - This is extra pay for unusual hours, such as "double time" or "triple time" pay for working extra overtime or during times when most employees take off - this is not required under any law, but is often a matter of supply and demand, i.e., whatever is necessary to get employees to be available at unusual times.
- *shift differentials* - Defined as higher hourly pay for second or third shifts, as opposed to the normal hourly rate given to workers on the daytime shift - as with "premium pay" above, this is a function of supply and demand.
- *raises* - Not required under state or federal laws, unless the minimum wage is increased on either the federal or the state level. However, even though raises are not required, withdrawing a raise that has previously been promised

could give an employee good cause to quit. Important: once a raise goes into effect, the employer must pay it until it is withdrawn - it may be withdrawn only prospectively, never retroactively - a retroactive pay cut will always violate the law.
- *pensions* - Pension or retirement plans are not required - however, keep the "1000-hour rule" in mind in case you have a pension plan and any workers who work at least 1000 hours in a 12-month period.

FLSA Coverage

The Fair Labor Standards Act provides two different ways for coverage to apply:

- *Individual coverage* - An individual whose work affects interstate commerce is covered as an individual - "interstate commerce" is defined so broadly that practically anything fits, such as ordering, loading, or using supplies from out of state, accepting payments from customers based on credit cards issued by out-of-state banks, and so on.
- *Enterprise coverage* - For most businesses, enterprise coverage applies if the business is involved in interstate commerce and the gross annual business volume is at least $500,000 - in that case, all employees working for the business are covered.
  - Coverage is automatic for schools, hospitals, nursing homes, or other residential care facilities
  - Coverage is also automatic for all governmental entities at whatever level of government, no matter how big or small.
  - Coverage does not apply to certain entities that are not organized for a business purpose, such as churches and eleemosynary institutions.

Exemption categories under the FLSA:
- Many minor exemptions exist for jobs in certain protected or favored industries.
- "White collar" overtime exemptions: executive, administrative, professional, computer professional, and outside sales representative.
- Two tests generally apply: the duties test and the salary test.

Duties Test for Exempt Employees

- Executive: an executive exempt employee has the authority to hire, fire, promote, set policy, and supervises two or more full-time employees (or four or more half-time employees, or at least one full-time and two half-time employees) in managing an enterprise or subdivision of the enterprise - examples given in the regulations include the president of a company or the head of a major division of an enterprise - also, a department head with hiring and firing authority can qualify - if the employee has no actual hiring or firing authority, but is highly influential in such decisions, the executive exemption can still apply.
- Administrative: performs specialized or technical office or non-manual work related to management policies or general business operations of an enterprise - the decisions such an employee makes are of substantial importance to the company as a whole - their work supports the organization, not individual customers - has a great deal of discretion and independent judgment in day-to-day duties - typical examples include personnel director, vice president of operations, head buyer, head dispatcher, department head.
- Professional: performs original and creative work or work requiring advanced knowledge normally acquired through a prolonged course of specialized academic study; a professional exempt employee's work cannot be standardized with respect to time - typical examples are physician, attorney, CPA, engineer, architect, scientist (geologist, botanist, physicist, zoologist, chemist, etc.), registered nurse, and teacher at any educational institution.
- New regulations from the U.S. Department of Labor became effective on August 23, 2004 and January 1, 2020 - for more information, see the article "Focus on the DOL White-Collar Exemption Regulations" in this book.

Salary Test for Exempt Employees

All three of the above exemptions require payment of a true salary:
- "Salary" is defined as agreed-upon periodic compensation, intended to cover a period of at least a week, equivalent to at least $684 per week,* that is not subject to reduction on the basis of quantity or quality of work performed.
- That means that if an employee does poor work (including damage to or loss of property), the employer cannot dock the employee's salary - if the employee violates a rule (other than a safety rule of major significance), the employer cannot dock their pay - if the employee misses a few hours in a day, a private employer cannot dock the salary (but a governmental employer can!)
  - However, if in addition to the salary, the exempt employee receives additional pay such as a commission or bonus, such additional pay can be docked, consistent with a written wage deduction authorization agreement - see DOL opinion letters FLSA2006-24 and FLSA2006-24NA.
- Vacation: employers can dock the salary in units of a day at a time for personal absences.
- Sick days: employers can also dock the salary in units of a day at a time for health-related absences if the employer has a bona fide sick leave policy (at least five paid sick leave days per year – a minimum tenure requirement is

permissible) – if the absences are covered by the FMLA, then partial-day deductions from salary are possible.

- Two varieties of unpaid suspensions: 1) the salary may be reduced in units of a full day at a time in the case of suspensions without pay for infractions of workplace conduct rules, pursuant to a written policy that applies to all employees; 2) deductions in any amount of time can be done for violations of "safety rules of major significance" - minor rules do not satisfy that requirement, so if a salaried exempt employee violates less serious rules, find another way to discipline them, such as full-day suspensions as mentioned above.
- A tougher rule applies in the case of absences due to jury duty, witness duty, or temporary military duty: if an employee works any part of a week and misses the rest of the week for jury, witness, or military duty, he or she must receive the full salary for the whole week, but if they miss a full week, no pay is due for that week; partial-week deductions from leave balances are allowed.
- Same rule applies for unpaid holidays, furloughs, bad-weather days, and other occasions when work is unavailable to salaried exempt employees who are otherwise available for work: if the office is closed on a day that a salaried exempt employee would normally work, then partial-week deductions from pay are not allowed, but if the employee misses an entire week for such a reason, the salary may be reduced by that amount; deductions from leave balances are allowed in any amount (see below).
- Partial-day docking of salary should not be done by a private sector employer unless the FMLA applies to an absence, or the employer imposes a disciplinary suspension for violation of a safety rule of major significance.
- TWC takes the position that no written authorization is necessary under the Texas Payday Law for such deductions (based on DOL regulation 29 C.F.R. § 541.602(b)). However, no Texas court has ruled on that specific point, and there is always the chance that TWC could change its own rule on this issue. Accordingly, it may be prudent to go ahead and include such an item in a standard written wage deduction authorization agreement, as illustrated by item 12 in the sample wage deduction authorization agreement in this book. An alternative could be to grant a paid leave advance and deduct it later from future accruals, as long as the company's written paid leave policy provides for such offsets. A policy that does not address that issue can certainly be revised accordingly and distributed to all employees.
- A prorated reduction of the salary for the first week of work, and for the final week of work, is allowed under the FLSA and does not require written authorization from the employee (see 29 C.F.R. § 541.602(b)(6)).
- Partial-day docking of leave balances – DOL says it is permissible to dock leave balances for absences, as long as the salary itself is unaffected – however, docking leave balances for partial days missed can lead to morale problems if the employee feels that such a practice amounts to nickel-and-diming on the employer's part, particularly if the employee always works a lot of hours each week in any event – for compliance with the Texas Payday Law, ensure that any deductions from leave balances are consistent with the company's written paid leave policy.
- For more information on how the 2004 and 2020 DOL regulations changed the requirements for exemptions, see the article "Focus on the DOL White-Collar Exemption Regulations" in this book.

* $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government. The 2020 regulation provides that up to 10% of the salary can consist of non-discretionary bonuses or commissions.

Outside Sales Representatives

- Only a duties test applies - for an outside sales representative, the primary duty involves working away from the employer's principal place of business calling on customers and making sales.
- There is no minimum wage, overtime, or salary requirement.
- The only thing to keep in mind is to follow the commission pay agreement - failure to do so will violate both general contract law and most state wage payment laws.

Computer Professionals

- There is a special exemption under FLSA section 213(a)(17) for "any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is --
  (A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  (B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  (C) the design, documentation, testing, creation, or modification of computer programs relating to machine operating systems; or
  (D) a combination of duties described in subparagraphs (A), (B), and (C), the performance of which requires the same level of skills, and who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 per hour."
- The regulations (29 C.F.R. 541.400 and 541.401 (former

regulations 541.3(a)(4) and 541.303)) exclude workers who build or install computer hardware or who are merely skilled computer operators; they make clear that the exemption applies only to the true software programming or design experts.

- A DOL letter ruling of December 4, 1998 (BNA, WHM 99:8201) states that this exemption does not include employees who "provide technical support for business users by loading and implementing programs to businesses' computer networks, educating employees on how to use the programs, and by aiding them in troubleshooting." In other words, "help desk" employees do not fit this exemption. See also DOL opinion letter FLSA2006-42 in this regard.
- Properly speaking, the exemption applies only to the very top experts in computer software, i.e., the ones who actually write the software programs, or who design, implement, and maintain a company's network software, intranet, or Internet presence.
- An employee who fits this exemption may be paid either a salary of at least $684 per week,* or on an hourly basis with no premium for overtime work, i.e., straight-time pay for all hours worked, as long as the hourly rate is at least $27.63 per hour.

* $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government. The 2020 regulation provides that up to 10% of the salary can consist of non-discretionary bonuses or commissions.

Child Labor

- Aside from certain occupations in agriculture, and the entertainment industry (child actors), children younger than 14 may not be employed by companies; under 29 C.F.R. § 570.122(a)(4), children younger than 14 may be employed directly by their parents (sole proprietors, the only partners of a partnership, or the sole owners of a corporate business) in any occupation other than manufacturing, mining, or one included on DOL's list of hazardous duty occupations - see below.
- Child actors under 14 may be employed under special rules with submission of a valid authorization form (available at http://www.twc.state.tx.us/ui/lablaw/llcl73.pdf).
- No hazardous duties for any child younger than 18 - a complete list of hazardous duty categories is at http://www.twc.state.tx.us/ui/lablaw/llcl70.pdf.
  - Limitations on hours of work for children who are 14 or 15:
  - No work during school hours
  - No more than three hours during a school day, or more than 18 hours in a school week
  - No more than eight hours during a non-school day, or more than 40 total hours during a non-school week
  - No work between 7:00 p.m. and 7:00 a.m. during the school year
  - If not enrolled in summer school, 14- and 15-year olds may work between 7:00 a.m. and 9:00 p.m. from June 1 through Labor Day.
  - If interstate commerce is not involved, and the FLSA does not apply, then Texas law provides that 14- and 15-year olds may work no more than 8 hours per day and no more than 48 hours in a week; may not work between 10:00 p.m. and 5:00 a.m. before a school day; may not work between midnight and 5:00 a.m. before a non-school day; and may not work between midnight and 5:00 a.m. during the summer recess.
- There are no limitations on hours of work for children who are 16 or 17 ; however, employers should take care that their work schedules do not cause problems for the young employees under any school truancy laws or local curfews that might apply.
- Children are entitled to minimum wage and overtime pay.
  - Sub-minimum wage of $4.25/hour is permissible during the first 90 days in a job.
  - Children who are tipped employees may be paid the same as other tipped employees.
  - Other sub-minimum wages (generally, 85% of the current minimum wage) may be permissible under special certificates issued by DOL for certain student employees and apprentices.
- Normal payroll tax laws apply to children, just as they do to workers over 18.
- If possible, secure written permission from the child's parent or guardian to employ anyone under age 18, or to conduct background or drug tests on such employees.
- Special training is advisable for management regarding harassment issues if the business employs children; complaints from employees younger than 18 should receive top priority for resolution; certain offenses (assault, improper photography, etc.) may need to be reported to law enforcement.
- Penalties for child labor law violations:
  - Texas law - civil penalties up to $10,000 per violation; criminal penalties for Class A and B misdemeanors; injunctive relief.
  - Federal law - civil penalties up to $11,000 per violation ($50,000 for death or serious injury to a minor employee - $100,000 for repeated or willful violations of that type); criminal penalties (up to a $10,000 fine per violation and/or imprisonment); injunctive relief; prohibition on sale or transfer of any goods produced by the employer at the time of, or within 30 days after, a child labor violation (such goods are also known as "hot goods").

ERISA - Employee Retirement Income and Security Act of 1974

ERISA has disclosure and reporting requirements:
- disclosure to participants and U.S. Department of Labor
- annual reports to IRS - strict reporting requirements - severe tax penalties for non-compliance.

Pension benefit plan (if a company has a pension/retirement plan, it must make it available to any employee who works at least 1,000 hours in a 12-month period) - the plan must be funded - two main types:
- retirement pensions (defined benefit plans); and
- deferred income plans (defined contribution plans).

Welfare benefit plan - no funding requirements - examples of "welfare benefits":
- medical/hospitalization benefits
- vacation and sick leave pay
- disability/death benefits
- unemployment benefits
- training/apprenticeship/scholarship programs
- prepaid legal services
- severance pay:
  - normally fits under welfare benefit plan as long as payments are not contingent upon retirement, total pay does not exceed twice the annual pay, and payments are completed within 24 months of termination
  - exception: severance pay that is a one-time offer not routinely included in an employer's benefit plan; this type of payment is more akin to "wages in lieu of notice" (see below).
- Not included in welfare benefits: "payroll practices", on-site facilities, holiday gifts, sales to employees, and some group insurance programs.

Payroll practices not covered by ERISA include:
- overtime pay
  - shift premiums or differentials
- holiday and weekend premiums
- maternity leave pay paid out of general funds
- "payday" or wage payment laws - every state has a statute governing at least some aspects of the wage payment procedure - most laws impose a deadline for final pay, limitations on what an employer may deduct from wages and whether authorization for such deductions has to be in writing, and rules on how often particular types of employees must be paid
- severance pay/wages in lieu of notice
  - severance pay: this is a post-termination payment that the employer has somehow previously obligated itself to give - it is usually, but not always, based upon a set formula such as length of prior service – it will delay unemployment benefits for the period covered thereby unless it results from a negotiated settlement of a claim or litigation, or was required under a contract negotiated before the work separation occurs
  - wages in lieu of notice: this type of post-termination payment is something that the employer has never previously obligated itself to give - just like the name implies, it is given to make up for the lack of advance notice of termination - such a payment is usually not based upon length of service, but rather upon whatever arbitrary amount the employer deems appropriate at the time – this type of payment delays unemployment benefits for the period covered thereby

DOL has a new eLaws advisor (tutorial/Q & A) on its EBSA site: http://www.dol.gov/elaws/ebsa/fiduciary/introduction.htm. For information on enforcement of ERISA, see http://www.dol.gov/ebsa/erisa_enforcement.html.

Expense Reimbursements

- Employers may choose to deduct as business expenses any reimbursements to employees for business-related expenses; that would not apply to reimbursements for personal, non-business expenses, such as the costs of the employee's personal entertainment while on the road.
- General rule – IRS Treas. Reg. 1.62-2(c): expense reimbursements, both for business and personal expenses, are taxable as part of gross income for employees.
- Exception: if reimbursements are made pursuant to an "accountable plan", the payments are not included in gross income (see IRS Publ. 15, p. 15 (2015)) and are not considered "wages" for purposes of unemployment compensation or the Texas Payday Law.
- Accountable plan criteria (IRS rule 1.62-2(c)(5)):
  - an expense advance is made within 30 days of when an expense is paid or incurred;
  - reimbursements can only be made for business expenses incurred by the employee in connection with the performance of the employee's duties;
  - the plan must require employees to substantiate their expenses within a reasonable period of time (within 60 days after the expense is incurred); and
  - the plan must require employees to repay any reimbursements which exceed substantiated expenses within a reasonable period of time (within 120 days after expense is incurred).
- "Non-accountable plan" – includes reimbursements that do not meet those criteria.
- Employers do not have to reimburse an employee's out-of-pocket business-related expenses; however, the employee must be allowed to deduct unreimbursed business expenses as itemized deductions.

- Most employers reimburse such expenses pursuant to a written policy – see below.
- Careful with minimum wage issues!
  - Do not force employees to pay business costs if it takes them below minimum wage.
  - Reimbursements for actual business expenses (i.e., made under an accountable plan) do not count toward the regular rate for overtime calculation purposes, while reimbursements in excess of the actual amounts (those not made in accordance with an accountable plan) would be considered extra pay that would count toward the regular rate of pay – see section 778.217 of DOL's wage and hour regulations for details.
- Expense reimbursement policy considerations:
  - Set a clear written policy stating what will be reimbursed, under what conditions, and when, and have employees sign it; be as specific as possible.
  - Same thing for expenses that will not be reimbursed – as noted above, be careful with the issue of minimum wage.
  - Larger expenses should require authorization.
  - Require receipts.
  - Provide for auditing by someone other than the employee.
  - Provide a corrective action procedure for handling violations of the policy.
  - Under the law of employment at will, the policy can be changed.
- Meals and travel:
  - Usual case: reimbursement is based upon actual costs and receipts, but some companies pay a standard per diem (the federal meal/incidental expense rate is set by IRS and meets the criteria for an accountable plan).
  - FLSA issue: if the company pays a per diem that is larger than reasonably necessary, the excess must be included in the employee's "regular rate" as noted above (and also must be considered part of taxable wages).

Tip-Pooling / Tip-Sharing

- The U.S. Department of Labor's position is that tip-pooling / tip-sharing arrangements are permissible as long as the employees sharing in the tips have somehow participated in serving the customers who left the tips. Courts cases regarding tip-sharing arrangements focus on whether the employee interacted with the customer, assisted in providing the customer with a pleasurable dining experience, and/or provided "direct table service" before or during the meal, while the customer was seated. It is a good practice to put the tip-sharing policy in writing and have everyone acknowledge it.
- DOL regulation 29 CFR § 531.54 – "Tip pooling. Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of sections [203(m)] and [203(t)]. Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. Section [203(m)] does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose." These requirements are in addition to the other requirements outlined in 29 C.F.R. § 531.59(b) for taking the tip credit for tipped employees.
- DOL Field Operations Handbook § 30d04: Tip pooling.
  a. The requirement that an employee must retain all tips does not preclude tip-splitting or pooling arrangements among employees who customarily and regularly receive tips. The following occupations have been recognized as falling within the eligible category:
     1) waiters
     2) bellhops
     3) counter personnel who serve customers
     4) busboys/girls (server helpers)
     5) service bartenders

     It is not required that all employees who share in tips must themselves receive tips from customers. The amounts retained by the employees who actually receive the tips, and those given to other pool participants are considered the tips of the individuals who retain them, in applying the provisions of sections [203(m)] and [203(t)].
  b. A valid tip-pooling arrangement cannot require employees who actually receive tips to contribute a greater percentage of their tips than is customary and reasonable. For enforcement purposes, Wage and Hour will not question contributions to a pool where the net amount of tips contribute (after return of any tips from the pool) does not exceed 15 percent of the employee's tips. However, only those tips that are in excess of tips used for tip credit (e.g., where the maximum tip credit is taken, those in excess of 40 percent of the minimum wage) may be taken for a pool. If such requirements are met, it is not necessary that the pooling be voluntarily consented to by the employees involved (notwithstanding Reg. 531.54).
  c. Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip pooling arrangements.

The following employee occupations would therefore not be eligible to participate:
1) janitors
2) dishwashers
3) chefs or cooks
4) laundry room attendants

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

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

- Two DOL opinion letters address this issue:
  - Customer-greeting chefs are tipped employees: http://www.dol.gov/esa/whd/opinion/FLSA/2008/2008_12_19_18_FLSA.htm
  - Barbacks are tipped employees: http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_15_12_FLSA.htm
- Gratuities charged by an employer are not tips – see http://www.tipcompliance.com/polLearningCenter.cfm?doc_id=89 - "A gratuity is not considered tip income within the control of the regularly tipped employee. A gratuity is a charge that is directly added for services rendered as determined by management, e.g. adding an 18% gratuity for parties over 10 people. This amount is considered wages, and is within the control of the employer, not the employee. Employers may distribute a gratuity at their discretion."
- *Chau v. Starbucks*, 94 Cal.Rptr.3d 593 3 (Cal. Ct. App., 4th Dist., July 2, 2009) - Section 351 (the California tipped employee statute) does not contain any language prohibiting an employer from equitably dividing tips placed in a collective box among the employees who provided the service.
- *Budrow v. Dave & Busters of Calif., Inc.*, 90 Cal.Rptr.3d 239 (Cal. Ct. App., 2nd Dist., Mar. 2, 2009) - Bartenders who poured or mixed drinks that were brought to restaurant patrons at their tables could participate in tip pools established pursuant to statute making gratuities property of employees to whom they were paid, even if bartenders did not personally bring drinks to tables.
- Hosts are tipped employees: *Kilgore v. Outback Steakhouse of Florida, Inc., a/k/a FMI Restaurants, Inc.*, 160 F.3d 294 (6th Cir. 1998): "an employer must inform its employees of its intent to take a tip credit toward the employer's minimum wage obligation." Further: "Hosts at Outback are "engaged in an occupation in which [they] customarily and regularly receive[] . . . tips because they sufficiently interact with customers in an industry (restaurant) where undesignated tips are common." "... one court has held that a tip pool that benefits a maitre d' is permissible under the FLSA. In *Dole v. Continental Cuisine, Inc.*, 751 F. Supp. 799 (E.D. Ark. 1990), the district court upheld a mandatory tip pool where servers tipped out solely to a maitre d' who 'receives no tips directly from customers' and whose responsibilities included setting up the dining room, greeting and seating customers, serving the first drink to customers, and assisting servers in serving customers as needed."
- *Etheridge v. Reins International*, 91 Cal.Rptr.3d 816: The court explained that "[t]ip pools exist to minimize friction between employees and to enable the employer to manage the potential confusion about gratuities in a way that is fair to the employees."
- In the Ninth Circuit, the tip pooling rules apply only when a tipped employee is paid a cash wage of less than the federal minimum wage. "The FLSA does not restrict tip pooling when no tip credit is taken." (See *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 582 (9th Cir. 2010).) The 4th and 10th Circuits recently agreed with the 9th Circuit on that issue (*Trejo v. Ryman Hospitality Properties, Inc.*, 795 F.3d 442 (4th Cir. 2015); *Marlow v. The New Food Guy, Inc., et al*, 861 F.3d 1157 (10th Cir. 2017)).
- For tipped employees, it would not be legal to make deductions from tips toward a "breakage" fund. See the following two cases:
  - *Chisolm v. Gravitas Restaurant Ltd.*, 2008 WL 838760 (S.D. Tex. 2008) and
  - *Bursell v. Tommy's Seafood Steakhouse*, 2006 WL 3227334 (S.D. Tex. 2006).

Policy Issues

Affirmative Action/Equal Employment Opportunity Policies

- Federal grantees and federal contractors must have an affirmative action plan and EEO statement in their policies, according to Executive Order No. 11246, according to Executive Order 11246, the Vietnam Era Veterans Readjustment Assistance Act of 1974, and the Rehabilitation Act of 1973; these federal requirements are enforced by the DOL's Office of Federal Contract Compliance Programs (see http://www.dol.gov/esa/OFCCP/).
- An employer may be ordered by a court or an administrative agency to adopt such policies.
- Employers may adopt such policies on their own - however, be careful about "reverse discrimination" - basing employment decisions on minority status alone is very risky.
- Affirmative action can be as simple as advertising job openings in media that reach diverse markets and in ways that are designed to bring word of openings and

promotional opportunities to the broadest possible group of potential applicants - the goal is to cast as wide a net as possible.

Attendance and Leave Policies

Absenteeism Policies

- "Point" or "no fault" system - example: 1/2 point for each instance of tardiness, 1 point for each absence, plus extra 1/2 point for failing to give notice of tardiness or absence - usually involves a set series of warnings at intervals, such as a verbal warning after 5 points, first written warning after 7 points, second written warning after 10 points, final written warning after 15 points, and termination for 18-20 points within a 12-month period - different companies have different point and warning systems to suit their individual needs.
- Be careful - employers covered by the Family and Medical Leave Act, or by a similar state law, need to remember that no FMLA-covered absence may be used as the basis for any kind of disciplinary action - that means it cannot be counted toward total absences in a "point" system.
- "Chargeable" and "non-chargeable" absences (or excused and unexcused absences) - remember to leave FMLA-covered absences out of the calculation.
- It is up to the employer to decide what will be excused or unexcused, but keep in mind that in an unemployment claim, many states will not disqualify a claimant if the final absence was due to personal illness or the illness of the claimant's minor child (however, a private-sector taxed employer's tax account will usually be protected from chargeback of benefits, as is the case in Texas, for example).
- Other important exclusions from such a policy include military leave, jury duty leave, witness leave, and voting leave.
- Some employers adopt neutral absence control policies that place an outside limit (beyond the point system) on the overall amount of absenteeism, without regard to the reason, an employee may have without becoming subject to being replaced due to "unavailability for work" - such policies can help an employer avoid the perception that the company is acting out of discriminatory intent with regard to workers' compensation, pregnancy, disability, family leave, or other reasons having to do with medical or family issues; as noted above, do not count military leave, jury leave, witness leave, or voting leave toward such a limit, since those categories are effectively off-limits in terms of corrective or adverse action. Remember to allow for consideration of reasonable accommodations in the event of an ADA-related issue.
- An employer always has the right to ask an employee to explain the reason for an absence. If the reason has to do with something that is normally documentable, the employer has the right to require the employee to document the reason given, i.e., jury duty would be documented with a copy of the jury summons, taking care of a matter in court would be documented with some kind of official document relating to the court appearance, a visit to a doctor's office would be documented with some kind of a note or receipt from the clinic, and so on. There is no need to get specific, though, about confidential or private matters, so do not insist on specific medical information or similar things.
- If an employee refuses to explain why it is necessary to miss work, the employer would be entitled to treat the absence as unauthorized for that reason alone.

Tardiness policies

- What applies to absenteeism generally applies to tardiness.
- Notice of absence or tardiness - how much advance notice should be given? To whom should the notice be given? Is it alright to leave a message? What if a supervisor is unavailable? Can the employee's spouse or other companion give the notification? The employer must decide these things and let the employees know exactly what is expected.

Documentation of Attendance

- Employers should fully document attendance and hours worked.
- Anytime an employee claims the need to miss work due to a medical condition, the employer has the right to require documentation of the condition or the medical visit - remember, due to the ADA, such documentation should be kept in a separate, confidential medical file for the employee, not in the regular personnel file.
- The employer must decide whether documentation will be required for any medical absence, or just for those lasting over a certain number of days.
- Try to achieve a sensible balance - most companies do not require an actual doctor's note for simple one- or two-day absences for things like 24-hour "bugs", but do require them if the employee claims to have seen a doctor.

Leaves of Absence or Sabbaticals

- Have employees apply in writing for such leave ; give the answer in writing.
- Such periods of absence can be paid or unpaid, voluntary or involuntary, and medical or "other" - the return date can be specified or left open.

Avoid Favors and Exceptions to Policies

- As a general rule, employers should not make exceptions to company policies and procedures unless there is a

clear business case for doing so, such as an urgent and compelling circumstance that makes the exception necessary for some reason.

- Exceptions from rules, including "favors" for employees, can potentially put an employer at risk of charges of favoritism and discrimination.
- Too many exceptions can swallow a rule and render it effectively irrelevant.
- Human nature being what it is, employees are quick to forget favors and slow to forget grievances, so an employer who does favors for employees often finds that employees come to expect them - over time, some employees become more and more demanding and ungrateful.
- Exceptions include forgiving rule violations and allowing some employees to disregard procedures, but not others
- Favors include things like loans, wage advances, paid leave advances, bailing employees or their family members out of jail, letting them use equipment that others are not allowed to use, and so on.
- It is particularly risky to loan money or advance wages or paid leave, because if that is not done with a clear written repayment agreement authorizing deductions from wages, the employer may not ever be able to recoup the money without taking the employee to court.
- Even with a valid wage deduction authorization agreement, if the employee gets a loan or advance and quits suddenly, the employer might not be able to fully recover the money.
- As an example of just how sorry an employer can be that it did a favor for an employee, consider this story from an actual wage claim that was filed in late 2006: The employer had allowed an employee paid time off for his wife's maternity-related medical appointments and for spending time with their baby. The employer verbally agreed with the employee that the paid days off would be repaid a day at a time from future paychecks, but when the employee walked off the job soon after the child's birth, the employer deducted the amount all at once from the final paycheck. Since the deduction agreement was not in writing, the employer lost the Texas Payday Law wage claim that the claimant filed. The claimant sent the following e-mail to the employer:
  "I know we agreed to you taking the five days you paid me for that I didn't work, one paycheck at a time, but I quit before you could take your money back. You are a dumb s***!!! The Texas Commission says without my signature you can say we agreed to this verbally but you lose since I didn't sign anything. I intentionally left your store open when I quit, hope someone came in and stole everything in the store. Answer my call so I can tell you what a dumb s*** you are. I know (sic) have a new trick with my next job, take days off, promise to do makeup work, get paid and then quit."
  (Regarding whether an employer may legally report such things in conjunction with job references, see the topic in the first section of the book titled "References and Background Checks" and the article "Job References".)

Bad Weather - Pay and Attendance Issues

Pay Issues

- Hourly employees may simply be paid for the number of hours they work; day-rate employees are paid for the number of days they work; piece-rate employees are paid for the number of pieces they produce. If the company's paid leave policy permits it, they may apply available paid leave to the time missed due to bad weather. A company may also go so far as to have an optional benefit allowing regular pay for bad weather days - that would be similar to an extra day of paid vacation, paid personal time off, paid bereavement leave, or similar optional paid leave. Although such paid leave is optional under the law, once it is promised in writing, it must be given according to the terms of the written policy once the conditions for its use have been satisfied.
- Salaried non-exempt employees may have their paid leave balances docked, as long as that is consistent with whatever paid leave policy the company has in place. They may also have their pay docked, as long as they have given written authorization for such a deduction from pay (see item 12 in the sample wage deduction authorization agreement in this book for an illustration of how to obtain such authorization).
- Salaried exempt employees may not have their pay docked in increments of less than a full workweek at a time for bad-weather absences (see item 7 in the topic on the salary test for exempt employees) - full-week absences could result in pay reductions with proper written authorization (see item 12 in the above sample agreement). Salaried exempt employees may have their available paid leave balances reduced in any increments of time for such absences, consistent with the company's paid leave policy.

Attendance Issues

- Absences due to closure of the business based on bad weather or other similar disaster or emergency condition should not count toward whatever absence limit a business has. On the other hand, if the business is open, and other employees are able to make it in, elective absences by employees may count toward an absence limit. Before such an absence is counted against an employee, the policy should provide the absent employee an opportunity to document how their attendance on such days would not have been possible.
- Failure to come into work on a day when authorities have closed area roads and are recommending against travel will likely not be considered disqualifying misconduct in an unemployment claim. An employer would have the

burden of proving that the employee really could have come to work, despite the inclement weather conditions.

Cell Phones and Other Electronic Devices

- Employer may regulate use or possession of such devices in the workplace; 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 remember that wage deductions need to be authorized in writing.
- Solutions for excess company cell phone charges: Texas Payday Law-compliant agreement for recoupment of wage advances or deduction of such excess charges, or 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 (disadvantage: the company loses some control over how the employee uses such a cell phone).
- Advise employees to use common sense and discretion - example: leave personal phones in 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-capture devices, extra precautions are advisable - provide that pictures in non-private areas are allowed only if taking such pictures would not violate a law or the privacy rights of anyone being photographed, and indicate that no cameras whatsoever are allowed in private areas where anyone would have a reasonable expectation of privacy.
- Risks: invasion of privacy, theft of company secrets, improper photography.
- Sexual harassment claims have been filed based on coworkers' use of such devices.
- Provide that a violation of the policy leads to loss of phone privileges or other disciplinary action, up to and possibly including termination.
- Safety issues – the policy may provide: do 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 law or liability from accidents incurred while using a cell phone 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" or USB 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" 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 regulating 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.
- Regulating 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 transmission 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 connect to company networks or electronic systems, and to make copies of any files found therein (see the sample "Internet, E-Mail, and Computer Use" policy).
- Employees who object to such a policy may be instructed to leave their electronic devices at home.
- The 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!
- 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.

Computer, E-Mail, and Internet Policy

- With the right kind of policy, employers have the right to monitor employees' e-mail at work, employees' use of the Internet, and employees' use of company computers.
- Every employer needs to have a detailed policy regarding use of company computers and resources accessed with computers, such as e-mail, Internet, and the company intranet, if one exists.
- Each employee must sign – it can be made a condition of continued employment.
- Define computers, e-mail, Internet, and so on as broadly as possible, with specifics given, but not limited to such specifics.
- Remind employees that the company owns all such systems and that that is why it is reserving the right to monitor any and all usage of the systems.

- Remind employees that when they use company Internet access and e-mail systems, the company's computers record all incoming and outgoing transmissions of files, e-mail messages, and other data, as well as store copies of e-mail messages received and sent through company systems.
- Define the prohibited actions as broadly as possible, with specifics given, but not limited to such actions.
- Remind employees that not only job loss, but also civil liability and criminal prosecution may result from certain actions.
- Company needs to reserve the right to monitor all computer usage at all times for compliance with the policy.
- Policy should remind employees that it has the right to inspect an employee's computer, HD, floppy disks, and other media at any time.
- Reserve the right to withdraw access to computers, Internet, and e-mail if the employee abuses such access
- Make sure employees know they have no reasonable expectation of privacy in their use of the company's electronic resources, since it is all company property and to be used only for job-related purposes.

Confidentiality of Employee Information

- Good starting point: all information relating to an employee's personal characteristics or family matters is private and confidential.
- Information relating to an employee should be released only on a need-to-know basis, or if a law requires the release of the information.
- All information requests concerning employees should go through a central information release person or office.

Conflict of Interest/Trade Secrets/Non-Competition Agreements

Conflicts of Interest and Trade Secrets

- Contractual limitations - if these are an issue, have affected employees sign a clear written agreement promising not to do certain things and agreeing to pay damages in the event that the employees breach the agreement.
- Policy guidelines - on top of a written agreement signed by each affected employee, the policy handbook should mention what the employer expects of employees in this regard.

Non-Competition Agreements

Texas law provides that a covenant not to compete is enforceable only if it:

- is ancillary to or part of an otherwise enforceable agreement; and
- contains reasonable limitations as to time, geographical area, and scope of activity.
- Most courts have ruled that the public policy is to promote competition, not limit it, and that before an agreement limiting competition will be enforced, the employer must show how non-enforcement would harm it and that enforcement would not place an unreasonable burden on a person's right to practice a profession or trade or otherwise make a living. The more specialized the knowledge for the position is, the easier it is to show a need to limit competition in some way. The more general the knowledge is, the more difficult it will be to show that the business needs protection from competition (this is also known as the "common calling doctrine").
- In the case of *Alex Sheshunoff Management Services, L.P. v. Johnson and Strunk & Associates, L.P.*, 209 S.W.3d 644 (Tex. 2006), the Texas Supreme Court held that an "otherwise enforceable agreement" can include an executory promise (a promise that the maker intends to fulfill in the future) made in conjunction with an at-will employment agreement if the employer actually performs the promise it made at the time that it secured the non-competition agreement (such as a promise to give certain training, allow access to certain proprietary information, and similar things that give rise to the business interest protected by the non-competition agreement).
- See also *Cobb v. Caye Publishing Group*, 322 S.W.3d 780 (Tex.App.-Ft. Worth 2010) (covenant not to compete cannot be enforced outside of area where the employee worked and where the employer had any kind of commercial activity); and *Marsh USA, Inc. and Marsh & McLennon Cos. v. Rex Cook*, 2011 WL 6378834 (Tex. December 16, 2011) (stock options can be consideration to support the agreement).

Non-disclosure or confidentiality agreements specifically limiting what types of confidential information or trade secrets an employee may divulge to third parties are usually easier to enforce than non-competition agreements.

Discipline

Progressive disciplinary systems usually include a range of disciplinary measures, including two or more of the following steps:

- oral and written warnings;
- probation;
- suspension with or without pay;
- disciplinary pay cuts (it is best to make this a token amount of one or two per cent - do not impose such a cut without a prior written warning - give notice of the cut in writing in order to reduce risk of a wage claim);
- demotion or reassignment;
- final warning; and
- discharge.

Documentation is very important for use in justifying a personnel action and defending against claims and lawsuits

- The employee should get a copy, and a copy should go into the personnel file.
- Have the employee or a witness sign and date the warning, and have a company representative sign and date it as well.
- The warning should clearly let the employee know what the next step will be if the problem continues.
- The employer should follow its own policy and prior warnings as closely as possible, unless there is a compelling reason not to do so; do not issue warnings until the company is ready to take action and mean it; warnings that are not enforced are even worse than completely ignoring a problem.
- Do not issue a "final warning" until and unless the company is ready to terminate the employee upon the very next occurrence of the problem that caused the warning to be issued - sample wording:

Final Warning

On _____, you were given a written warning concerning excessive personal phone calls while on duty. You were told that while the company allows personal phone calls for emergency reasons, such calls do not include conversations lasting several minutes with friends and family. We reminded you that your coworkers have to shoulder the burden of extra and unnecessary work when you make yourself unavailable to do your job by talking on the phone under such circumstances. Since that time, you have been observed on ____ occasions engaging in personal conversations on the phone while on duty, which is in violation of your previous warning.

This is your final warning. There will be no further chances given. If you violate the Company's phone call policy again, you will be subject to immediate dismissal from employment. We sincerely hope it will not come to that, but you must understand that you have arrived at this point by your own actions, and it is only by following the phone call policy that you will be able to remain employed.

I understand that my signature on this form does not necessarily mean that I agree that I did anything wrong, but rather only that I have seen this warning and have had it explained to me.

I Agree: _____
I Disagree: _____
Date: _____

[* Note: regarding why it might be a good idea to include the "I disagree" signature line, see "Refusal to Sign Policies or Warnings" further along in this outline of employment law issues.]

Disclaimers

- Disclaimers in an offer letter, employment agreement, and/or employee policy handbook can help employers avoid contractual liability toward at-will employees.
- Disclaimers should provide that:
  - the employee handbook is not a contract;
  - the employee handbook may not be modified except by certain specified procedures and by certain company officials; and
  - the employee handbook does not alter "employment at will" status - it is common for an "employment at will" disclaimer to appear at both the beginning and the end of an employee handbook - it can also appear in other documents, such as a job application, a compensation agreement, or a request to change the terms and conditions of employment.

Dress Codes and Grooming Standards

- Dress codes and grooming standards, even those that distinguish between men and women, are acceptable under EEOC guidelines as long as they bear a reasonable relationship to legitimate business needs and are enforced fairly. Safety concerns are generally recognized as legitimate business needs: in *EEOC v. Kelly Services*, 598 F.3d 1022 (8th Cir. 2010), the court upheld a temporary staffing firm that failed to refer a woman for a job in a commercial printing factory because the applicant refused to remove her headscarf, which she said she had to wear for religious reasons. Noting that the work environment was full of printing machinery with rollers, conveyors, and fast-moving parts, the court ruled that the employer was entitled to enforce a dress code that prohibited hats, other headgear, and any loose clothing items around the machines.
- Employers can always require employees to appear at work with a neat and clean appearance, including combed or brushed hair, bathed, and wearing clean clothes.
  - A no-facial hair policy for men is permissible under the above guidelines (business image, safety rules, and so on), but an employer may need to make a reasonable accommodation for certain individuals, such as men with *pseudofolliculitis barbae* (a skin condition common with some minorities) and those whose religious practices may require wearing of a beard. Accommodation questions of these types should be discussed with an experienced employment law attorney.
  - A no-tattoo or body-piercing policy may be enforceable under the above guidelines. Most employers have a middle ground: allow such items if they do not interfere with the safe operation of equipment or can be concealed with clothing. In the case of *Cloutier v. Costco*, 390 F.3d 126 (1st Cir. 2004), the court held that a retail sales company did not illegally discriminate against

an employee who was told that her facial piercings and jewelry violated the company's dress code, despite her position that her religious belief required her to wear such ornamentation, since the employer successfully showed that it had a legitimate interest in presenting a professional image to its customers, the employee's job as cashier placed her directly before the customers, and it would have been an undue hardship to the company to make an exception for the employee.

- Poor hygiene: no employer is obligated to tolerate an employee whose dirty appearance cannot be explained by the needs of the job. It is more complicated if an employee appears clean, but has an odor about him or her that is offensive and cannot be explained by the working conditions. In such a case, it would be best to have a discreet, one-on-one talk with the employee to explore that issue and give the employee a chance to explain what might be going on. If the employee gives what amounts to a medical explanation for the odor, the employer has the right to require the employee to furnish medical documentation of that fact. However, if the employer has 15 or more employees and is thus subject to the ADA, it would be prudent to be prepared to address the issue of reasonable accommodation. If the employee does not claim a medical condition as the cause of the odor, the employer may address the issue through the corrective action process.

- Employers are allowed to have one set of rules for employees who deal with the public and another set of rules for employees who have no regular contact with the public. For example, a department store could have one set of guidelines for cashiers and customer service employees, a set for administrative office staff, and another set for warehouse staff. However, the rules should be uniformly enforced as to all employees within each particular group.
- If a dress code results in what is basically a uniform that is required for the job, there may be a minimum wage issue if not reimbursing the employees for the extra costs would result in their wages effectively going below minimum wage ($7.25 per hour), and/or below time and a half at their regular rate of pay in case of overtime hours.
  - In that situation, the company would have to reimburse enough to bring them up to minimum wage and/or the proper level of overtime pay for the time they worked that week, if applicable. That would be an issue only for the workweek in which the extra clothes were purchased. The company could, of course, require the affected employees to submit receipts documenting their costs and to stagger the purchases over two or more weeks, in order to minimize the chance that a given purchase would have an effect on minimum wage and/or overtime pay.
  - Failure to abide by the dress code would be a rule violation – address violations according to the company's corrective action procedure.

Drug and Alcohol Policies

- Adopt a written policy - some employers are obligated by law to have written drug-free workplace policies (federal contractors and employers subject to U.S. Department of Transportation drug/alcohol testing rules).
- Give the policy to all employees in writing - have employees acknowledge receipt.
- If drug or alcohol testing is done:
  - pre-employment, random, post-accident, and "for cause" testing are all allowed in Texas and many other states.
  - Specific drug test results should be obtained from the testing lab - do not use a lab that is not willing to give you a copy of the results and the chain of custody of the sample.
  - Preferably, use a nationally-certified testing lab that will follow strict procedures and furnish complete documentation to support the employer in case a claim or lawsuit is filed - the documentation should show at least the following:
    - type of tests performed and concentrations of specific substances found;
    - indication of specific cut-off levels required for a positive result;
    - initial results confirmed by GC/MS (gas chromatography/mass spectrometry) method; and
    - a chain of custody showing who handled the sample at all pertinent times - this is for dealing with the common excuse that the samples must have been switched.
- In cases of drug tests mandated under DOT rules, obtain copies of documents showing complete compliance with DOT regulations concerning the test and the review of the results by the medical review officer - DOT rule 49 C.F.R. § 40.323 allows release of such documentation by the employer for responding to claims and lawsuits arising from such a test.
- When responding to unemployment claims arising from drug or alcohol tests, copies of the policy, the signed test consent form, and the documentation outlined in comments 3 and 4 above, should be submitted to TWC in response to the claim.

English-Only Policies

- Such policies are very tricky and controversial - EEOC's position is that such policies potentially have a disparate impact on ethnic/national origin minorities (see 29 C.F.R. § 1606.7).
- Courts will uphold such policies if they are based on business necessity, such as public safety, customer service, or minimizing complaints from other employees - the burden is on the employer to show such necessity (see *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993);

Dimaranan v. Pomona Valley Hospital, 775 F. Supp. 338 (C.D. Ca. 1991); *Roman v. Cornell University*, 53 F. Supp. 2d 223 (N.D. NY. 1999); and *EEOC v. Premier Operator Services, Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000).

- Prior to implementing such a policy, an employer should, if possible, have documentation to support whatever business necessity exists, such as reports of safety problems, comments from customers about lack of service, or complaints from coworkers that speakers of a different language appeared to be commenting about them in such a way that they felt excluded or targeted.
- The policy should be carefully focused on the business needs at issue - unless there is a compelling reason to do otherwise, do not attempt to prohibit speaking of other languages during non-duty times; if employees need to speak a language other than English in order to better do their jobs; or while employees are speaking among themselves in another language in a context that does not suggest they would be aware that others who do not speak that language would consider themselves somehow "talked about" or excluded (this consideration applies not only in the context of different languages - it is certainly possible for English speakers to create morale problems by the way they talk around each other and about each other, and it is important for employers to address such concerns anytime they become aware of the issue).
- The company should consider whether there are any alternatives to a blanket rule. If poor conduct (unkind remarks or the like) was only an isolated incident by certain workers, and there is no widespread incidence of discriminatory remarks in other languages, simply handle the problem via counseling that is directed toward the ones who caused the problem.
- Even the most well-written policy can be useless, though, if the managers are not properly trained in how to explain and apply it; for example, if a manager tells employees that the policy prohibits any speaking of a minority language, even during breaks, a fact issue arises which can make it much harder to deal with a discrimination claim or lawsuit (see *Maldonado, et al. v. City of Altus, Oklahoma*, 433 F.3d 1294 (10th Cir. 2006)). Thus, proper training is essential, and human resources staff and top management should carefully monitor how the policy is actually applied in the workplace.
- The main idea is that such a policy should be applied no more than is necessary to get the job done well and to minimize friction between employees - beyond that, employees should be left to whatever language they prefer to use.
- The policy should remind all employees, regardless of what language they speak at a particular time, that cooperation and good communications are vital to the company's interests and that they will be held accountable for the degree to which they exhibit good teamwork and effective communications with coworkers and customers.
- Once employees understand that smooth relations and effective communications have a direct bearing on advancement opportunities and potential pay raises, they will generally handle language issues accordingly.

Family and Medical Leave Act (FMLA)

- FMLA applies to any public or private employer with 50 or more employees, as well as to all public agencies, and public and private elementary and secondary schools, regardless of number of employees.
- A covered employer must post a notice in the workplace concerning the FMLA and how employees may qualify under its provisions.
- Even though all governmental (public) employers and all elementary and secondary schools are covered employers regardless of how many employees they have, individual eligibility requirements may still render an employee ineligible to take FMLA leave - see the following item.
- To be eligible, an employee has to have worked at least 1250 hours within the last 12 months; has to have worked at least 12 months' total time for the employer; and be employed at a facility at which at least 50 employees are employed within a 75-mile radius - due to the 1250-hour requirement, many part-time employees will not be eligible for FMLA leave - however, state FMLA laws may have lower requirements - Texas does not have an FMLA-style law, so only the federal law applies.
- Be careful not to promise FMLA leave to an employee who is not eligible, because the company might have to extend such leave anyway if the conditions for equitable estoppel are satisfied (see the discussion of the *Minard v. ITC Deltacom Communications* case in "Other Types of Employment-Related Litigation" in the outline of employment law issues in part IV of this book).
- Time spent in military duty counts toward both the hours worked and tenure requirements - for details, see the article titled "Legal Issues for Military Leave" in this book.
- The reason for the absence must be the serious health condition of the employee or of a member of the employee's immediate family; the birth or adoption of a child or the placement of a foster child in the home; or "any qualifying exigency" (which generally means an urgent or emergency situation) associated with the employee's spouse, child, or parent being on active military duty, or having been notified of an impending call to active duty, in support of a contingency operation - see DOL's poster on the new law at http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf, as well as FMLA regulation 29 C.F.R. § 825.126.
- With regard to leave to care for a child's serious health condition, or parental leave for a biological, adopted, or foster child, the term "parent" means father, mother, or anyone else who stands *in loco parentis* (in the place of a parent) to the child, including same-sex parents (see the

DOL FMLA opinion letter AI 2010-3, issued on June 22, 2010).

- The employer must make up to 12 weeks of paid and/or unpaid leave during a year available to such an employee.
- New 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; the law that created this category of FMLA leave also put an outside limit of 26 weeks of all types of FMLA leave in a "single 12-month period" - see http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf and FMLA regulation 29 C.F.R. § 825.127(c).
- The leave can be all at once or intermittent, even 2 or 3 hours at a time, but intermittent leave all goes toward the 12-week limit.
- It is best to give employees prompt written notice that they are on FMLA leave and that they must keep in touch with the employer at regular intervals specified by the employer - the return date can be specified or left open.
- FMLA leave cannot be counted against an employee under a "no-fault" or "point system".
- Generally, an employer's duty to allow FMLA leave is separate from an employee's duty to follow company policies regarding notice of absences and use of leave. In other words, a company must allow FMLA leave for an employee where its use is warranted, but is allowed to hold an employee accountable for failure to abide by company policies to the same extent that it holds other employees accountable in non-FMLA situations.
- Important for compliance with Texas Payday Law limitations on wage deductions: if the employer is to make payments on behalf of the employee to keep the health insurance plan in effect during the FMLA leave, the employer should make sure to have the employee sign a written agreement that any money so paid will be regarded as an advance against future wages owed and will be repaid in installments deducted from future paychecks.
- FLSA problem - docking exempt workers for time missed:
- Executive-, administrative-, and professional-exempt workers must meet the "salary basis" test - for all employers in the private sector, partial-day deductions from salary will destroy the salary basis for the exemption.
- The only exception to that rule is for a situation covered by the FMLA - in that case, hourly docking of pay or leave time would be allowable, but careful documentation must be maintained - this exception only works if the employer, the employee, and the situation are all covered by the FMLA!

Grievances

- Every company with more than just a few employees needs a clear procedure for reporting and resolving grievances.
- The procedure should provide for the situation where the supervisor is the subject of the grievance - another person should be designated to handle the grievance in such a case.
- An effective grievance procedure can be a useful tool in helping an employer avoid morale problems or unionization efforts.
- It can also be an important part of an alternative dispute resolution system.
- Keep grievance records in a separate grievance and investigation file.

Harassment

- Clear policy needed - harassment does not need to be specifically prohibited by law (such as sexual harassment) in order for an employer to be able to forbid such conduct - "sexual harassment" includes any unwelcome conduct of a sexual nature that tends to creates adverse or hostile working conditions for an employee.
- Education and training of all employees regarding the policy.
- It is especially important for all management and supervisory personnel to be fully committed to the anti-harassment policy and procedures.
- Essential in light of 1998 Supreme Court rulings on sexual harassment: to the greatest extent possible, limit supervisors' authority to adversely affect the terms and conditions of employment for their subordinates, i.e., firing, suspension, demotion, pay cuts, adverse changes in shifts, work locations, or duties, or similar tangible job actions - make it clear to all employees that the most their supervisors can do is recommend changes, but that any changes must be approved and carried out by specifically-designated individuals.
- Prompt investigation and remedial action - results on a "need to know" basis - documentation should be maintained in a separate grievance and investigation file.
- Uniform application of policy is important.

Holiday Policies

- Most state laws, including those of Texas, do not require employers to observe any holidays or to pay employees if time off for holidays is granted.
- Just as with paid leave, though, it is essential to set holiday pay policies down clearly in writing, since state payday laws will enforce whatever the written policy says.
- Holiday pay promised in a written policy or other form of agreement is an enforceable part of the wage agreement

under the Texas Payday Law, but if there is nothing in writing promising holiday pay, it cannot be claimed under that law.

- The policy should cover what happens if an employee works during a paid holiday, i.e., does the employee simply get double pay for that day, or can the employee have some other day off to make up for the missed holiday? Some companies have policies providing "compensatory holidays" in the event a paid holiday is missed through no fault of the employee, like in this situation in which the employee works on the holiday – in such a case, the comp holiday would be used on a day that is mutually convenient for the employee and the company. Other companies provide that paid holidays are lost if the employee would not have been at work in any event (a holiday that falls in a vacation week or a period of a leave of absence), or if the employee worked on that day. Some companies make no provision at all. However, the only case in which holiday pay is required is the one in which the written policy itself expressly promises such a payment, i.e., if the policy indicates that holiday pay will be given for that day, regardless of whether the employee works or does not work that day. Otherwise, the presumption is that holiday pay is only for people who would have been working on that day, but for the holiday. In other words, the presumption coincides with the most commonly-accepted understanding of holiday pay, which is that it is a benefit given to employees who do not work on a holiday so that they might have a full paycheck for the week in which the holiday occurred.
- Do not count paid holiday hours toward "hours worked" for overtime or FMLA eligibility purposes.
- Companies with 15 or more employees and thus subject to religious discrimination laws may need to allow employees with religious convictions time off on certain holidays in order to observe religious customs, unless such time off would be an undue hardship for the business (the burden of proving that would be on the employer).
- Sample policy:
  "The Company will generally observe the following days as paid holidays:
  - 1, 2, 3, 4, 5, 6, 7, or however many - (list the holidays and specify the dates if needed)
  - Production and staffing needs may make it necessary for selected employees to work on such holidays. Failure of a selected employee to work on the designated day will be considered an absence, which will be either excused or unexcused according to the policy regarding absences from work. Employees who work on a paid holiday will not receive pay for the holiday in addition to pay for the work, but will be allowed to take another day off during the following twelve-month period on a day that is mutually convenient for the employee and the Company."

Jury Duty

- Jury duty leave is job-protected leave. An employee who is on jury duty is entitled to protection against termination or other adverse action by the employer (see §§ 122.001 and 122.0022 of the Juror's Right to Reemployment Act in the Texas Civil Practices & Remedies Code). However, paid leave for jury duty is not required - see below.
- Just as with military leave and leave to serve as a subpoenaed witness in a court or administrative proceeding, an employer should not count jury duty leave toward an absence limit, such as one found in a neutral absence control policy.
- Texas law does not currently require that jury duty leave be paid, except for those who are salaried exempt employees (see below). A bill that would have required employers to pay $40 of jury duty pay for the first day of jury service did not pass during the 81st general session of the Legislature in 2009. The general rule under both Texas and federal law is that an employer does not need to pay for time not worked. That would include time spent on jury duty. See http://www.co.travis.tx.us/district_clerk/jury/E2.asp for one Texas county's explanation regarding jury duty pay.
- In addition, time spent on jury duty is not time worked for purposes of the FLSA, so it would not count toward overtime. Finally, even if an employer has an optional jury duty paid leave policy, the hours so paid would not count toward overtime, just as other types of paid leave and paid holiday hours do not count toward overtime.
- If an employer does pay the regular wages or salary while an employee is serving on the jury, the law would allow the company to require the employee to turn over the jury duty pay to the company.
- Specific rules apply in the special situation of exempt salaried employees. In the event of absences due to jury duty, witness duty, or temporary military duty, if an employee works any part of a week and misses the rest of the week for jury, witness, or military duty, he or she must receive the full salary for the workweek, but if they miss a full week, no pay is due for that week (see 29 C.F.R. 541.602(a)); however, partial-week deductions from leave balances are allowed. A deduction for a week not worked must be authorized in writing by the employee to be valid under the Texas Payday Law (see item 12 of the sample wage deduction authorization agreement in this book). However, that special rule affects only salaried non-exempt employees. It does not affect salaried exempt employees (because the salary definition regulation specifically allows such deductions), or exempt employees who do not have to be paid a salary, such as doctors, lawyers, and teachers.
- Thus, the above limitation pertains to partial-week deductions from salary. Deductions for an entire workweek would be legal, if they are authorized by the employee in writing under the Texas Payday Law. Deductions from

paid leave would be legal in any amount.

- A deduction from the salary of a non-exempt employee could be made for jury duty time, but would have to be authorized by the employee in writing under the Texas Payday Law, or else covered with available paid leave. It would not be a recommended practice to discipline an employee for refusal to authorize such a deduction, since it might be possible for the employee to convince a court that the discipline somehow violated the juror protection law. In most situations, a reasonable alternative would be to give the employee a paid leave advance, and simply offset future leave accruals by the amount so advanced, or else deduct the advance from the employee's final pay at the time of work separation (see item 11 of the sample wage deduction authorization agreement in this book).
- Concerning paid leave deductions, such deductions are legal for any employee as long as they do not conflict with the employer's written paid leave policies. An employer should cover the issue of using paid leave for jury duty-related absences in its written policy, and clearly specify whatever procedures employees need to follow.
- Requiring an employee to use vacation or other paid leave time for jury duty leave does not conflict with either Texas or federal law. It would be a good idea to ensure that there is no wording in the company's vacation/PTO policy that would prohibit or complicate application of paid leave to a jury duty absence.
- Where a company can get into trouble is if it treats its jury-duty employees less favorably than other employees with regard to pay and leave practices. Example: a salaried exempt employee on jury duty misses part of a week to serve on the jury, and the company requires 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 misses part of a workweek for a different reason. Such disparate treatment would arguably violate the jury duty law.

LGBT Issues

- The law on LGBT (lesbian, gay, bisexual, and transgender) issues in general has been developing rapidly on a federal level - despite the lack of specific mention of such groups in employment discrimination statutes, federal courts and agencies have been issuing new guidelines for LGBT employees (see below).
- Texas state law (Chapter 21 of the Texas Labor Code) does not have any provision directly addressing these issues. However, since most Texas employers are also covered by federal employment laws, it is important to be aware of how federal agencies are interpreting the statutes they enforce.
- Some Texas cities have adopted local ordinances regarding LGBT discrimination in private employment (Austin, Dallas, Fort Worth, Plano).
- Foundational ruling: U.S. Supreme Court case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) - the Court held that a female manager had been illegally discriminated against due to her failure to conform to established gender stereotypes.
- Similar cases extended the "non-conformance with gender stereotypes" concept to same-sex harassment and LGBT protection: *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Kastl v. Maricopa Co. Cmty. Coll. Dist.*, 325 Fed.Appx. 492 (9th Cir. 2009); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *EEOC v Boh Brothers Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013); *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008); see also *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008), and *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009).
- Federal agency rulings with regard to federal employees: *Lusardi v. Department of the Army*, Appeal No. 0120133395 (October 6, 2015, http://www.eeoc.gov/decisions/0120133395.txt) (see also https://osc.gov/Resources/2014-08-28_Lusardi_PPP_Report.pdf regarding the same case); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012); *Complainant v. U.S. Postal Serv.*, EEOC Appeal No. 0120122376 (February 19, 2013); *Complainant v. Dep't of Energy*, EEOC Appeal No. 0120131136 (August 13, 2013); *Complainant v. Dep't of the Interior*, EEOC Appeal No. 0120121354 (August 13, 2013); and *Complainant v. U.S. Department of Transportation (FAA)*, EEOC Appeal No. 0120133080 (July 15, 2015).
- The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has issued new requirements for employers working on federal contracts (http://www.dol.gov/ofccp/LGBT.html); see also https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html. Further guidance from OSHA is online at https://www.osha.gov/Publications/OSHA3795.pdf.
- The latest EEOC guidance for covered employers is online at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm. More information from the federal government is on the U.S. Department of Labor's website at http://www.dol.gov/asp/policy-development/lgbt-workers.htm.
- Due to the rapid pace of developments in this area of the law and to the complexity of the issues, employers should contact experienced employment law counsel if such an issue arises in the workplace.

Medical Leave-Related Laws

- There is a potential problem when an employee needs

medical leave and multiple laws apply.
  - FMLA - applies to employers with 50 or more employees – up to 12 weeks of unpaid leave for eligible employees
  - ADA (Americans with Disabilities Act) – 15 or more employees – reasonable accommodation of disabilities can include medical leave – no set time limit
  - Pregnancy Discrimination Act – 15 or more employees – reasonable accommodation of pregnancy and related conditions – no set time limit
  - Workers' compensation – no employee limit – the law prohibits retaliation or discrimination against employees who file workers' compensation claims – no set time limit
- Each law has different purposes and requirements:
  - FMLA provides job protection for up to twelve weeks for certain family and medical events affecting the employee – some FMLA qualifying events may involve disabilities, pregnancies, and even work-related illnesses or injuries.
  - ADA requires reasonable accommodation for people with disabilities – not all medical problems are ADA-protected disabilities, but some are.
  - PDA requires reasonable accommodation for pregnancy, childbirth, and conditions related to those events – some pregnancies involve the FMLA and the ADA.
  - Workers' compensation provides temporary income replacement for employees with job-related medical problems –most job injuries do not result in disabilities, but some do, and some will involve the FMLA as well.
- Some conditions or events may involve multiple laws, depending upon the number of employees and type of condition or event involved.
- As a general rule, if two or more leave-related laws apply to an employee, the employer should consider how much leave or other protection or benefit each applicable law would require for the employee, and then apply the outcome that would provide the greatest benefit to the employee.
- As a way of maintaining an outside limit on the overall amount of absenteeism that might result from medical or family conditions, many companies adopt neutral absence control policies – courts will enforce such policies if the policy is evenly and consistently applied and allows for reasonable accommodation under the ADA. See the sample policy of the same name in the section of this book titled "The A to Z of Employee Policies".

Metal Detectors and X-Ray Machines

- No restrictions on use of machines to detect metal objects or to "see into" employees' bags, purses, briefcases, and other objects brought to work.
- Use in conjunction with a search policy.
- Can be a condition of continued employment.
- Illegal items should not be handled further – notify local authorities.

Nursing Mothers

- The federal health care reform bill signed on March 23, 2010 contained an amendment to the FLSA (new section 207(r)(1)) requiring employers to give breaks for nursing.
- Under that new FLSA provision, a non-exempt employee is entitled to a "reasonable break time" to express breast milk for her nursing child, each time the employee needs to express the milk, for up to one year following the child's birth.
- "Reasonable break time": the statute indicates that the break must be allowed "each time such employee has need to express the milk." DOL fact sheet # 73 states that "employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk, as well as the duration of each break, will likely vary." The burden of challenging how much time a nursing mother needs for such a purpose would be on the employer. For most people, the frequency of such breaks would decline in the natural course of events, so they should not be too difficult to accommodate.
- A nursing mom has the right to a private, non-restroom place 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. Employees who use their regular paid rest breaks for nursing/expression of breast milk would be paid for those breaks just like any other employees. 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 (the burden of proving that would be on the small employer).
- See the new DOL fact sheet at http://www.dol.gov/whd/regs/compliance/whdfs73.htm.
- The federal law notes that state laws are not preempted – thus, in Texas the following laws are important to be aware of:
  - Texas Health & Safety Code, § 165.002. A mother is entitled to breast-feed her baby in any location in which the mother is authorized to be.
  - Texas Health & Safety Code, § 165.003. "(a) A business may use the designation 'mother-friendly' in its promotional materials if the business develops

a policy supporting the practice of worksite breast-feeding ... ."

- Texas Government Code, §§ 619.002 - 619.005: For public-sector employees in Texas, no time limit applies to the right to express breast milk at the employee's workplace. Public employers must adopt a written policy that states that the public employer supports the practice of expressing breast milk, and make reasonable accommodations for the needs of employees who express breast milk. Such an employer must allow a reasonable amount of break time for an employee to express breast milk, as often as the employee needs to do that, and must provide a secluded place, other than a multi-user bathroom, that is private and safeguarded from intrusions by other employees and the public, where the employee can express her milk. Finally, the public employer must ensure that no adverse action is taken against employees who avail themselves of their rights under the law.

OSHA - Workplace Safety and Health Requirements

- The nation's main workplace safety and health law is the Occupational Safety and Health Act of 1970, which requires all private-sector employers to furnish a safe workplace, free of recognized hazards, to their employees, and requires employers and employees to comply with occupational safety and health standards adopted by the U.S. Department of Labor's OSHA division (for the main duty clause of OSHA, see 29 U.S.C. § 654).
- The complete listing of DOL's OSHA regulations is accessible from the OSHA web site at www.osha.gov.
- OSHA does not apply to the federal government, the Texas state government or any of its agencies, or a political subdivision of Texas, such as a city or county government (see 29 U.S.C. § 652(5); also "All About OSHA", https://www.osha.gov/Publications/all_about_OSHA.pdf).
- Compliance with OSHA standards can not only help prevent needless workplace tragedies from accidents, but also help minimize the number of injury-related employee absences, keep workers' compensation and other insurance costs to a minimum, and promote higher productivity from employees who can feel secure that the company is looking out for their safety and can thus concentrate on doing their jobs well.
- The key to understanding OSHA regulations is to remember that almost all of them are based on common sense, best practices, and what experienced and prudent employees would do in their jobs anyway. For example, the regulations require such things as wearing seat belts when driving vehicles or operating machines with seats, ensuring that safe scaffolding and fall protection are in place for employees working at heights, wearing goggles or other face protection during welding or while working with abrasive materials, using cave-in protection when working in trenches, using guards on any tools with moving blades, using guards and other protective barriers on machines with large moving parts, providing kill switches on machinery for immediate shut-off if anything goes wrong, providing adequate ventilation for workers in enclosed areas where fumes are present, protecting health-care workers from accidental pricks from needles and other sharp medical instruments, avoiding sparks near flammable materials, and so on.
- Although employers have the right to take appropriate corrective action toward employees who violate known safety rules, OSHA protects an employee's right to report workplace safety concerns and violations of safety rules, and an employer that retaliates in any way against an employee who reports safety-related problems or participates in an OSHA-related investigation is subject to enforcement action in court by DOL (see 29 U.S.C. § 660(c)(1, 2)).
- Non-willful violations can result in civil penalties, which become more substantial for serious or repeated violations, and willful violations can result in both civil penalties and imprisonment for those responsible, depending upon the severity of the violation.
- Violations of OSHA are not necessarily enough to prove an employer's negligence as a matter of law in a civil lawsuit arising from a workplace injury, but can be used as evidence of negligence. Similarly, evidence of compliance with OSHA may not be sufficient to avoid liability in such a lawsuit, and compliance is certainly not enough to prevent a workers' compensation claim from being filed, since workers' compensation claims are generally handled without regard to issues of fault. See 29 U.S.C. § 653(b)(4).
- Child labor presents special safety issues under both Texas and federal laws. Regardless of how safe a workplace may be for adult employees or how much in compliance with OSHA an employer may be, children may not perform hazardous duties or work during restricted times. A complete list of prohibited duties and restrictions on hours of work for children under both Texas and federal laws appears on the Texas child labor law poster available for free downloading at http://www.twc.state.tx.us/ui/lablaw/llcl70.pdf (PDF). For more information on child labor laws, see the topic "Child Labor" in this outline in part II of this book.
- OSHA's official PowerPoint and video presentations for workplace safety education in various industries are excellent training tools for employers and employees alike and are available for free downloading at http://www.osha.gov/SLTC/multimedia.html. The department's self-guided study and training tools are available on the OSHA eTools page. In addition, OSHA offers free compliance training and consultation to small and medium-size businesses - see

OSHA's On-site Consultation page for details.

- The state agency in Texas with the greatest authority in the area of workplace safety is the Texas Department of Insurance, the Division of Workers' Compensation of which has enforcement responsibility for the Texas Workers' Compensation Act (for the general provisions of that law, see Chapter 401 of the Texas Labor Code). The main workplace safety resource information for Texas is on the TDI website at http://www.tdi.state.tx.us/wc/safety/index.html. The Workers' Compensation Division's OSHCON Department provides workplace safety and health consultations to Texas employers, including free OSHA compliance assistance – their website is at http://www.txoshcon.com.
- As with many federal laws, OSHA does not preempt state laws that provide a greater degree of protection or benefit for employees – thus, in Texas the following laws are examples of state-level workplace safety and health laws (this is not a complete list of state laws affecting workplace safety and health - many occupations regulated under the Occupations Code have safety-related laws in the chapters for those occupations):
  - Texas Health and Safety Code, Section 81.042 - duty of some employers to report certain communicable diseases (PDF) to local health authorities or to the Texas Department of State Health Services at 1-800-705-8868
  - Texas Health and Safety Code, Chapter 256 - Safe Patient Handling and Movement Practices
  - Texas Health and Safety Code, Chapter 437 - Regulation of Food Service Establishments, Retail Food Stores, Mobile Food Units, and Roadside Food Vendors
  - Texas Health and Safety Code, Chapter 502 - Hazard Communication Act
  - Texas Labor Code, Chapter 51 - Employment of Children
  - Texas Labor Code, Chapter 52 - Miscellaneous Restrictions
  - Texas Workers' Compensation Act, Texas Labor Code, Chapter 401, et seq.

Part-Time / Full-Time Status

- Texas and federal laws leave it up to an employer to define what constitutes full-time and part-time status within a company and to determine the specific schedule of hours.
- Most companies define full-time employees as those who are regularly scheduled for a set number of hours each week (40, 37.5, 45, or similar amount), and part-time status is for anyone who is regularly scheduled to work less than that amount of time each week.
- A common reason for differentiating between part-time and full-time employees is to distinguish the set of employees who receive company benefits from those who are not eligible for such benefits, or to supply a way of distinguishing between two sets of benefits for two classes of employees. It is legal to have one set of benefits, or none at all, for part-time employees, and another set of benefits for full-time employees, as long as there is equal employment opportunity within the company.
- Certain benefits have specific rules, however:
  - *Pension or retirement benefits* – if a company offers such benefits, the federal law known as ERISA provides that an employee who works at least 1,000 hours in a twelve-month period must be given the chance to elect participation in the pension or retirement plan (this is known informally as the "thousand-hour rule" – see 29 U.S.C. § 1052)
  - *Health insurance benefits* – if an employer has a health insurance plan, Insurance Code § 1501.002(3) provides that an "eligible employee" is anyone who usually works at least 30 hours per week (however, that definition does not include "an employee who works on a part-time, temporary, seasonal, or substitute basis")
- Having part-time/full-time definitions that are insufficiently specific can lead to a problem of interpretation, if the workplace gets busy for more than a week or two at a time, and employees who are hired as part-timers have to work 40 or more hours several weeks in a row. Such employees might begin to think of themselves as full-time employees and expect full-time benefits. For that reason, some employers write the definitions in a manner similar to this:

> "Full-time employees are those who are regularly assigned to work at least 40 hours each week. Part-time employees are those who are regularly assigned to work less than full-time. While part-time employees may occasionally work 40 or more hours in a particular workweek, or in a series of workweeks, that by itself will not change their regular schedule. However, the company reserves the right to change the regular schedules of employees at any time. In such a case, the company will give affected employees as much advance notice as possible of their new regular schedules and will advise employees of the effect of such changes on their eligibility for company benefits."

Performance Evaluations

- Evaluation criteria should be job-related.
- Evaluations must be frank and objective - do not be afraid to let workers know about their faults just because they happen to belong to some minority group - courts have held it to be discriminatory to fail to let minority workers know when they have shortcomings.
- Give at regular intervals.
- Use measures that are as quantifiable as possible.
- Discuss the evaluation with employee; have the employee sign it.
- Provide a space for the employee's response/self-evaluation.

- Inform the employee that signing the form does not necessarily mean agreement, but rather only receipt and a chance to review.

Refusal to Sign Policies or Warnings

- One of the thorniest problems is that of the employee who refuses to sign anything, either out of fear that signing something will commit them to it (in reality, under the employment at will rule in Texas, the only thing an employee needs to do to be committed to a policy or warning is stay with the company after being advised of the policy or warning - see *TEC v. Hughes Drilling Fluids*, 746 S.W.2d 796), or out of a general lack of cooperation.
- Below are some methods that employers can use to deal with such issues.
- Method 1 - mandatory staff meeting:
  - Hold a mandatory staff meeting - everyone knows they have to be there or face the consequences of an unexcused absence (remember to count it as work time for wage and hour purposes).
  - Prior to the meeting, publish an agenda (e-mail; paper memo; supervisors distribute individual copies to their employees and log who gets copies) showing "distribution and discussion of new employee policy handbook / new _____ policy" as one of the items to be covered during the meeting.
  - Before the meeting begins, have everyone there sign an attendance log as proof they were there.
  - The manager who leads the meeting should follow the agenda, especially the part about the new policy issues.
  - When the time comes to discuss the policy, distribute copies of the new policy to everyone in attendance - have people in charge who will personally ensure that everyone gets a copy.
  - Discuss the policy in as much detail as is needed to get the ideas across.
  - Distribute copies of receipt acknowledgement forms to everyone there and ask everyone to sign them and leave them with a designated supervisor at the end of the meeting.
  - Collect the receipt acknowledgement forms.
  - After the meeting, publish the minutes of the meeting, with special attention to the facts that the new policy issues were discussed, that everyone in attendance received a copy, and that everyone was asked to return a signed acknowledgement of receipt form.
  - Keep a copy of the meeting notice, the agenda, the attendance log, the policy, and the minutes of the meeting as documentation that specific employees were given reasonable notice of the new policy.
  - In the face of all that documentation, an ex-employee would be facing a real uphill battle for credibility if they try to claim at an unemployment appeal hearing that they were never told about a certain policy.
- Method 2: publish new policies on computer at log-in - employee must click on an acknowledgement and agree button (something like "I have read this policy and understand that it applies to me") that appears only after the employee has opened the policy document and scrolled down to the end - doing that allows the employee's regular desktop screen to appear (your IT staff should know how to code this set-up; have the IT staff maintain reliable documentation showing how each employee went through the process).
- Method 3: on warning forms, have spaces for "I agree with the reason for this warning" and "I disagree with the reason for this warning" - ask employees to choose one or the other and sign or initial their choice - if they do, they will be unable to make a credible claim that they never saw the warning (for a sample written warning, see the "Discipline" topic in this section of the book).

Searches

- Any search policy should overcome the "expectation of privacy" - let employees know that all areas within the employer's premises, all persons entering or leaving the premises, all vehicles used in the employer's business, and all belongings brought into or onto company premises or vehicles are subject to search at any time.
- No use of physical force is allowed - never, ever physically force an employee to submit to a search - otherwise, your company could face civil and criminal liability for assault, battery, false imprisonment, intentional infliction of emotional distress, and/or other charges.
- All an employer needs to do is to make submission to searches a condition of continued employment - the policy should state that refusal to submit to a search will be grounds for discharge.

Social Media Issues

- A surprising number of employers report that employees have posted derogatory comments about their company or their job on the Internet, via Facebook, MySpace, or private blog sites, or else while using other media such as Twitter. Such conduct is becoming increasingly common with the advent of new technologies on the Internet. Unfortunately, while the technology has improved dramatically, there has been no corresponding upswing in common sense or decency in society. Thus, the loose and often intemperate comments that people used to share with each other over drinks are now freely posted online, with the employees sometimes completely unaware that their comments will become available worldwide and be archived on countless network servers across the globe.
- Bringing to mind the old saying "fools' names and fools'

faces often appear in public places," many examples have appeared in unemployment claims of how unwise use of social media by employees can get them in trouble. Here are a few of those cases:

- An employee obtained permission for a two-week FMLA absence, but posted pictures on a social Web site that were taken during that time of herself and her boyfriend on a Caribbean cruise ship, as well as a running account of the good times she was having.
- A golf resort employee used his company-issued "smart phone" to chat with friends and write about his low opinions of his boss. A printout of his chat records revealed that during one staff meeting, he posted comments on a social media site about how boring and useless the meeting was.
- Another employee used a social media site to blog about how much she hated her supervisor and her job. Although she used a pseudonym, she could not resist the temptation to gradually come out with enough identifying information about herself, her boss, and her company to where it became clear who she was.
- Another employee was found to have posted pictures on his social media page of himself and some non-employee buddies having a drunken good time in the employer's office, after hours, when the store was supposed to be completely closed.

- The general principle here would be a restatement of the old wisdom that "your business ends where my nose begins", i.e., while it is true that a person's off-duty activities are a person's own affair, that works only as long as the person does not interfere with the rights of others. In an employment context, employees are free to do what they will in their own free time, as long as what they do does not adversely affect coworkers, the employer, or the employer's clients or customers.
- However, recent guidance and rulings from the NLRB indicate that employers need to be careful about blanket prohibitions of discussing company business or their jobs online. That agency takes the position that the NLRA gives employees the right to discuss the terms and conditions of their employment together, even if they do it online on their own time. Although no courts have yet ruled on this specific issue, it seems clear that what was protected activity before the advent of social media (i.e., pay discussions, complaints about working conditions, and the like) remains protected even if it takes place online. Of course, not all online activity is protected. For example, an employee's "freedom" to disparage co-workers while off-duty should be limited by the co-workers' right to be free of a hostile work environment. Similarly, unauthorized disclosure of confidential information is not protected (aside from discussions of pay and benefits between employees). It is hard to define where that line is, but employees can and should be held accountable when they cross it. It is really no different from other forms of off-duty conduct that damage workplace relationships - courts have long held employers responsible if they fail to take effective action with respect to employees who commit illegal harassment against co-workers, whether the harassment occurs on- or off-duty. In general, a company has the right under Texas law to take action against an employee for off-duty conduct if such conduct has the effect of damaging company business (remember, though, the exception for NLRA-protected activity) or work relationships.
- It would be a good idea to adopt clear, written policies on computer and Internet usage and on the use of social media by employees. Sample policies on those subjects appear in "The A-Z of Personnel Policies" section of this book.
- Should your company adopt such a policy, all employees should sign for copies of the policy and be trained in what it means. If any employees refuse to acknowledge the policy, see "Refusal to Sign Policies or Warnings" for ideas on how to proceed.
- In Texas, Texas Penal Code § 33.07, "Online Harassment", lists the following criminal offenses:
  - third-degree felony: using a fake name or identity to create a Web page or post one or more messages on a commercial social networking site without the other person's consent and "with the intent to harm, defraud, intimidate, or threaten any person";
  - class A misdemeanor: sending "an electronic mail, instant message, text message, or similar communication" referencing any identifying information of another person without that person's consent, with the intent of causing recipients of such a communication to believe that the other person sent or authorized it, and with the intent to harm or defraud any person. This offense would become a third-degree felony if the one committing the offense intends to solicit a response by emergency personnel.

Telephone Monitoring

- It is legal for an employer to monitor employees' use of the company's phones for business purposes.
- Let employees and outside callers know in advance that such monitoring will take place.
- Stop listening as soon as it is apparent that personal, private details are being discussed – handle from there as a disciplinary matter.
- As long as one party to a conversation knows it is being recorded, it is legal to record it (this applies to in-person recordings as well).
- Be on guard against surreptitious recording of conversations in the workplace - it is legal for an employer to prohibit possession or use of recording devices in the workplace.
- *Frank B. Hall Company v. Buck* case – the company was hit with a defamation lawsuit after bad statements were made in the context of job reference calls.

Vacation, Sick, and Parental Leave Policies

- Vacation leave is not required under Texas law - sick and/or parental leave is also not required, unless it would be a reasonable accommodation under disability- or pregnancy-related laws.
- If granted, such leave can be paid or unpaid.
- The employer can impose a cap on such leave and can put substantial eligibility strings on vacation, sick, or parental leave.
- Paid vacation or sick leave is usually accrued at a set amount per month or year - parental leave is usually just a set amount per parental event (birth or adoption of a child, or placement of a foster child in the home).
- It is extremely important to set the policy down clearly in writing, since the Texas Payday Law will enforce leave pay according to the terms of the written policy.
- Paid leave promised in a written policy or other form of agreement is an enforceable part of the wage agreement under the Texas Payday Law, but if there is nothing in writing promising paid leave, it cannot be claimed under that law.
- Things to cover: amount accrued each month/year; whether leave can be carried over from year to year, and if so, how much; what approval is needed to take leave; how much advance notice is needed to take leave; return to work status reports; what happens when paid leave runs out, but the employee is still on leave; whether paid leave advances will be granted, and if so, under what circumstances and with what repayment obligations; what happens to accrued leave balances when an employee leaves the company.
- Let employees know that permission to take a vacation is not automatic and that such time off will be granted only if it is mutually convenient for both the employee and the company.
- A way to keep the accrued balance from exceeding "x" amount of hours would be to draft the policy in such a way that it would be clear that once an employee reaches an accrued total of "x" hours, no further accruals will occur, and that the maximum amount of available sick leave at any given time will be "x" hours.
- These kinds of leave are sometimes lumped together into one category called "personal time off" (PTO).
- Do not count paid leave hours toward "hours worked" for overtime or FMLA eligibility purposes.
- Just like other forms of paid leave, funeral or bereavement leave is not mandatory - some companies offer this as a separate category of leave, others include it within vacation or sick leave, or else include it as a qualifying reason for personal time off - this kind of leave is usually limited to three days per year or so, if offered - employers are allowed to ask employees to document the need for such leave, but it is a good idea to try to be as sensitive and accommodating as circumstances will allow.

Video Surveillance

- Same basic rules as for telephone monitoring – if only video is recorded, notice and consent are not mandatory (but are a good idea - see below) – if audio is also recorded, notice and consent are required (for customers, place a notice on the door that the premises are subject to video monitoring).
- To avoid grumbling about covert surveillance and possible bad publicity, go ahead and just let employees know that video monitoring of certain areas *will* take place and get their written consent.
- Never attempt to videotape areas where it is known that employees may be undressed on a routine basis (restrooms, dressing rooms).
- Only authorized personnel should ever view surveillance tapes – defamation and invasion of privacy suits can result if tapes are shown to unauthorized persons.

Voting - Time Off

- Assuming that an employee has not already voted in early voting, the employee is entitled to take paid time off for voting on election days, unless the employee has at least two consecutive hours to vote outside of the voter's working hours - see Sections 276.001 and 276.004 of the Texas Election Code.
- No Texas court cases address those statutes. The following four Texas Attorney General opinions address the matters of time off to vote and pay for such time:
  - O-6242 (1944) - an employee is entitled to a reasonable amount of time off from work in order to vote, and the employer can even prescribe what hours the employee will have off, as long as the time is reasonable and sufficient to allow the employee to vote, but the provision requiring the employer to pay the employee for the time so taken is unconstitutional. This latter holding was overruled by AG opinion V-1475 in 1952 - see below.
  - V-1475 (1952) - based upon a decision of the U.S. Supreme Court in *Day-Brite Lighting, Inc. v. State*, 72 S.Ct. 405 (1952), the Attorney General overruled in part the prior opinion in O-6242 by holding that the statute in question is a valid exercise of the state's police power, and it does not violate either the Texas or U.S. Constitution to require an employer to pay employees for time taken off from work for the purpose of voting.
  - V-1532 (1952) - this ruling clarified V-1475 by holding that paid voting leave is required only if the employee does not have sufficient time to vote outside his working hours (at least two consecutive hours).
  - M-53 (1967) - the law does not require an employee to be given paid time off to vote while working

overtime hours that he had voluntarily requested.

- Bottom-line considerations:
  - Let employees have at least two hours off to vote on an election day (unless they have already voted under early voting procedures).
  - Such time off needs to be paid to the extent that it cuts into the employee's normal working hours (V-1532).
  - Such time off does not need to be paid if the two hours are available outside of normal working hours (V-1532).
  - If the time is taken off from mandatory overtime, the time off should be paid at the rate that would have applied to the time so missed (M-53).
  - If the time is taken off from optional overtime voluntarily requested by the employee, the time off does not need to be paid, since the time off would be outside of normal working hours and is time that the employee voluntarily chose to spend working rather than voting (M-53).
- Attendance at state or local political conventions is job-protected leave, but such time off does not have to be paid - § 161.007(b) of the Texas Election Code provides that "penalty" does not include "a deduction for the actual time of absence from work."
  - No written authorization is needed to not pay an hourly employee for time not worked while attending a political convention, but if unpaid convention leave is deducted from an employee's salary, such a deduction would need to be authorized by the employee in writing under the Texas Payday Law (see item 12 in the sample wage deduction authorization agreement in this book).
  - Deductions for unpaid convention leave from the salary of an exempt salaried employee would be more complicated - full days missed could be deducted on a pro rata basis, but not partial days, and any such deductions would have to be authorized by the employee in writing as noted immediately above - for details on the DOL regulations pertaining to deductions from an exempt employee's salary, see "Salary Test for Exempt Employees" in the outline of employment law issues in this part of the book.
  - Deductions from available paid leave balances are allowed - see "Salary Test for Exempt Employees" as noted directly above.

Weapons at Work

- Regarding the legality of a policy barring weapons at work, preventing possession of weapons while in company vehicles or on company business, or even restricting an employee from carrying a concealed weapon during work hours in his or her own car that is used for company business, the considerations below may be relevant.
- The constitutional protection afforded to U.S. citizens in the Second Amendment does not apply to disputes or controversies between private citizens, so a company would not be constrained under the U.S. Constitution from enforcing such a policy.
- The Texas Constitution would also not apply in such a way.
- There is no federal or Texas law that would prohibit a company from enforcing such a policy and insisting that employees follow it as a condition of employment.
- A weapons policy should be specific enough to cover the general categories that include the usual implements of combat, mayhem, and personal violence (firearms; clubs; sharp and/or pointed objects; explosive or incendiary devices; and noxious, caustic, or toxic chemicals, for example), and may prohibit anything that the employer believes could be used by someone to inflict harm upon another.
- The policy may also cover ordinary objects that are used as weapons against others.
- In most cases, the property right of an owner or custodian of business premises to control who and what comes onto the property overrides the right of a person to carry a weapon onto the premises - that applies even to a holder of a "concealed carry" license.
- A new Texas statute (Labor Code § 52.061) allows CCL holders and those who legally possess firearms to have such firearms and ammunition inside their own locked vehicles parked on company property, but that does not extend to vehicles parked somewhere else. The Texas Attorney General's Office has explained that statute in Opinion No. GA-0972 (see https://www.oag.state.tx.us/opinions/opinions/50abbott/op/2012/htm/ga0972.htm).
- It would be best, from the standpoints of enforceability, public relations, and morale, to restrict the policy's coverage to the minimum extent needed for safety and other business considerations. However, if the employee violates a weapons law, even while off-duty, in such a way that it damages the company's reputation, goodwill, or business standing in the community, or causes his work to suffer (absences due to answering the charge), such a violation could legitimately be the basis for appropriate corrective action.

Workers' Compensation

- Texas, unlike other states, does not require an employer to have workers' compensation coverage.
- Subscribing to workers' compensation insurance puts a statutory limit on the amount and type of compensation that an injured employee may receive .
- Being a "non-subscriber", i.e., going "bare" or without coverage, leaves an employer open to personal injury lawsuits from employees who are injured on the job – the potential financial liability is high – in addition, certain defenses available in most personal injury lawsuits, such as assumption of the risk, contributory

negligence, "last clear chance", and co-worker negligence, are not available to a non-subscriber in a job injury case.

- At hire, notify each new hire of coverage (Notice 6) or non-coverage (Notice 5) and post the same notice along with other required workplace posters - also, let each new hire know that they have five days to elect to waive their right to workers' compensation benefits and retain their common-law right to sue the employer for a work-related injury - the notice must let the employee know that if they give up workers' compensation, they give up the right to receive medical or income benefits under the workers' compensation law.
- If an employer discontinues its workers' compensation coverage, it must inform employees and the Workers' Compensation Division of the Texas Department of Insurance as soon as possible via a Form DWC005.
- Under workers' compensation law, an injury or illness is covered, without regard to fault, if it was sustained in the course and scope of employment, i.e., while furthering or carrying on the employer's business; this includes injuries sustained during work-related travel.
- Injuries are not covered if they were the result of the employee's horseplay, willful criminal acts or self-injury, intoxication from drugs or alcohol, voluntary participation in an off-duty recreational activity, a third party's criminal act if directed against the employee for a personal reason unrelated to the work, or acts of God.
- Injured workers must file injury reports within thirty days of the injury, must appeal the first impairment rating within 90 days of its issuance, and must file the formal paperwork for the workers' compensation claim within one year of the injury. If the work-related nature of the injury or illness was not immediately apparent, those deadlines run from the date on which the employee should have known the problem was work-related.
- Three main types of benefits: medical benefits, income benefits, and death benefits – each type is statutorily defined and limited.
- The law places a heavy emphasis on return-to-work programs, since all studies show that recovery is faster and more efficient if an employee has some kind of useful work to do.
- An employee's refusal of suitable light-duty work can stop the payment of workers' compensation benefits.
- A job injury can involve other laws as well, such as the FMLA and the ADA – in multiple-law situations, whatever law provides the greatest protection should be applied (see "Medical Leave-Related Laws").
- Chapter 451 of the workers' compensation law prohibits discrimination or retaliatory action against employees who have filed workers' compensation claims or are somehow in the process of doing so – stray remarks can be harmful to a company's legal position in a Chapter 451 lawsuit, so never let anyone with your company be heard talking about a claim in terms of it being a problem, since any negative remarks can be twisted and spun to make the employer look as if it intended to retaliate against the claimant.
- Design your paid leave policies to avoid "benefits stacking", i.e., the combining of workers' compensation and leave-related benefits in such a way that the employee ends up getting more than 100% of his or her regular wage each week – for a sample policy, see "Limits on Leave Benefits" in "The A to Z of Personnel Policies" in this book.
- Employees on workers' compensation do not have to be allowed to continue accruing leave or other benefits, but should be treated at least as favorably as other absent employees in that regard.
- Loss of health insurance benefits while on workers' compensation leave is a COBRA-qualifying event.
- If a workers' compensation claimant files an unemployment claim, he or she will be disqualified from unemployment benefits unless the workers' compensation benefits are for "permanent, partial disability", which translates to "impairment income benefits" under the current law – in addition, the claimant's medical ability to work would be in question and should be raised by the employer as an issue in its response to the unemployment claim.

TEN - NO, MAKE THAT 15 - COMMANDMENTS OF KEEPING YOUR JOB

(This first appeared in *Texas Business Today,* 2nd/3rd Quarters 1998 issue. Since then, it has appeared on a lot of company bulletin boards and employee break room walls. The last five were added in 2010.)

1. Be on time, whether it is with showing up for work, returning from breaks, going to meetings, or turning in assignments.

2. Call in if you know you will be tardy or absent. Most companies treat absences or tardiness without notice much more seriously than simple absence or tardiness.

3. Try your best; always finish an assignment, no matter how much you would rather be doing something else. It is always good to have something to show for the time you have spent.

4. Anticipate problems and needs of management - your bosses will be grateful, even if they do not show it.

5. Show a positive attitude - no one wants to be around someone who is a "downer".

6. Avoid backstabbing, office gossip, and spreading rumors - remember, what goes around comes around - joining in the office gossip may seem like the easy thing to do, but almost everyone has much more respect - and *trust* - for people who do not spread stories around.

7. Follow the rules. The rules are there to give the greatest number of people the best chance of working together well and getting the job done.

8. Look for opportunities to serve customers and help coworkers. Those who would be leaders must learn how to serve.

9. Avoid the impulse to criticize your boss or the company. It is easy to find things wrong with others - it is much harder, but more rewarding, to find constructive ways to deal with problems. Employees who are known for their good attitude and helpful suggestions are the ones most often remembered at performance evaluation and raise review time.

10. Volunteer for training and new assignments. Take a close look at people in your organization who are "moving up" - chances are, they are the ones who have shown themselves in the past to be willing to do undesirable assignments or take on new duties.

11. Avoid the temptation to criticize your company, coworkers, or customers on the Internet. Social networking sites like Facebook, MySpace, Twitter, and blogs offer many opportunities to spout off – remember that anyone in the world can find what you put on online and that employers may be able to take action against any employee whose online actions hurt the company or its business in some way.

12. Be a good team member. Constantly focusing on what makes you different from others, instead of how you fit into the company team, makes you look like someone who puts themselves first, instead of the customer, the team, or the company.

13. Try to avoid ever saying "that's not my job". Many, if not most, managers earned their positions by doing work turned down by coworkers who were in the habit of saying that, and they appreciate employees who help get the job done, whatever it is.

14. Show pride in yourself. Never let yourself be heard uttering minority-related slurs or other derogatory terms in reference to yourself or to others. Use of such terms perpetuates undesirable stereotypes and inevitably disturbs others. It also tends to make others doubt your maturity and competence. The best way to get respect is to show respect toward yourself and others.

15. Distinguish yourself. Pick out one or more things in your job to do better than anyone else. Become known as the "go-to" person for such things. That will help managers remember you favorably at times when you really need to be remembered.

VERIFICATION OF SOCIAL SECURITY NUMBERS

Circular E, Employer's Tax Guide (Internal Revenue Service Publication 15) states the following regarding social security numbers:

"Name and social security number. Record each new employee's name and social security number from his or her social security card. Any employee without a social security card should apply for one."

Employee's Social Security Number (SSN)

"You must get each employee's name and SSN because you must enter them on Form W-2. (This requirement also applies to resident and non-resident alien employees.) You may ask your employee to show you his or her social security card. The employee is required to show the card if they have it available. If you do not provide the correct employee name and SSN on Form W-2, you may owe a penalty.

Any employee without a social security card can get one by completing Form SS-5, Application for a Social Security Card. You can get this form at Social Security Administration (SSA) offices or by calling 1-800-772-1213.

NOTE: Record the name and number of each employee exactly as they are shown on the employee's social security card. If the employee's name is not correct as shown on the card (for example, because of marriage or divorce) the employee should request a new card from the SSA. Continue to use the old name until the employee shows you the new social security card with the new name."

The penalty for incorrectly reporting social security numbers on W-2s is $50 for each incorrect social security number. In a large organization, incorrect reporting of social security numbers could lead to substantial penalties. The correct entry of new hire social security numbers is essential to protecting against incorrect numbers on W-2s, because W-2s are generated from payroll records.

When setting-up a new employee's payroll record, ensure accuracy by making a copy of the social security card and using that to enter the employee's name (exactly as shown on the card) and social security number. For example, you may hire an employee who calls himself Bud Jones. However, if the name on his social security card is Robert Stephen Jones, you should set up payroll records as Robert Stephen Jones, not Bud Jones. At work everyone may call him Bud, but his payroll records must reflect his legal name on record with the Social Security Administration.

To avoid errors, do not record the name and social security number from the application form or Basic Employee Data Sheets completed by the employee or a representative from your organization. On such forms, the name or social security number may not be properly recorded. Only record the name and social security number from a copy of the social security card."

Risk of Payroll Audits

Because of the potential for fines ($50 for each W-2 with an incorrect social security number), it is wise to periodically audit your payroll records to ensure that social security numbers are correct. The Social Security Administration (SSA) provides assistance with SSN verification. You may request verification by phone, paper, magnetic tape (allow 30 days' response time), or online (immediate response available, depending upon your Internet connection, for up to ten names and SSNs, while larger lists of up to 250,000 names and SSNs can be uploaded in batch files and verified by the next business day). Up to five SSNs can be verified over the phone toll-free at 1-800-772-6270. Up to 50 SSNs can be verified via paper lists by contacting your local Social Security office. Full information about the SSN verification program is available on the SSA's Web site at http://www.socialsecurity.gov/employer/ssnv.htm.

In the absence of an Internet connection, employers can request information from SSA's headquarters by sending a letter to:

Social Security Administration OSR OPR, DDSE, Client Identification Branch
3-H-16 Operations Building
6401 Security Blvd.
Baltimore, MD 21235
Fax: (410) 966-9439

Requests must include the following information:

- Employer name and federal employer identification number (EIN)
- Employee name, including middle initial if applicable
- Employee social security number
- Date of birth
- Gender

Little-Known Exception

As with almost everything affected by laws, there is an exception to the apparent iron-clad rule cited in the above guidance (without exceptions, how else would we keep lawyers off the streets?). Every once in a while, you may encounter a would-be employee who, for one reason or another, not only

does not have a social security card, but refuses to show you one, or else claims not to have a social security number at all. Such employees generally fall into one of three categories: 1) those who do not accept the prevailing viewpoint that one needs a social security number in order to work in this country and who resent being made to do something they did not know about before; 2) those who are afraid that having a number will enable the government or private investigators to track them for various purposes such as child support enforcement; and 3) those who are true conscientious objectors and believe in principle that it is wrong for a government to try to number and track its citizens in such a way (for the special subset of people who have religious objections, see the final paragraph of this article). The categories can sometimes be very difficult to tell apart.

The IRS actually provides a procedure for employers and employees to use if such a situation occurs and the employer still wishes to hire the individual; the procedure is described in detail on its Web site at http://www.irs.gov/businesses/small/international/article/0,,id=129234,00.html ("Filing Forms W-2 and 1042-S Without Payee TIN's"), and involves the use of an affidavit. While the IRS has no official form for such an affidavit, one form available for such a purpose is called "Form P-1, Reasonable Cause Affidavit by Payor For Not Obtaining Payee's Identifying Number" (a privately-developed form findable with an Internet search engine). Properly filled out and signed by the employer and employee, it serves as a way to request a release from the penalty otherwise provided for an employer under IRS Code Section 26 U.S.C. 6724(a). The employer certifies that it attempted to get the number, and the employee certifies that he or she declined to give the number. (Of course, the employee is thereby potentially submitting himself or herself to the tender mercies of the IRS, but that is a story that is outside the scope of this article.)

The employee might even cite IRS Code Section 26 U.S.C. 3402(p) and Treasury Regulation 26 C.F.R. Section 31.3402(p)-1 in declining to fill out a form W-4. If that occurs, and you hire him or her anyway, simply include an affidavit as discussed above with any required returns to the IRS.

Does Anything Trump That Exception?

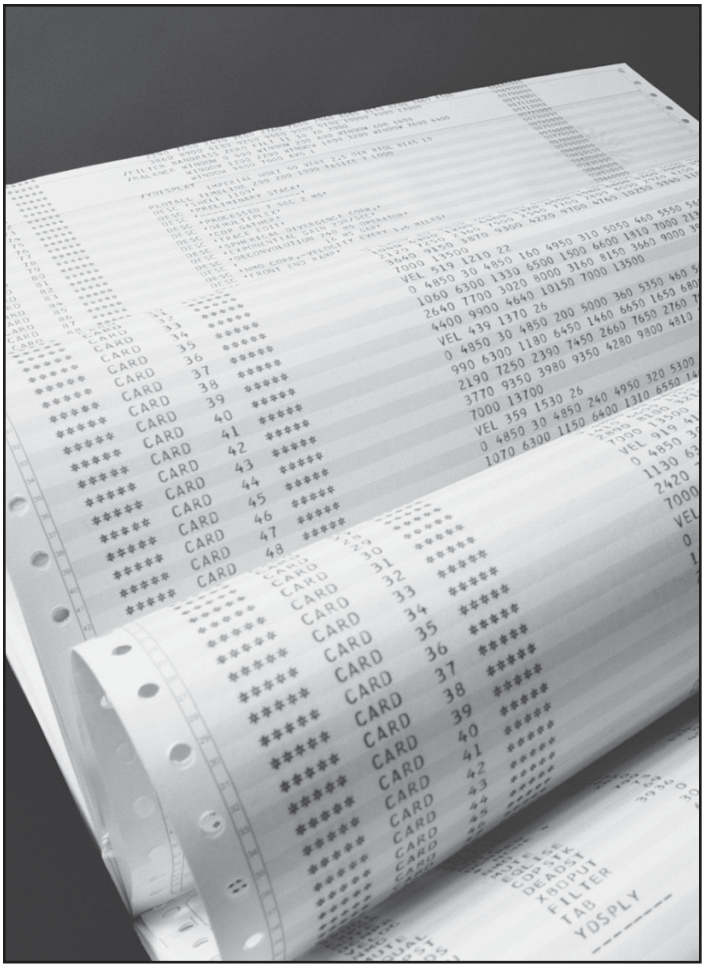
Despite the exception arising from the "voluntary" nature of the W-4, there is one law that presents a seemingly tougher obstacle for those without SSNs or who wish not to disclose it: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), a federal law better known by its popular name as the New Hire Reporting Act. 42 U.S.C. 653a(b)(1)(A) requires employers to report all new hires and rehired employees to a designated state agency (Texas Employer New Hire Reporting Operations Center). The report must include the employee's SSN; current legal guidance from the Texas Attorney General's Office and the U.S. Department of Health and Human Services, the agencies responsible for the state and national new hire registries, respectively, does not address any exceptions regarding SSNs, nor does it address the interaction of the new hire reporting statute with the Religious Freedom Restoration Act (42 U.S.C. 2000bb) and the case law thereunder. The state law enacted to enforce the federal law is found in the Texas Family Code Sections 253.101 - 253.104. Strict penalties exist for an employer's failure to comply with that law. For more details on new hire reporting, see the article in this book titled "New Hire Reporting Laws". For information on the issue of employees without SSNs, see "Employees Without Social Security Numbers" (the next article in this book).

So, What to Do?

To put all this together, if a person showed a Social Security card at I-9 time that the Social Security Administration later says contains an invalid SSN, the employer would have a good-faith suspicion that the Social Security card shown for the I-9 process was not genuine. However, the I-9 requirements can be satisfied with something other than a Social Security card, i.e., with one of the documents contained in "List C" of the I-9 as establishing authorization to work in the United States. If the employee shows what appears to be another valid document from List C, that would cure the defect caused by an invalid Social Security card. However, and this is very important, it would still not cure the defect caused by an invalid SSN for IRS and state unemployment tax purposes. The employer cannot simply continue to report wages under a SSN that is known to be invalid. A similar dilemma occurs if the employee does not furnish any SSN at all for reasons discussed above. In all such cases, the law does not present any obstacle to refusing to hire someone who refuses or fails to supply a correct SSN (other than those who are without SSNs due to religious reasons – see the final paragraph below).

The bottom line is that an employer is entitled to require as a condition of continued employment that all employees with social security numbers furnish them correctly, and in the situation of an invalid SSN, the employer would be entitled to insist that the employee furnish proof that he or she has a valid SSN before allowing the person to return to work, as long as all workers are subject to the same requirement, regardless of nationality or citizenship status. In the case of incorrect SSNs, it would be advisable for the employer to tell the employee about the problem, explain that the company cannot comply with federal and state wage reporting and payroll tax laws without valid SSNs for employees, give the employee instructions on how to contact the SSA, and give the employee a reasonable amount of time to do so before making a temporary suspension from employment into a permanent discharge. In the case of employees who refuse outright to furnish a social security number, and the employer decides not to hire the employee, it would be well-advised to

take advantage of its right *not* to explain why an applicant is not being hired. To explain would only invite legal action. If the employer does decide to hire the employee anyway, it would need to submit an affidavit (such as a completed "Form P-1") along with any reports the IRS requires regarding payroll-related taxes. An employee who refuses to complete the employee section of such an affidavit can be warned and then discharged for continued refusal to cooperate. For more on the issue of employees without SSNs, see "Employees Without Social Security Numbers".



Final Potential Fly in the Ointment

If the employee is not hired, and the employee has cited religious objections to having a social security number, an employer with 15 or more employees may have a risk of an EEOC claim for an alleged failure to accommodate an employee's right to practice a legitimately-held religious belief. Despite a lack of court decisions on the new hire reporting laws, it is likely that a refusal to hire based upon reluctance to run afoul of the new hire reporting requirements would pass legal muster. For much more on this issue, see "Employees Without Social Security Numbers". In any such case, the employer should definitely consult a qualified employment law attorney regarding the matter.

EMPLOYEES WITHOUT SOCIAL SECURITY NUMBERS

Although almost all employers can go years without seeing this situation, and most employers never encounter it at all, every once in a while, an employer might run across an applicant or a new hire who claims not to have a social security number, or else refuses to disclose it. Now, the situation could be as simple as that of a person who is newly arrived in this country and does not yet have a social security number, in which case the employer can give the applicant, if hired, or the new hire the basic information on how to apply to the Social Security Administration for a number (see http://www.ssa.gov/ssnumber/), and proceed with the I-9 process as usual (see "I-9 Requirements"). However, the situation is more complex if the applicant / new hire claims not to have a social security number, or refuses to disclose it, because of a religious or other form of conscientious objection.

It is certainly legal to hire someone who is authorized to work in this country, but who does not have a social security number or who chooses not to disclose it. In such a case, as noted in the article "Verification of Social Security Numbers", the employer has the right to require the employee to complete an affidavit such as a "Form P-1" ("Reasonable Cause Affidavit by Payor For Not Obtaining Payee's Identifying Number" (a privately-developed form findable with an Internet search engine)) or similar document that the employer will need to excuse its failure to obtain a social security number for IRS (whether such an affidavit is sufficient to excuse non-disclosure of the SSN on a new hire report is an open question, at least in the situation of religious objectors – see below). Employers do not face any particular legal issues for discharging an employee who refuses to complete such a form, other than perhaps an unemployment claim, the outcome of which would depend upon whether the employer could prove that refusal to complete the employee portion of the form amounted to work-related misconduct and that the employee either knew or should have known they could be fired for such a reason.

The complicated issue is whether the employer can legally refuse to hire a conscientious SSN objector or discharge a new hire who is in that category, based solely upon that fact. That issue, in turn, depends upon a number of factors, including the reason for the conscientious objection and the number of employees in the company (the religious discrimination laws do not apply to employers with fewer than 15 employees). Conscientious objectors fall into two main categories: those with religious objections, and those without. The simpler of the two situations is that of someone who objects to having a social security number on general principles not involving religious conviction.

There is no law or legal doctrine in Texas that affords any kind of job protection for such an individual. In contrast, the situation of a person who objects to having a social security number for religious reasons involves complex legal issues, and the rest of this article will focus on that situation.

Reasons for Requesting a Social Security Number

Many employment-related laws call for new hires and other employees to furnish a social security number to the employer, and SSNs are often requested in a number of other situations that affect the workplace – following is a list of the most common situations in which SSNs will be requested:

- Job applications (for the purpose of enabling background checks)
- Background check consent forms
- W-4 (information for tax withholding)
- I-9 (verification of employment authorization)
- New hire report (reporting of new hires to the state)
- Professional and other occupational license applications and renewals
- Permits needed by the employee or the company for the job
- Driver's license application
- Some benefit applications and sign-up forms

The situations in which the employer feels the greatest need to get the social security number include the W-4, the I-9, and the new hire report. Here are the legal issues of which employers should be aware for each of those forms:

W-4 and W-2 Forms

As noted in the article "Verification of Social Security Numbers", employers do not have to supply the employee's SSN on the W-4 form. However, employers may face a monetary penalty from the IRS for failing to include the employee's full and correct name and SSN on W-2s and other wage reports. To apply for a waiver of the penalty if the employer decides to keep the employee, employers should have the employee who claims not to have an SSN (or declines to give it) complete their portion of an affidavit to that effect, such as the previously-described "Form P-1" (see "Verification of Social Security Numbers").

Section 4 of IRS Publication 15 (http://www.irs.gov/pub/irs-pdf/p15.pdf) contains the following information relevant to the SSN issue:

4. Employee's Social Security Number (SSN)

You are required to get each employee's name and SSN and to enter them on Form W-2. This requirement also applies to resident and non-resident alien employees. You should ask your employee to show you his or her social security card. The employee may show the card if it is available. You may, but are not required to, photocopy the social security card if the employee provides it. If you do not provide the correct employee name and SSN on Form W-2, you may owe a penalty unless you have reasonable cause. See Publication 1586, Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs. …

Applying for a social security number. If you file Form W-2 on paper and your employee applied for an SSN, but does not have one when you must file Form W-2, enter "Applied For" on the form. If you are filing electronically, enter all zeros (000-00-0000) in the social security number field. ...

Correctly record the employee's name and SSN. Record the name and number of each employee as they are shown on the employee's social security card. ...

IRS individual taxpayer identification numbers (ITINs) for aliens. Do not accept an ITIN in place of an SSN for employee identification or for work. An ITIN is only available to resident and non-resident aliens who are not eligible for U.S. employment and need identification for other tax purposes. You can identify an ITIN because it is a 9-digit number, beginning with the number "9", with either a "7" or "8" as the fourth digit, and is formatted like an SSN (for example, 9NN-7N-NNNN). CAUTION: An individual with an ITIN who later becomes eligible to work in the United States must obtain an SSN. …

I-9 Form

Although there is a space in section 1 of the I-9 form for the employee's SSN, there is no requirement on an employer that it get that space filled in. Here is what the U.S. Citizenship and Immigration Services bureau (USCIS) of the U.S. Department of Homeland Security says about that in its current instructions for employers for the I-9 form:

> NOTE: Providing a Social Security number on Form I-9 is voluntary for all employees unless you are an employer participating in the USCIS E-Verify program. Providing an e-mail address or telephone number is voluntary.
> You may not ask an employee to provide you a specific document with his or her Social Security number on it. To do so may constitute unlawful discrimination.
>
> *Source:* M-274, *I-9 Handbook for Employers*, page 3 http://www.uscis.gov/files/form/m-274.pdf

In addition, although a social security card is listed as one of the items in List C on page 3 of the Form I-9 that an employee can show to prove employment authorization, it is only one of several such documents. USCIS cautions that conditioning the I-9 process on showing of a social security card can possibly subject an employer to a charge of "document abuse", which amounts to a form of employment discrimination. Thus, an employer should not insist on seeing a social security card in connection with the I-9 employment verification process.

New Hire Report

The issue is trickiest when it comes to the new hire report that employers must submit to the state new hire directory within the first twenty (20) days after hire. The federal statute (42 U.S.C. 653a(b)(1)(A)) and the regulation adopted by the Texas Attorney General's office (1 T.A.C. § 55.303) both specify that the employer must include the SSN as one of six data elements. Interestingly, both provisions also note that the reporting should be done with a copy of the W-4 form or its equivalent. If, as noted above, the SSN may not be required when completing the W-4, can the new hire reporting statute nonetheless insert such a requirement? Another question is what weight should be given to a person's religious belief that having a social security number is wrong? Those questions are not definitively answered by any materials currently available from either state or federal government agencies.

Religious Freedom Issues

Following a decision by the U.S. Supreme Court in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress passed a law in 1993 known as the Religious Freedom Restoration Act (42 U.S.C. 2000bb). Its purpose was to reverse the Supreme Court's holding in Smith that facially-neutral legal requirements and restrictions were permissible as long as they applied equally to all, regardless of religious faith or lack thereof. The RFRA specifically provided that the legal standard for restrictions on a person's exercise of religious faith should be restored to the pre-*Smith* holdings in *Sherbert v. Verner* (374 U.S. 398 (1963)) and *Wisconsin v. Yoder* (406 U.S. 205 (1972)), both of which held that the government must prove two things to defend a requirement or restriction that substantially burdens a person's sincerely-held religious belief: 1) that the government action is in furtherance of a compelling state interest; and 2) that the action is the least-restrictive means of enforcing that interest. Thus, the RFRA addressed the balancing test that must occur before Congress or a state may infringe upon a person's free exercise of religious faith.

There is a real potential for a conflict between the two federal statutes in question, 42 U.S.C. 2000bb (the RFRA) and 42 U.S.C. 653a(b)(1)(A) (the "New Hire Reporting Law" requiring employers to report an employee's SSN to a designated state agency). No U.S. court has yet directly addressed a situation involving the interplay between the two statutes. Thus, one must speculate on what the outcome might be. The RFRA predates the new hire reporting law; which law came last is sometimes taken into account in conflict of law situations, but the effect is not always the same. As a general rule, though, the most recent law is given precedence, all other factors being equal, since a court usually presumes that the lawmakers were aware of their prior enactment and would have included a saving provision in the latter statute if they had intended for the previous statute to be undisturbed. However, there is likely no need to get into that kind of analysis, since the new hire law is extremely specific in nature, and the RFRA does not attempt to address PRWORA's subject matter, but instead affords a general backdrop for constitutional analysis of federal and state statutes and regulations. Although the Supreme Court ruled in *Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), that the RFRA was unconstitutional as applied to states and local governments, the Ninth Circuit in *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999), ruled that the RFRA is constitutional as applied to the federal government.

The RFRA makes it clear that a government action that infringes on a person's religious liberty interest must pass certain tests if it is to be considered constitutional. Here is the statute in question:

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings
The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
(3) governments should not substantially burden religious exercise without compelling justification;
(4) in *Employment Division v. Smith,* 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes
The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The statute summarizes what used to be the prevailing case law in cases involving infringements of religious liberty. Basically, in order to justify such an infringement, the government must show a compelling interest in doing so. Only a compelling government interest (in the case law, the government interest is equated with "public interest", i.e., the interest of the people at large) can justify going against a fundamental right guaranteed under the Constitution. The burden of proving such an interest has always been on the government. These principles certainly come to light in the two court cases cited in the RFRA provision in question, relevant selections from which appear below:

> *Sherbert v. Verner,* 374 U.S. 398, 406 (1963) (an unemployment insurance case): "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation,' Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430. ... For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (ibid at 407).
>
> *Wisconsin v. Yoder*, 406 U.S. 205, 235 (a compulsory school attendance case):
> "... courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements. ... and it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish" (ibid at 236).

However, in the case of *U.S. v. Lee*, 455 U.S. 252, 102 S.Ct. 1051 (1982), the U.S. Supreme Court ruled that the exemption from SSN taxes that applies to self-employed individuals with religious objections to participation in the social security system does not apply to employers or employees with similar

religious objections.

An argument that the new hire reporting statute is not a statute that would have to pass muster under the RFRA, if push ever came to shove for a religious objector to SSNs, would be unlikely. The real question is, would the government's purpose in enacting the SSN reporting requirement be compelling enough to meet the standards under *Verner and Yoder*? Most commentators on the new hire reporting requirement recognize two main purposes for the law: 1) to better enable the federal and state governments to track across state lines non-custodial parents who for one reason or another fail to satisfy their court-ordered child support obligations; and 2) to enable state and federal agencies to detect, discourage, and deal with benefit fraud under various government programs. Now, as important as the second purpose is, it is doubtful that it would be enough to pass the compelling interest test as explained in RFRA and in the *Verner* and *Yoder* cases. However, the public interest behind that first purpose is much more compelling, and has been used as a rationale for many other enactments on a state and federal level. It is why, for example, that in the order of priority for garnishments and wage attachments, child support has a greater priority than anything except for a bankruptcy court garnishment (even there, the bankruptcy trustee must give child support garnishments priority over almost everything else when disbursing funds to creditors of the estate) or a prior IRS tax lien. For guidance on how compelling the child support interest is in relation to an infringement of religious liberty, a court would look to, among other things, the intent and findings of Congress when it passed the new hire reporting statute.

The only provision in PRWORA (http://wdr.doleta.gov/readroom/legislation/pdf/104-193.pdf) dealing directly with a Congressional finding on the child support issue seems to be in Section 101 of Title I, in which the following finding appears:

(4) In 1992, only 54 percent of single-parent families with children had a child support order established and, of that 54 percent, only about one-half received the full amount due. Of the cases enforced through the public child support enforcement system, only 18 percent of the caseload has a collection.

The statute does not list child support as a "compelling government interest", although it characterizes the goal of ensuring the financial self-reliance of alien immigrants as such. It characterizes the goal of reducing child pregnancy and out-of-wedlock births as a "very important government interest", which might not satisfy the tests in the RFRA.

Court Decisions on Religious Freedom and Child Support

An essential task here is to analyze the case law regarding free exercise and compelling state interest issues. The cases that deal with this subject seem to focus on four main issues:

1) whether the plaintiff or defendant has a sincerely-held religious belief;
2) whether the government action imposes a substantial burden on the free exercise of that belief;
3) whether the government action is in furtherance of a compelling state interest; and
4) whether the action is the least-restrictive means of enforcing that interest.

The threshold questions are the first two, but once those have been established by the plaintiff or defendant, the second two questions must be answered in the affirmative by the government in order for the government action to be enforceable.

The case that turns up time after time in other free-exercise child support cases is *Hunt v. Hunt*, 162 Vt. 423, 648 A.2d 843 (Vermont 1994), in which the Vermont Supreme Court held that the state has a compelling interest in enforcing child support obligations, and hence affirmed the child support order even though it produced a burden on the father's free exercise of his religious beliefs, but vacated the contempt order against the father because the state failed to prove that contempt was the least-restrictive means of enforcing the obligation.

Other cases that recognize a compelling state interest in enforcing child support obligations include *Murphy v. Murphy*, 574 N.W.2d 77, 80 (Minn.App. 1998); *Walton v. Walton*, 789 S.W.2d 64, 67 (Mo.App. 1990); *Berry v. Berry*, 769 P.2d 786, 787 (Or.App. 1989); *In re Marriage of Crockarell*, 631 N.W.2d 829, 835 (Minn.App. 2001); and *Rooney v. Rooney*, 669 N.W.2d 362, 370 (Minn.App. 2003). There were others as well, but they did not particularly address religious freedom issues.

The Texas Attorney General's office, which enforces the new hire reporting laws and has a major division devoted to enforcing child support obligations, takes the position that child support is a compelling state interest (see Op. Tex. Att'y Gen. No. DM-348 (1996)). This author has not found any Texas cases directly addressing the sort of issues one finds in the *Hunt* case.

Regarding the SSN requirement in the new hire reporting law, based upon the case law and other indications such as the high priority given to child support withholding orders in wage garnishment situations, it seems likely that a court would find that there is a compelling state interest behind the law.

The real battle, in this author's view, would be over whether the government could meet its burden of showing that the SSN requirement is the least-restrictive means of enforcing that

interest. Much would depend upon whether the government could document its opinion, as might be the case with studies showing that the SSN is the most universal identifier and that forcing the government to use some other means of identifying and "tagging" support-delinquent parents would be too great a burden on the public. Such an argument failed in two cases dealing with state requirements that Amish horse-drawn carts had to display an orange, triangular slow-moving vehicle plaque on the back of each cart on the road. The courts in both cases ruled that the state had failed to offer any studies establishing that the Amish alternative of a white reflective stripe across the back would have left the automobile-driving public less safe. Thus, the states failed the least-restrictive means test in that situation.

How the least-restrictive test would work out with the SSN requirement is unknown. The author is unaware of any case directly on point here.

Lack of Clear Administrative Guidance

This area of the law is so relatively new that there is a dearth of authoritative government rulings, opinion letters, and other forms of official guidance. All of the agency handbooks for employers regarding the new hire laws are still at the "here's what the law says" stage, and all of the references point back to the same untested statutes. "Untested" in this context means no published court opinions directly on point, especially at the appeals court level. What seems to be the most direct agency guidance is on the Web site of the U.S. Department of Health and Human Services, in the National Directory of New Hires section, in the FAQ section for employers - here is the link: http://faq.acf.hhs.gov/cgi-bin/employers.cfg/php/enduser/popup_adp.php?p_sid=-bSPJami&p_lva=&p_li=&p_faqid=831&p_created=1062108728&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PWRmbHQmcF9ncmlkc29ydD0mcF9yb3dfY250PTcxJnBfcHJvZHM9JnBfY2F0cz0xMDkmcF9wdj0mcF9jdj0xLjEwOSZwX3N1YXJjaF90eXB1PWFuc3dlcnMuc2VhcmNoX25sJnBfcGFnZT0y.

Here is the question and HHS's answer:

> Question: May an employer submit a new hire report without using an employee's Social Security number?
>
> Answer: No. The Social Security number (SSN) is a required data element in the new hire report. Including a SSN in a new hire report is important for a number of reasons. Before state new hire records are submitted to the National Directory of New Hires (NDNH), the Social Security Administration (SSA) verifies the name and SSN combination provided to the State Directory of New Hires with the SSA master file of correct SSNs. If the combination submitted does not correspond to SSA's file, the new hire report is not entered into the NDNH.
>
> Correct SSN data is (sic) also important because new hire records are used for crossmatching with outstanding child support cases and with unemployment insurance claims. These crossmatches are performed using the SSN as a key field. Therefore, it is critical that you use only a valid SSN. Do not use an Individual Taxpayer Identification Number or Resident Alien ("green card") number in place of the SSN.

Of course, that answer does not get the analysis very far, since it merely makes the obvious observation that the new hire report form has a "required field" for the SSN, which in turn is based upon the basic statute (42 U.S.C. 653a). Following is HHS's answer to the author's request for clarification of the interaction between the RFRA and the SSN requirement in the new hire reporting law:

> Response (FPLS) - 06/24/2008 03:16 PM
> No, we have not undertaken a study regarding how PRWORA and the RFRA interface. 42 U.S.C 653a requires that employers report newly-hired employees' names, addresses, and Social Security numbers. If the employee has a Social Security number, it should be reported; if the employee does not have a Social Security number, we will attempt to locate the person without it.
>
> We regret that we do not have additional information on this topic. For information regarding the new hire reporting laws, please visit the Policy section of our website, at: http://www.acf.hhs.gov/programs/cse/.

Thus, it would appear that there is no particular penalty under the federal new hire reporting law if the report does not include an employee's SSN for the reason that the employer does not have it. If a report comes in without such a number, the new hire office will simply go ahead with its mission, which is to keep track of the employee at the new job.

Under Texas law, new hires must be reported to the Attorney General's New Hire Reporting office – the applicable regulation is 1 T.A.C. § 55.303, which includes the SSN as one of six required data elements (thus echoing the federal law). The latest guidance from the Texas office, quoting HHS directive PIQ-99-05 (issued July 14, 1999), is that failure to provide an SSN is permitted if the employee or applicant submits an affidavit [author's note: no official form exists] stating that the individual does not have a Social Security number. Of course, that flexibility does not apply to someone who has a number, but refuses to reveal it.

Refusal to Hire Due to Lack of SSN

As to the question of whether an employer may legally refuse

to hire an applicant due to failure or refusal to furnish a social security number, courts from around the country generally support an employer's right to refuse to hire an applicant for such a reason. In *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000), *cert. denied*, 531 U.S. 895, 121 S.Ct. 226 (2000), the Eighth Circuit Court of Appeals held that the IRS requirement that an employer furnish an employee's correct name and SSN with payroll tax documents is sufficient neutral justification for refusal to hire, even if the refusal infringes on an applicant's religious beliefs, and that an employer is not obligated to seek a waiver from the IRS in order to get past that requirement (thus, even though an employer may file an affidavit of reasonable cause for failing to furnish the SSN, it is not bound by any law to do so). The *Seaworth* court cited other court decisions along the same line: *E.E.O.C. v. Allendale Nursing Centre*, 996 F.Supp. 712, 717 (W.D. Mich.1998) ("requirement that employee obtain SSN is requirement imposed by law, not employment requirement"); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-31 (9th Cir. 1999) ("employer not liable for not hiring person who refused for religious reasons to provide his SSN, because accommodating applicant's religious beliefs would cause employer to violate federal law, which constituted 'undue hardship'"); and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67, 107 S.Ct. 367 (1986) ("accommodation causes undue hardship whenever it results in more than *de minimis* cost to employer") *(ibid*). The *Sutton* case further noted that in the absence of proof of some kind of collusion with the government, there is no valid RFRA claim against a private sector employer that is simply complying with the law (*Sutton, supra* at 836-842). A similar decision came in the case of *Weber v. Leaseway Dedicated Logistics, Inc.*, 5 F.Supp.2d 1219 (D.Kan.1998), *aff'd in an unpublished opinion*, 166 F.3d 1223 (10th Cir. 1999), which held that a trucking company did not have to hire an applicant for a commercial driver position who refused on religious grounds to submit his SSN; according to the court, the SSN was required by both IRS and DOT regulations, and it would have been an undue hardship on the employer to hire the applicant and risk both IRS and DOT penalties. Finally, in *Baltgalvis v. Newport News Shipbuilding Inc.*, 132 F.Supp.2d 414 (E.D. Va. 2001), aff'd in an unpublished opinion, 15 Fed. Appx. 172 (4th Cir. 2001), the court, agreeing with the decisions cited above, ruled that the employer did not violate religious discrimination laws by acting on the basis of IRS requirements regarding the SSN, and that it would have been an undue hardship on the employer to require the company to either seek a waiver from the IRS or use an identifying number other than the SSN.

In an opinion letter dated June 14, 2003, the EEOC agreed with the above court decisions and indicated there would be no problem under Title VII with an employer insisting that an employee give a valid SSN in connection with employment (see http://www.eeoc.gov/eeoc/foia/letters/2003/titlevii_religion_ssn.html).

Conclusion

While it may be possible for an employer to hire an employee without a social security number and seek a waiver from IRS regulations requiring its use on various payroll tax-related forms, it is by no means clear that other laws, such as new hire reporting statutes and DOT regulations, allow such waivers. On the other hand, it seems very clear that courts around the country will support an employer's decision that it will not hire an employee who fails to give a social security number for use in complying with various government regulations, even if the failure to give the SSN is due to the employee's sincerely-held religious belief.

Ever since passage of the Immigration Reform and Control Act in 1986, employers have had to verify the employment authorization of each employee they hire. This is done with the I-9 form, a copy of which must be completed for each newly-hired employee. IRCA is enforced by the U.S. Citizenship and Immigration Services (formerly known as the INS); the agency's Internet home page is at http://www.uscis.gov/portal/site/uscis.

I-9 REQUIREMENTS - DOCUMENT LISTS

Ever since passage of the Immigration Reform and Control Act in 1986, employers have had to verify the employment authorization of each employee they hire. This is done with the I-9 form, a copy of which must be completed for each newly-hired employee. IRCA is enforced by the U.S. Citizenship and Immigration Services (formerly known as the INS) (https://www.uscis.gov/).

The USCIS has a handbook with detailed guidance on the I-9 form, including frequently-asked questions and answers on employment eligibility verification and I-9 forms, at the following link: https://www.uscis.gov/i-9-central/handbook-employers-m-274.

The main things for employers to keep in mind about I-9s are:

- they are completed only for employees, not applicants;
- the documents are either one unexpired document from List A (documents showing both identity and work authorization), or one unexpired document from List B (documents showing identity) and one from List C (documents showing work authorization);
- the lists show several different documents that are acceptable - employers may not insist on certain documents for I-9 purposes;
- use only the latest version of the I-9 form (as of January, 2020, the most recent version is dated 07/17/17), available as a free download on the USCIS Web site at http://www.uscis.gov/files/form/I-9.pdf;
- it is a good idea to photocopy the documents shown by the employee in case of a later audit; and
- keep the I-9 records during the entire time the employee is employed and then beyond that, for at least three years past the date of hire, or one year after the employee leaves the job, whichever is later (however, it's a good idea to keep all employment records at least seven years after the employee leaves employment).

The latest version of the form (July 17, 2017) is available on the USCIS Web site at https://www.uscis.gov/i-9 as a PDF file (requiring Adobe Acrobat Reader). Following is a list of the acceptable documents as they appear on the most recent Form I-9 (all documents must be unexpired):

LISTS OF ACCEPTABLE DOCUMENTS
All documents must be unexpired

List A - Documents that Establish Both Identity and Employment Authorization

1. U.S. Passport or U.S. Passport Card
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa
4. Employment Authorization Document that contains a photograph (Form I-766))
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status:
   a. Foreign passport; and
   b. Form I-94 or Form I-94A that has the following:
      (1) The same name as the passport; and
      (2) An endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I–94 or Form I–94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.

List B - Documents that Establish Identity

1. Driver's license or ID card issued by a state or outlying possession of the United States, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
2. ID card issued by federal, state, or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
3. School ID card with a photograph
4. Voter's registration card
5. U.S. military card or draft record
6. Military dependent's ID card
7. U.S. Coast Guard Merchant Mariner card
8. Native American tribal document
9. Driver's license issued by a Canadian government authority

(For persons under age 18 who are unable to present a document listed above:)

10. School record or report card
11. Clinic, doctor, or hospital record
12. Day-care or nursery school record

List C - Documents that Establish Employment Eligibility

1. A Social Security Account Number card, unless the card includes one of the following restrictions:*
   1) NOT VALID FOR EMPLOYMENT

2) VALID FOR WORK ONLY WITH INS AUTHORIZATION
3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION

2. Certification of Birth Abroad issued by the Department of State (Form FS-545)
3. Certification of Report of Birth issued by the Department of State (Form DS-1350)
4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
5. Native American tribal document
6. U.S. Citizen ID Card (Form I-197)
7. ID card for use of Resident Citizen in the United States (Form I-179)
8. Employment authorization document issued by the Department of Homeland Security.

The most recent version of the regulation is found in USCIS regulation 8 C.F.R. 274a.2(b) (revised effective July 22, 2010 - when the next revision will be posted is uncertain, but the home page for e-CFR (the Electronic Code of Federal Regulations) is at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=%2Findex.tpl, and the latest online copy of the regulation can be searched for by using the Browse box to go to Title 8, clicking on Parts 1-507, then on "274a.1 to 274a.14", then on "§274a.2"; scroll down until you come to subsection (b)(1)(v)). The July 22, 2010 version of the regulation is reproduced in pertinent part below:

CODE OF FEDERAL REGULATIONS
TITLE 8--ALIENS AND NATIONALITY

CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

(Note: what used to be known as the INS is now known as the U.S. Citizenship and Immigration Services, a bureau of the U.S. Department of Homeland Security)

PART 274a--CONTROL OF EMPLOYMENT OF ALIENS--Table of Contents
Subpart A--Employer Requirements
Sec. 274a.2 Verification of identity and employment authorization.
(b) Employment verification requirements
(1) Examination of documents and completion of Form I-9.
(v) The individual may present either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity. Only unexpired documents are acceptable. The identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I-9.

[List A]
(A) The following documents, so long as they appear to relate to the individual presenting the document, are acceptable to evidence both identity and employment authorization:
(1) A United States passport;
(2) An Alien Registration Receipt Card or Permanent Resident Card, Form I-551;
(3) A foreign passport that contains a temporary I-551 stamp, or temporary I–551 printed notation on a machine-readable immigrant visa;
(4) An unexpired Employment Authorization Document which contains a photograph, Form I-766;
(5) In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with a Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form;
(6) A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I–94 or Form I–94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI; or
(7) In the case of an individual lawfully enlisted for military service in the Armed Forces under 10 U.S.C. 504, a military identification card issued to such individual may be accepted only by the Armed Forces.

[List B]
(B) The following documents are acceptable to establish identity only:
(1) For individuals 16 years of age or older:
(i) A driver's license or identification card containing a photograph, issued by a state (as defined in section 101(a)(36) of the Act) or an outlying possession of the United States (as defined by section 101(a)(29) of the Act). If the driver's license or identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address;
(ii) School identification card with a photograph;
(iii) Voter's registration card;
(iv) U.S. military card or draft record;
(v) Identification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be

included such as: name, date of birth, sex, height, color of eyes, and address;
(vi) Military dependent's identification card;
(vii) Native American tribal documents;
(viii) United States Coast Guard Merchant Mariner Card;
(ix) Driver's license issued by a Canadian government authority;

(2) For individuals under age 18 who are unable to produce a document listed in paragraph (b)(1)(v)(B)(1) of this section, the following documents are acceptable to establish identity only:
(i) School record or report card;
(ii) Clinic doctor or hospital record;
(iii) Daycare or nursery school record.

(3) Minors under the age of 18 who are unable to produce one of the identity documents listed in paragraph (b)(1)(v)(B) (1) or (2) of this section are exempt from producing one of the enumerated identity documents if:
(i) The minor's parent or legal guardian completes on the Form I-9 Section 1--"Employee Information and Verification" and in the space for the minor's signature, the parent or legal guardian writes the words, "minor under age 18."
(ii) The minor's parent or legal guardian completes on the Form I-9 the "Preparer/Translator certification."
(iii) The employer or the recruiter or referrer for a fee writes in Section 2--"Employer Review and Verification" under List B in the space after the words "Document Identification #" the words, "minor under age 18."

(4) Individuals with handicaps, who are unable to produce one of the identity documents listed in paragraph (b)(1)(v)(B) (1) or (2) of this section, who are being placed into employment by a nonprofit organization, association, or as part of a rehabilitation program, may follow the procedures for establishing identity provided in this section for minors under the age of 18, substituting where appropriate, the term "special placement" for "minor under age 18", and permitting, in addition to a parent or legal guardian, a representative from the nonprofit organization, association, or rehabilitation program placing the individual into a position of employment, to fill out and sign in the appropriate section, the Form I-9. For purposes of this section, the term "individual with handicaps" means any person who
(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities,
(ii) Has a record of such impairment, or
(iii) Is regarded as having such impairment.

[List C]

(C) The following are acceptable documents to establish employment authorization only:
(1) A Social Security account number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States;*
(2) Certification of Birth issued by the Department of State, Form FS-545;
(3) Certification of Report of Birth issued by the Department of State, Form DS-1350;
(4) An original or certified copy of a birth certificate issued by a State, county, municipal authority, or outlying possession of the United States bearing an official seal;
(5) Native American tribal document;
(6) United States Citizen Identification Card, Form I-197;
(7) Identification card for use of resident citizen in the United States, Form I-179;
(8) An employment authorization document issued by the Department of Homeland Security.

Receipts and Reverification of Documents

8 C.F.R. § 274a.2(b)(1)(vi)(A) provides that unless the employment is for less than three business days, a receipt for a lost, stolen, or damaged document will suffice for I-9 purposes as long as the replacement document itself is presented within 90 days of hire or, in the case of reverification, no later than the expiration date of the reverified document. The receipt is not acceptable, though, if the employer has actual or construction knowledge that the employee is not authorized to work in the United States. Other receipts that are acceptable with restrictions are the arrival portion of the Form I-94 or I-94A containing an unexpired Temporary I-551 stamp and photograph, or the departure portion of Form I-94 or I-94A with an unexpired refugee admission stamp. For details on receipts, see question 23 in the M-274 I-9 Handbook.

ID cards (included in the List B documents) often cause confusion. A frequent issue is whether a driver's license is required, or some other form of ID can suffice. A related issue is whether ID cards with expiration dates must be reverified upon expiration. First, the ID document listed first in List B does not have to be a driver's license – it can be any government-issued ID card, even a parolee's ID card if the date of birth, gender, height, eye color, and address are on it. Second, regarding reverification of expired ID cards, as the note on the top of page 5 of the latest I-9 form specifies, "all documents must be unexpired" when presented for verification. However, the only expirable documents that require a tickler-based reverification procedure are those that involve work authorization, not identity. Thus, the DHS

documents that expire would have to be reverified upon expiration, i.e., new, unexpired documents would have to be presented. If a document used only for identity purposes expires, that does not require reverification. See page 47, question 36, of the Handbook for Employers, Publication M-274, which includes the following statement: "You may not reverify an expired U.S. passport or passport card, an Alien Registration Receipt Card/Permanent Resident Card (Form I-551), or a List B document that has expired." Driver's licenses and similar ID cards appear in List B.

* SSA regulation 20 C.F.R. § 422.103(e)(3) - "Restrictive legend change defined. ... This restrictive legend appears on the card above the individual's name and SSN. Individuals without work authorization in the U.S. receive SSN cards showing the restrictive legend, 'Not Valid for Employment'; and SSN cards for those individuals who have temporary work authorization in the U.S. show the restrictive legend, 'Valid For Work Only With DHS Authorization'. U.S. citizens and individuals who are permanent residents receive SSN cards without a restrictive legend. ... ."

PROBATIONARY PERIODS

There is no Texas or federal law that either prescribes or prohibits employers from treating employees as probationary, initial, trial, introductory, or provisional employees. No matter what name a company assigns to new employees, that is up to a company to determine through its policies. That issue primarily has relevance with respect to whether new employees have seniority of any kind for purposes of a benefit plan. The only type of benefit for which those incoming employees would potentially have to be granted immediate access to your company's benefit plan would be health insurance, due to the federal law known as HIPAA (Health Insurance Portability and Accountability Act). To determine whether HIPAA would apply in your company's case, ask your company's health insurance carrier for guidance. No other types of benefits would have to be immediately granted.

The other major reason for classifying employees as new, probationary, initial, trial, introductory, or provisional is to let them know that during that time, they will be subject to special scrutiny and must turn in successful performance in order to continue with the company and become "regular" employees. As noted above, there is no obstacle to the company classifying the incoming employees in such a manner. There is also no particular legal significance to such a classification, since Texas is an employment at will state, and an employer can subject any at-will employee at any time to special scrutiny, consistent with express employment agreements and specific statutes such as employment discrimination laws.

Change in Ownership of the Company

Sometimes a company changes ownership, in which case the predecessor's employees may be hired by the successor company. In such a case, the new owner of the company would have the legal right to consider the predecessor's employees as new employees of the new company. Of course, the new owner would have to ensure that the predecessor entity fully pays the employees through their ending date with that company, or else be prepared to assume such obligations itself. If a company acquires the organization, trade, and business of the other company, it also acquires whatever obligations the predecessor entity owes to its employees and to TWC (under Section 204.086 of the Texas Unemployment Compensation Act, the successor company acquires any state unemployment tax debt the predecessor owes to TWC). The division of such liabilities is usually accomplished via the contract of acquisition.

A Problem of Terminology

The problem with using a term such as "probationary period" or "probationary employee" is that over time, such terms have acquired a certain amount of semantic baggage that tends to mislead some employees into thinking that once they have "passed" the probationary period, their jobs are "safe" or even guaranteed, and they cannot be fired except for cause. In other words, some people think, however erroneously, that during a probationary period, their employment is at will, and they can be fired at any time for any reason that doesn't violate a specific law, and that passing a probationary period actually modifies the at-will employment relationship to where their employer can no longer fire them at will, but rather must have some sort of good cause before it can fire them. Such employees, if they are fired after completing the initial period of employment, often think they have a good case for bringing a lawsuit against the company. As a rule, such lawsuits are extremely difficult to sustain and are usually dismissed.

Under general Texas employment law, the presumption is that all employment is at will, unless the employer has done or said something tangible that would modify the relationship. Usually, that kind of thing is something like a formal written employment contract, wherein certain procedures are laid out that must be followed before someone can be terminated from employment, such as a prescribed series of warnings and a notice period, or else specified offenses that can lead to immediate termination. Most employment relationships are not on the basis of a formal contract, and employment at will is the rule followed. A general statement of the Texas employment at will rule is found in the topic "Pay and Policies – General" in this book.

With the above issues in mind, most employment law attorneys in Texas these days advise against calling the initial period of employment a "probationary period", simply because it is so often misunderstood by employees, and for that reason can lead to unnecessary, and expensive, lawsuits. Rather, many attorneys advise calling the initial period an "initial", "trial", "introductory", or "provisional" period, not because those are magic words or are required by law, but because they have not resulted in the same level of misunderstanding by employees. No matter what the initial period of employment is called, though, it is a good idea to make it clear in the section of the policy handbook defining such a period that completion of the period does not change the employment at will relationship and that either party may terminate the employment relationship at any time, with or without notice. That would be in addition to the standard employment at will disclaimer that should be in any good employee handbook. See "Disclaimers - General" in the Outline of Employment Law Issues at the start of this section of the book.

Significance of Probationary Periods in Unemployment Claims

Put simply, probationary periods, by themselves, have no significance in unemployment claims and can actually mislead an employer into a false sense of security if they think that a probationary period will insulate the company from such claims. The UI law does not care how long someone worked for a particular employer prior to filing a UI claim. Anyone who is no longer working for pay can file a basic UI claim, but must satisfy several different wage, work separation, and eligibility criteria in order to actually draw any benefits.

Where probationary, initial, trial, introductory, or provisional periods can come in handy with respect to UI claims is in the area of chargeback liability. The key is in whether the employer is a base period employer. That, in turn, depends upon the timing of the initial claim with respect to whatever period of employment the claimant had with the employer. Basically, if the claimant worked a relatively short period of time with the company, and filed the initial claim fairly soon after losing that short period of employment, the employer might not be a base period employer at all, meaning that it will have no potential chargeback or reimbursement liability if the claimant draws benefits. This subject is fully explained in the topics "Date of the Initial Claim" and "Length of Time Worked Prior to the Initial Claim" in the article "How Do Unemployment Claims Affect an Employer?" in part IV of this book.

Due to the way the base period works, and the fact that non-base period employers have no financial involvement in an unemployment claim, a probationary period can actually have some value if the employer handles it correctly. Properly seen, the probationary period really should be a time of close scrutiny of a new employee. The employer should closely monitor the new employee's work performance and general "fit" within the organization. If it becomes clear during a trial period that the employee is not going to work out on a long-term basis, then there is no reason – no reason at all – to continue the employment relationship past the point where the employer determines that fact. There is no better time to act. The longer an employer waits to terminate a clearly unsuitable employee, the greater the chance is that the employer will end up in the base period of an unemployment claim. In addition, the longer the employee is employed, the higher the wage level will be, and since the level of chargeback liability is directly proportional to the amount of wages paid, the employer's potential financial involvement can only increase with the passage of time (again, see the article "How Do Unemployment Claims Affect an Employer?"). Thus, an employer should watch carefully and act without delay when it comes to handling new employees who do not work out. Below is a chart showing what the base period of a UI claim looks like:

Base Period Quarter 1	Base Period Quarter 2	Base Period Quarter 3	Base Period Quarter 4	Lag Quarter	Quarter In Progress When Claim Is Filed
✓	✓	✓	✓	X	X

As an example, if an employer hires an employee in February, and lets the employee go after 30 days, and the claimant files an initial claim prior to April 1, then the base period would not include the first quarter of that year (the quarter in progress), nor the fourth quarter of the preceding year (the lag quarter), but would consist of the fourth quarter of the year before the year preceding the current year, and the first three quarters of the year preceding the current year. Since the employer did not report wages during that base period, it will have no financial involvement in the claim. The same would apply if the claimant waited until April, May, or June to file the initial claim - in that case, the base period would omit the second quarter of the current year, the first quarter of the current year, and consist of the four quarters of the preceding year. If the ex-employee files an initial claim after June 30 of the current year, then the employer could be a base period employer, but its chargeback liability would be limited due to having paid only 30 days' worth of wages.

SMOKING BREAKS

Many companies have employees who smoke, and many companies allow employees to take some sort of break or breaks during the workday. The question often arises whether employees who smoke must be given extra breaks. Some employers even wonder whether smoking is a protected disability that must be accommodated under the Americans with Disabilities Act. The answer to both questions is "no".

Employers in the vast majority of situations do not have to give breaks during the day, so if a company does allow breaks, it can put whatever strings it wants to on those breaks. That includes limits on how long the breaks can be, how many breaks occur during the day, and where the breaks can or cannot be taken. Thus, if an employee is normally allowed two breaks per eight-hour shift, the employer can legally deny any extra breaks for smoking, for example.

Smoking by itself is also not a "disability" under the ADA or its state equivalent, Chapter 21 of the Texas Labor Code. One way that would not be the case is if the employer were to make the mistake of regarding the employee as disabled; the law is such that regarding a non-disabled person as disabled will generally bring them under the protection of disability protection laws.

Another theoretical way is if the person is so dependent upon nicotine in tobacco products that they can be considered an addict. Addiction to alcohol or drugs can, under some circumstances, be regarded as a disability under the ADA. If a person's addiction becomes so bad that it substantially impairs a major life activity such as working, walking, sleeping, seeing, or breathing, the addiction may be covered under the law. If a person has a covered disability, the employer has a duty to explore with the employee whether a reasonable accommodation exists that would allow the person to nonetheless do the job. So, if an employee tries to claim that they are disabled due to nicotine addiction and must be allowed to have extra breaks for smoking, do not worry – remember that even if the ADA applies, employers do not have to accept whatever accommodation an employee might request, and there are other accommodations that might be reasonable in such a context, such as nicotine patches. An employer could well argue that extra breaks would not be a reasonable accommodation due to loss in efficiency, morale problems among non-smokers who do not get extra breaks, and so on. The bottom line is that a company does not have to make an exception to its break policy just to let smokers take extra breaks.

For a sample policy regarding smoking at work, see "The A to Z of Personnel Policies" section of this book.

EXEMPT / NON-EXEMPT STATUS UNDER THE FLSA

The Fair Labor Standards Act has many exemptions. Some exemptions are extremely broad, as in the case of exemptions from the definition of "employee". Others are more narrow, such as various exemptions from overtime pay. Still other exemptions apply to two or more protections normally afforded by the FLSA. Following are the major categories of exemptions:

Totally Exempt Workers

The following categories of workers are excluded from the definition of "employee" under the Fair Labor Standards Act and thus do not have the benefit of any of the provisions of the FLSA:

- Congressional interns – Section 203(e)(2)(A), in conjunction with Section 203(a)(2) of the Congressional Accountability Act of 1995, which made most employees of Congress subject to the FLSA
- Employees of the United States Postal Service or the Postal Rate Commission - Section 203(e)(2)(B)
- Employees of States, political subdivisions of States, or interstate governmental agencies who are exempt from the civil service laws of their States and who are either elected officeholders of the State or subdivision or else are selected by such officeholders to serve on their personal staff, are appointed by such officeholders to a policymaking position, serve as an immediate advisor to such officeholders regarding constitutional or legal powers of the office in question (such as a general counsel), or are employed by the legislature of the State or political subdivision (except for employees of the legislative library of such a State or political subdivision) – Section 203(e)(2)(C)
- Independent contractors Volunteers for public agencies of States, political subdivisions of States, or interstate governmental agencies under certain conditions – Section 203(e)(4) Volunteers at community food banks who are paid with groceries – Section 203(e)(5) Volunteers for non-profit religious, charitable, and civic organizations
- Certain trainees
- Prisoners in jail or correctional institutions
- Church members performing religious duties

Exemptions from Minimum Wage, Overtime, Child Labor, and Recordkeeping

The following categories of employees are exempt from the minimum wage, overtime, child labor, and recordkeeping provisions of the FLSA:

- Employees who work in foreign countries or in certain territories under the jurisdiction of the United States – Section 213(f)
- Employees of non-appropriated fund instrumentalities under the jurisdiction of the Armed Forces who serve in foreign countries or in certain territories under the jurisdiction of the United States – Section 213(f), in conjunction with Sections 218(b) and 218(b)(2)

Exemptions from Minimum Wage, Overtime, and Child Labor

The following categories of employees are exempt from the minimum wage, overtime, and child labor provisions of the FLSA:

- Employees who deliver newspapers to consumers – Section 213(d)
- Homeworkers who make wreaths from evergreens – Section 213(d)

Exemptions from Minimum Wage and Overtime

The following categories of employees are exempt from both minimum wage and overtime pay requirements of the FLSA:

- "White collar exempt" employees – executive, administrative, professional, computer professional, and outside sales representative employees – Sections 213(a)(1) and 213(a)(17) (the latter section, applicable to computer professionals, specifies a minimum hourly rate of $27.63 per hour, which applies if the employee is not paid a minimum salary of $684 per week)
- Employees of certain amusement or recreational establishments – Section 213(a)(3)
- Employees involved in cultivation, propagation, catching, harvesting, or first processing at sea of aquatic forms of animal or vegetable life – Section 213(a)(5)
- Certain agricultural employees of small farms or family-owned farms – Section 213(a)(6) – does not apply to farms operating in conjunction with other establishments, the combined business volume of which exceeds $10,000,000
- Employees principally engaged in the range production of livestock – Section 213(a)(6)
- Employees exempt under special certificates issued under Section 214 – Section 213(a)(7)
  - The 213(a)(7) exemption encompasses the following categories:
  - Learners – under special certificates issued by the Secretary of Labor – Section 214(a)
  - Apprentices – under special certificates issued by the Secretary of Labor – Section 214(a)
  - Messengers – under special certificates issued by the

Secretary of Labor – Section 214(a)
- Students employed in retail or service establishments – under special certificates issued by the Secretary of Labor – significant limitations on hours - Section 214(b)(1)
- Students employed in agriculture – under special certificates issued by the Secretary of Labor – in compliance with child labor laws - Section 214(b)(2)
- Students in institutions of higher education who are employed by their institutions – under special certificates issued by the Secretary of Labor – significant limitations on hours - Section 214(b)(3)
- Handicapped workers – under special certificates issued by the Secretary of Labor – Section 214(c) Students of elementary or secondary schools who are employed by their schools as part of the curriculum – in compliance with child labor laws – Section 214(d)

- Employees of certain small local newspapers – Section 213(a)(8)
- Switchboard operators for certain independently-owned public telephone companies – Section 213(a)(10)
- Seamen on vessels other than American vessels – Section 213(a)(12)
- Certain babysitters or companions for the elderly – Section 213(a)(15)
- Criminal investigators paid on an availability pay basis – Section 213(a)(16)
- Computer software professionals – Section 213(a)(17) (also noted at the beginning of this list) [note: although this appears in the "minimum wage and overtime exemptions" part of Section 213, it is really only an overtime exemption – to get the overtime exemption, the employer must pay the employee at least $27.63 per hour, i.e., a "minimum" wage, for all hours worked, or else a true salary of at least $684 per week.]

Exemptions from Minimum Wage Only

The following categories of employees are exempt from minimum wage only:

- Employees in Puerto Rico or the Virgin Islands – special rates apply – Section 206(a)(2)
- Employees in American Samoa – special rates apply – Section 206(a)(3)
- Domestic service employees who are not covered by the Social Security Act or who work 8 or fewer hours per week in such service – Section 206(f)
- New employees younger than age 20 who are within their first 90 days on a job – Section 206(g)

Exemptions from Overtime Only

The following categories of employees are exempt from overtime pay, but not from the minimum wage; some of the exemptions from overtime pay are very limited and need to be studied carefully:

- Employees working under a collective bargaining agreement that limits hours worked to 1040 in any period of 26 consecutive weeks – Section 207(b)(1)
- Employees working under a collective bargaining agreement that imposes certain minimums and maximums on hours worked in a 52-week period – Section 207(b)(2)
- Employees of certain smaller wholesale or bulk distributors of petroleum products that are engaged primarily in intrastate operations, if such employees receive at least 1 1/2 times the minimum wage for hours worked between 40 and 56 in a workweek and 1 1/2 times their regular rate for hours in excess of 12 in a day or 56 in a workweek – Section 207(b)(3)
- Employees working irregular hours under a bona fide individual contract or collective bargaining agreement that specifies a guaranteed regular rate not less than minimum wage for purposes of calculating overtime pay and guarantees such pay for not more than 60 hours in a workweek – Section 207(f)
- Certain employees paid on a piece rate basis – Section 207(g)
- Retail or service establishment employees whose regular rates are at least 1 1/2 times minimum wage and who earn more than half their income in a representative period from commissions – Section 207(i)
- Employees of hospitals or other types of residential care facilities – exemption from the 40-hour workweek rule – two-week period may be used for overtime computation if employees are paid time and a half for hours worked in excess of 8 in a day or 80 in a two-week period – Section 207(j)
- Fire protection or law enforcement employees of public agencies – a period of 7 to 28 days may be used for overtime computation if time and a half is paid for hours in excess of a certain number set by regulation – Section 207(k)
- Certain employees who are engaged in activities related to the auction sale of certain types of tobacco, as long as such employees get time and a half for hours worked over ten in a day or 48 in a workweek – exemption good for up to 14 weeks in a 52-week period – Section 207(m)
- Employees of local electric railways, trolleys, or bus carriers – limited exclusion from overtime computation of hours spent in charter activities – Section 207(n)
- Public agency employees working under a compensatory time agreement – Section 207(o)
- Fire protection and law enforcement employees who volunteer for a special detail in the employ of a separate and independent public agency – Section 207(p)(1)
- Public agency employees who work part-time for the same agency in some other capacity or who substitute for other workers – under certain conditions, hours in excess of 40

may be paid at straight time – Section 207(p)(2,3)

- Employees receiving certain types of remedial education in connection with the employment – overtime exclusion is limited to 10 hours per workweek, i.e., straight time is paid for up to 50 hours per workweek – Section 207(q)
- Certain employees of motor carriers regulated by the U.S. Department of Transportation – Section 213(b)(1)
- Employees of certain rail carriers (as defined in 49 U.S.C. 10102) – Section 213(b)(2)
- Employees of certain air carriers – Section 213(b)(3)
- Outside buyers of poultry, eggs, cream, or milk, in their raw or natural state – Section 213(b)(5)
- Any employee employed as a seaman on any vessel – Section 213(b)(6)
- Certain employees of small local radio or television stations – Section 213(b)(9)
- Certain employees of automobile, truck, farm implement, trailer, boat, or aircraft dealerships – Section 213(b)(10)
- Local delivery drivers or driver's helpers compensated on a trip rate or other delivery payment basis – Section 213(b)(11)
- Any agricultural employee – Section 213(b)(12)
- Employees who operate or maintain ditches, canals, reservoirs, or waterways for agricultural purposes – Section 213(b)(12)
- Employees who are primarily engaged in agricultural work, but who occasionally perform livestock auction duties that are paid at minimum wage or more – Section 213(b)(13)
- Certain employees of small country grain elevators and related establishments – Section 213(b)(14)
- Employees who process maple sap into non-refined sugar or syrup – Section 213(b)(15)
- Employees who prepare and transport fruits or vegetables from the farm to the place of first processing or first marketing within the same state – Section 213(b)(16)
- Employees who transport fruit or vegetable harvest workers within a state – Section 213(b)(16)
- Drivers employed by taxicab companies – Section 213(b)(17)
- Firefighting and law enforcement employees of certain very small fire or police departments Section 213(b)(20)
- Domestic service employee who resides in the household in which the work is performed – Section 213(b)(21)
- Certain married houseparents in non-profit educational institutions for children enrolled in and residing at such facilities who are either orphans or else have at least one natural parent who is deceased – Section 213(b)(24)
- Employees of motion picture theaters – Section 213(b)(27)
- Certain employees of small forestry or lumbering operations – Section 213(b)(28)
- Employees of amusement or recreational facilities located in national parks, forests, or refuges – Section 213(b)(29)
- Criminal investigators who are paid on an availability pay basis – Section 213(b)(30)
- Certain minimum wage employees whose minimum wage rates are set by the Secretary of Labor – Section 213(e)
- Certain employees engaged in cotton ginning, processing of raw cotton or cottonseed, or processing of sugar cane or sugar beets in certain facilities, as long as such employees get time and a half for hours worked over ten in a day or 48 in a workweek – exemption good for up to 14 weeks in a calendar year – Section 213(h)
- Certain employees who are engaged in cotton ginning for market in a county where cotton is grown in commercial quantities, as long as such employees get time and a half for hours worked over ten in a day or 48 in a workweek – exemption good for up to 14 weeks in a 52-week period – Section 213(i)
- Certain employees who process sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup, as long as such employees get time and a half for hours worked over ten in a day or 48 in a workweek – exemption good for up to 14 weeks in a 52-week period – Section 213(j)

Focus on the White-Collar Exemptions

The so-called white-collar exemptions (executive, administrative, and professional) are often difficult to apply to real-life situations. One has to understand that those exemptions come with both salary and duties tests and that the exemptions follow certain underlying principles.

Quick Basics

- The executive, administrative, professional, and computer professional exemption categories each have a salary test (minimum salary is $684/week; computer professionals can be paid $27.63/hour or more in straight-time pay for each hour worked in lieu of the minimum salary) and a duties test.
- Up to 10% of the salary can consist of non-discretionary bonuses or commissions.
- Employees who meet the tests for their categories do not have to be paid overtime pay, regardless of how much overtime they work.
- A salary alone does not make an employee exempt.
- A title alone does not make an employee exempt.
- Generally, exempt employees are the most important, highest-ranking, or highest-skilled workers in the company.
- Exempt employees are the ones to whom the non-exempt workers look for leadership, supervision, and other forms of guidance.
- Exempt employees all have a great deal of discretion and independent judgment in how they do the details of their jobs, meaning that to a large extent, they are "standalone" employees.
- It is practically impossible to standardize the work of an exempt employee with respect to time.
- They are not treated as hourly employees, i.e., the emphasis

is not on the exact number of hours they work, but rather on whether they are completing their projects or managing their departments properly.

- An employer hiring exempt employees is basically buying "results", whether the result is a better-run company, projects being managed to completion on time, departments being efficiently managed, or professional tasks that can only be performed by the holder of a special license; an employer hires non-exempt employees for the time they will be expected to put in carrying out specific instructions in predetermined sequences that have been designed by exempt employees.
- Keep in mind that in the event of a wage and hour audit or claim involving the employee's exempt status, what the facts show really happened day to day in the employee's job is at least as important as what is in the official job description.
- Executive-exempt employees have true executive authority, i.e., the power to hire and fire (or else great influence over such decisions) and carry out functions of similar importance with respect to the employment of those who work for them; they are generally the presiding officer of the company or the head of a major division of an enterprise.
- Administrative-exempt employees are the "back office" staff and support the work of the entire company or a major division of an enterprise; the decisions they make are of substantial importance to the company as a whole.
- Professional-exempt employees are either people in recognized professions (usually, professions for which a basic or advanced college degree and a license or certificate from the state are required) or else people who perform creative and original work in the areas of writing, art, music, and other traditional arts.
- The outside sales representative exemption applies only to those whose primary duty is contacting customers or potential customers, making sales, working on contracts, and the like, and who are customarily and regularly away from the employer's principal place of business while performing such duties.
- Outside sales representatives may be given a quota, but then are generally free to determine the number of hours needed to meet or exceed the quota.

Salary Test

In order for an employee to be exempt from the minimum wage and overtime requirements, he or she must be paid, with only minor exceptions relating to persons paid a fee, on a "salary basis". DOL regulations at 29 C.F.R. 541.602(a) (former regulation 541.118(a)) state that a person is paid a salary if he or she receives each pay period a set amount constituting all or part of the compensation, the amount of which is "not subject to reduction because of variations in the quality or quantity of the work performed." The minimum salary amount is $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government). Generally, an employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked". However, the regulation recognizes "the general rule that an employee need not be paid for any workweek in which he performs no work". Further guidance on the salary test is found in DOL's Field Operations Handbook, Section 22b01: "Extra compensation may by paid for OT to an exempt employee on any basis. The OT payment need not be at time and one-half, but may be at straight time, or flat sum, or on any other basis." "Any other basis" would presumably include compensatory time. That same rule is found in DOL regulation 29 C.F.R. § 541.604(a).

Certain Salary Deductions Are Allowed

If a salaried exempt employee misses a day for personal business unrelated to a medical condition, there is no problem with docking their pay for a day's worth of salary. If the same employee misses a day for medical reasons, and the employer has a bona fide sick leave policy (at least five paid sick leave days per year – a minimum tenure requirement is permissible), the employer may deduct a day's worth of pay for such a reason, but if the employer has no policy in place providing paid leave for such absences, then such a deduction would not be allowed. If a salaried exempt employee misses an entire workweek for any reason, then the employer could deduct a week's worth of pay from the salary. Days missed over a period of time longer than a workweek cannot be aggregated and later deducted a week at a time. Although written authorization for such deductions is unnecessary (because 29 C.F.R. § 541.602 specifically allows them), obtaining prior written authorization from employees tends to help minimize complaints when deductions are actually made. Regarding such deductions from salary, see item 12 in the sample wage deduction authorization agreement in this book.

In the event of absences due to jury duty, witness duty, or temporary military duty, if an employee works any part of a week and misses the rest of the week for jury, witness, or military duty, he or she must receive the full salary for the workweek, but if they miss a full week, no pay is due for that week (see 29 C.F.R. 541.602(a)); however, partial-week deductions from leave balances are allowed. The same rule applies for unpaid holidays, furloughs, business closures, bad-weather days, and other occasions when work is unavailable to salaried exempt employees who are otherwise available for work: if the office is closed on a day that a salaried exempt employee would normally work, then partial-week

deductions from pay are not allowed, but if the employee misses an entire week for such a reason, the salary may be reduced by that amount; partial-week deductions from leave balances are allowed. Do not forget that a deduction allowed under the FLSA for a day or a week not worked must be authorized in writing by the employee to be valid under the Texas Payday Law (see item 12 of the sample wage deduction authorization agreement in this book). The salary may be prorated for initial and terminal workweeks, i.e., pay for partial workweeks is allowed for the beginning and ending workweeks of employment, and no written authorization is needed for such proration.

Almost No Partial-Day Deductions from Salary Allowed

Under DOL interpretation and the U.S. Supreme Court's decision in *Auer v. Robbins*, 117 S.Ct. 905 (1997), if an employer has a clear policy that creates a substantial likelihood that an exempt employee's salary will be docked under circumstances not allowed in 29 C.F.R. 541.602, the salary test is not met, and the employee would be considered an hourly employee potentially entitled to back overtime pay. The rationale behind this interpretation is that since salaried exempt employees often put in substantial overtime for no additional compensation, it is unfair to make them "subject to" monetary penalties for missing a nominal amount of work on isolated occasions, especially if, as is usually the case, the few hours missed are made up by extra hours within the same week. As noted above, deductions from the salary on a full-day basis are allowed under limited circumstances: a day missed for personal business, or a day missed for medical reasons, if the employer has a sick leave pay policy in place. Under the new salary definition regulation, a deduction for an unpaid suspension for violation of a disciplinary rule may be made on "any basis", i.e., on a partial-day basis or any other interval. For more details, see the discussion under "Changes in Deductions from Salary" in the article "Focus On The DOL White-Collar Exemption Regulations". Regarding the only other category of partial-day salary deduction allowed, see the "FMLA Exception to Salary Test" section below.

Special Rules for Governmental Employers

Special rules apply for governmental employers with personal leave and sick leave accrual policies; generally, due to principles of public accountability for tax money, governmental employers may dock salaried employees' pay for absences of less than a day without losing the salary basis for the exemption, as long as the absences are due to personal or health-related reasons, assuming that the employee is either out of paid leave, chooses not to use it, or has been denied permission to use paid leave (29 C.F.R. 541.710 (former regulation 541.5d)); DOL administrative letter rulings of January 9, 1987 and July 17, 1987).

FMLA Exception to Salary Test

Not all partial-day deductions from salary are prohibited for private employers. Under the Family and Medical Leave Act, 29 U.S.C. 2612(c), an employer may grant unpaid leave for FMLA absences, even on a partial-day basis, without affecting the status of employees who are exempt from overtime pay under 29 U.S.C. 213(a)(1). DOL's regulation on this question is found at 29 C.F.R. 825.206(a) and commendably makes clear that partial-day deductions for intermittent leave will be allowed only if the employer, the employee, and the situation in question are covered by the FMLA.

Deductions from Leave Balances

Employers may require salaried exempt employees who miss partial days or partial weeks to apply paid leave time to such absences. In a letter ruling dated April 9, 1993 (BNA, WHM 99:8003), DOL stated "where an employer has bona fide vacation and sick time benefits, it is permissible to substitute or reduce the accrued benefits for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such benefits, the employee receives in payment an amount equal to his or her guaranteed salary." DOL has affirmed this position in several letter rulings issued since then. That having been said, employers may want to consider flexibility toward paid leave deductions if, by the end of the week, the employee has made up the hours by working extra time. In such cases, there should be no need to deduct from leave balances, since the whole purpose of paid leave is to enable an employee to receive full pay for a workweek that would otherwise be short due to absences. In other words, an employee who has worked the full number of hours normally associated with a standard workweek has not really had a short workweek, so it should be unnecessary to apply paid leave during such a week.

Exemptions from the Salary or Fee Requirement

A special exemption from the salary or fee requirement for the professional exemption category applies to physicians, attorneys, and teachers (see 29 C.F.R. 541.303(d), 541.304(d), and 541.600(e)). Such employees may be paid on any basis (unless a specific state law applies; Texas has no such law). Thus, the wage agreement or employment contract will determine what the pay of a physician, attorney, or teacher should be, and the only limitations on wage deductions would be the ones that apply under the Texas Payday Law.

Texas Payday Law Still Applies

Despite the deductions from salary allowed under the FLSA

on a partial-day, full-day, and weekly basis, as long as the interval of the pay period is longer than the time involved in the deduction, the employer would be facing a wage deduction situation that would be covered by the Texas Payday Law. Such a deduction would need to be authorized by the employee in writing in order to be valid under the TPL. For a sample wage deduction authorization form that addresses this issue, see item # 12 of the sample wage deduction authorization agreement near the end of this book.

Duties Tests

The DOL has set forth special tests for the executive, administrative, and professional exemption categories (29 C.F.R. 541.100, 541.200, and 541.300 (former regulations 541.1, 541.2, and 541.3, respectively)). They all have minimum weekly salary levels, as well as a requirement that the employee's primary duty be devoted to exempt duties. Each test has important distinguishing factors. For example, an "executive" has the primary duty of management of a company or subdivision of a company; supervises two or more full-time employees (or four or more half-time employees, or at least one full-time and two half-time employees); and has authority to hire, fire, and promote employees, or else greatly influences such decisions. An "administrative" employee performs office or non-manual work related to the management or general business operations of the company or its customers; customarily and regularly exercises discretion and independent judgment with respect to matters of significance; and makes decisions of substantial importance to the organization as a whole. A "creative professional" employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor." "Learned professionals" perform work requiring "advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction", exercise discretion and independent judgment in performing job duties, and perform work that is generally incapable of standardization with respect to time.

Examples of occupations typically encountered in the exempt categories:

- Executive: President of the company or the head of a major division of an enterprise, general manager with hiring and firing authority, department heads who have hiring and firing authority.
- Administrative: Vice-president of operations, general manager, department heads, personnel director, payroll director, chief financial officer, comptroller, head buyer, head dispatcher.
- Professional: Physician, attorney, CPA, engineer, architect, scientist (chemist, physicist, astronomer, geologist, zoologist, biologist, and so on), registered nurses, pharmacists, dentists, teachers, artists, writers, and other creative professionals.

In each category, the employee's "primary duty" must be exempt in nature. "Primary duty" is defined in 29 C.F.R. 541.700 (former regulation 541.103). As that regulation indicates, a duty in which the employee spends "more than 50 percent" of their work time is presumed to be the primary duty. However, the same regulation notes that in cases where the employee happens to spend 50 percent or less of the workweek in exempt duties, the exempt duties may still be the primary duties depending upon the following criteria:

(1) the relative importance of the managerial duties as compared with other types of duties;
(2) the amount of time spent performing exempt work;
(3) the employee's relative freedom from direct supervision; and
(4) the relationship between the employee's salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor (or other type of exempt employee).

These criteria have been widely accepted by courts around the country. Some courts have related the second criterion to the frequency with which the employee exercises discretionary powers.

Executive Exemption

Effective January 1, 2020, the Department of Labor (DOL) regulation 29 C.F.R. 541.100, all parts of which must be satisfied, defines an executive exempt employee as any employee who is:

(1) Compensated on a salary basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities;
(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
(3) Who customarily and regularly directs the work of two or more other employees; and
(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

Administrative Exemption

DOL regulation 29 C.F.R. 541.200 defines an administrative exempt employee as one who is:

(1) Compensated on a salary or fee basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities;
(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

Under regulation 29 C.F.R. 541.300, DOL distinguishes between two categories of exempt professional employees: "learned professionals" and "creative professionals". The exemption applies to any employee who is:

(1) Compensated on a salary or fee basis at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities;, exclusive of board, lodging, or other facilities; and
(2) Whose primary duty is the performance of work:
    (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
    (ii) Requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

As 29 C.F.R. 541.301 notes, the primary duty test for learned professionals includes three elements:
(1) The employee must perform work requiring advanced knowledge;
(2) The advanced knowledge must be in a field of science or learning; and
(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Regarding creative professionals, 29 C.F.R. 541.302(a) notes that "to qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training."

Other Types of White-Collar Exemptions

Outside Salespeople

Outside salespeople fall into a special category of exempt employees who do not have to receive either a salary or fee, or, for that matter, minimum wage or overtime pay; many such employees receive only a commission, while others receive that plus occasional bonuses, dividends, or overrides, depending upon the individual pay agreement in effect. Under 29 C.F.R. 541.500, an "outside sales employee" is someone who is "customarily and regularly engaged" away from the employer's place of business in making sales or obtaining orders for the sale of goods or services (see also 29 C.F.R. 541.501 – 541.502, which define the terms "making sales or obtaining orders" and "away from the employer's place of business"). The main thing to remember is that the pay for such an employee will be determined by the compensation agreement.

Computer Professional

There is yet another important "white collar" exemption that does not necessarily require a salary to be valid, that being the exempt "computer professional" under section 213(a)(17) of the FLSA. The definitions found in 29 C.F.R. 541.400 (former regulations 541.3(a)(4) and 541.303) apply the exemption to any computer employee paid on a salary or fee basis at least $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging, or other facilities, or else paid an hourly wage of not less than $27.63 an hour. In addition, the exemptions apply only to computer employees whose primary duty consists of:
(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
(2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
(3) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
(4) A combination of the aforementioned duties, the

performance of which requires the same level of skills.

The regulations exclude workers who build or install computer hardware or who are merely skilled computer operators; they make clear that the exemption applies only to the true software programming, design, or systems analysis experts. A DOL letter ruling of December 4, 1998 (BNA, WHM 99:8201) states that this exemption does not include employees who "provide technical support for business users by loading and implementing programs to businesses' computer networks, educating employees on how to use the programs, and by aiding them in troubleshooting." See also DOL opinion letter FLSA2006-42 (October 26, 2006), as well as court decisions in *Hunter v. Sprint Corp.*, 453 F.Supp.2d 44 (D.C. 2006) and *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574 (6th Cir.2004). As those decisions point out, typical help desk functions such as "responding to ... help desk tickets", "installing software ... on individual workstations", "troubleshooting Windows 95 problems", and "configuring desktops, checking cables, and replacing parts" are not covered by the computer professional exemption. Properly speaking, the exemption applies only to the very top experts in computer software or systems, i.e., the ones who actually write the software programs, or who design, implement, and maintain a company's network software, intranet, or Internet presence. An employee who fits this exemption may be paid on an hourly basis with no premium for overtime work, i.e., straight-time pay for all hours worked, as long as the hourly rate is at least $27.63 per hour. However, the employer could still choose to pay such a person on a salary basis without having to worry about extra straight-time pay if the employee meets the salary and duties tests for this exemption.

Caveat: Job Titles Do Not Make Employees Exempt

The DOL cautions against assuming that any particular job title or position will automatically be considered "exempt". The determination depends upon the facts behind the work relationship, not on what the employer and the employee may call it. However, the regulations do make clear that employees such as company and department heads, personnel directors, executive assistants, financial experts, physicians, and company attorneys are generally considered exempt, while employees such as clerks, errand runners, secretaries, bookkeepers, inspectors, and on-the-job trainees are non-exempt. In general, anyone performing "line duties" as the primary part of their job will be considered non-exempt and thus entitled to overtime pay if they work more than 40 hours in a week.

"On-the-job trainees" refers to new employees or current employees in new positions within a company who undergo specific job-related training while earning whatever pay applies to new employees in such positions. In limited circumstances, however, certain trainees may be exempt from the FLSA - for more information, see the topic on "Student Interns - Trainees" in this book.

Conclusion

It is clear that understanding which employees are exempt and which are non-exempt requires much more than just looking at a title and a salary. Several specific legal tests are involved. Companies should do periodic reviews of their exempt and non-exempt positions to ensure that changes in job duties or pay practices have not created changes in exempt/non-exempt status as well.

FOCUS ON THE DOL WHITE-COLLAR EXEMPTION REGULATIONS

Effective August 23, 2004, the U.S. Department of Labor adopted new duties-test regulations for interpreting Section 213(a)(1) and 213(a)(17) of the FLSA, which are the regulations specifying overtime exemptions for white-collar exempt employees, including executive, administrative, professional, outside sales representative, and computer software professional employees. The revised regulations, accessible online at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=10f50877082f08568d40dbfeaf119853&mc=true&r=PART&n=pt29.3.541, mainly had the effect of clarifying and reorganizing the criteria for distinguishing between exempt and non-exempt salaried employees. Effective January 1, 2020, DOL adopted a new minimum salary test for such employees, the official guidance page for which is at https://www.dol.gov/agencies/whd/overtime/2019/index. Following is a brief outline of the most notable changes the 2004 and 2020 regulations made.

Changes in the Salary Test

Instead of the old salary test divided into "long" and "short" tests that differ between categories of exempt employees, DOL adopted two clear dividing points, $684/week, and $107,432/year for "highly-compensated employees." Here is how the new regulations divide salaried employees up:

- Below a weekly salary of $684, all employees not covered by industry-specific exemptions will be presumed non-exempt;*
- If an employee earns at least $684/week ($35,568/year), but less than $107,432/year ($2066/week), the 2004 duties tests apply to determine whether the employee is truly exempt;*
- If the employee earns at least $107,432/year and performs office or non-manual work, the employee is a "highly-compensated employee" and presumed to be exempt as long as he or she customarily and regularly performs at least one exempt duty.*
- The salary test does not apply to owner-executives who own at least a 20% equity interest in their companies and are active in the management of their enterprises.

Changes in Deductions from Salary

Many of the long-standing rules about deductions from salary, including the prohibition against partial-day deductions from salary, remain in effect under the new regulations. For instance, deductions in units of a full day at a time are still allowed for absences caused by personal business, and for absences due to medical conditions, assuming that the employer has a sick leave pay policy. There were also no changes in the general rules for deductions for time missed for jury duty, witness duty, military duty, and office or plant closings due to business- or weather-related shutdowns: deductions for such absences may be made only in units of a full workweek at a time. However, the new regulations made the following useful changes:

- The salary may be reduced in units of a full day at a time in the case of suspensions without pay for infractions of workplace conduct rules, pursuant to a written policy that applies to all employees. A common example would be an unpaid two- or three-day suspension for workplace harassment or habitual attendance violations.
- The new regulations clarify that a deduction for an unpaid suspension for violation of a safety rule of major significance may be made in "any amount", i.e., in units of less than a full day at a time. The term "safety rules of major significance" continues to be defined as relating to the safety of the entire workplace and workforce, such as rules prohibiting smoking in an explosive or flammable environment.
- The "window of corrections" or "safe harbor" regulation has been clarified to excuse isolated, one-time, or inadvertent salary basis violations if the employer does not have a policy or practice resulting in such violations, reimburses the employees for any deductions wrongfully made, and commits to preventing such deductions in the future.

Keep in mind that such salary deductions should (as a matter of best practice) be authorized in writing by the employee - for an illustration of this principle with regard to salary deductions, see item 12 in the sample wage deduction authorization agreement in "The A to Z of Personnel Policies" section of this book.

Simplified Duties Tests

The new regulations greatly simplify the duties tests applying to each category of exempt employee. The old "long test" standard of exempt duties at least 80% of each workweek was deleted, and the old "short test" standard of having exempt work as a primary duty was extended to cover each category. The test for "primary duty" was clarified to explain that it does not have to be performed at least 50% of the time to be considered the primary duty. Instead, the new regulation expressly incorporates the standards commonly recognized by courts, namely, 1) the relative importance of the exempt

duties; 2) the amount of time spent performing exempt work; 3) relative freedom from direct supervision; and 4) the relationship between the employee's salary and the wages paid to other employees for the same kind of non-exempt work.

Following is a summary of the duties tests for the various exemption categories:

- Executive – under the new test, an executive exempt employee's primary duty is management of the enterprise or a major division thereof; the employee customarily and regularly supervises two or more full-time employees (or four or more half-time employees, or at least one full-time and two half-time employees); and the employee has the authority to hire and fire other employees, or else the employee's recommendations as to hiring and firing are given particular weight by the company.
- Administrative – the administrative exempt employee's primary duty must be performance of office or non-manual work related to the management or general business operations of the company or its customers, and the primary duty must involve the exercise of discretion and independent judgment with respect to matters of significance.
- Professional – for the "learned professional" exemption, the employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This usually involves at least a four-year college degree in the field of learning associated with the occupation; a high-school diploma or two-year associate's degree is insufficient. For the "creative professional" exemption, the employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- Computer professional - under the new regulations, the salary test is either $684/week or else $27.63 per hour straight-time pay for all hours worked, and the duties test is identical to the test reflected in FLSA section 213(a)(17):
    4) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
    5) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
    6) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
    7) A combination of the aforementioned duties, the performance of which requires the same level of skills.
- Outside sales representative - in place of the former rule that a maximum of 20% of the workweek be devoted to non-sales work, the new regulations require only that the employee's primary duty be sales-related work and that such work be customarily and regularly performed away from the employer's regular place or places of business. Of course, this exemption does not apply to inside sales staff.

Employers should note that the basic principles applying to exempt employees continue to be important: the white-collar exemptions are intended for the most important, highest-ranking, and most highly-skilled employees, the ones for whom it is generally impossible to standardize their work with respect to time, and the ones whose decisions substantially impact the company as a whole.

The DOL has posted a very useful overview of the various overtime exemption categories on its website at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/overtime_complianceguide.pdf.

SALARY DEFINITION REGULATION

Since the most frequently-requested overtime exemption regulation is the one defining what a true salary is, it is presented here in its entirety for the convenience of employers who need to see the full definition as adopted and enforced by the U.S. Department of Labor. Following is the text of 29 C.F.R. 541.602:

Sec. 541.602 Salary basis.

(a) General rule. An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

(2) An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(3) Up to ten percent of the salary amount required by § 541.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. This provision does not apply to highly compensated employees under § 541.601.

(i) If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount required by § 541.600(a), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

(ii) An employee who does not work a full 52-week period for the employer, either because the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a pro rata portion of the minimum amount established in paragraph (a)(3) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (a)(3)(i) of this section within one pay period after the end of employment.

(b) Exceptions. The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions

from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness, or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

Under current TWC rules, no written authorization is necessary under the Texas Payday Law for the deductions authorized under § 541.602(b) above. However, it may help reduce potential complaints from employees if the employer obtains such authorization, as illustrated by item 12 in the sample wage deduction authorization agreement in this book.

RECORDKEEPING REQUIREMENTS FOR NON-EXEMPT EMPLOYEES

A. General

Part 516 of the wage and hour regulations (Title 29, Code of Federal Regulations) governs the recordkeeping obligations of employers under the FLSA. Employers should not regard the recordkeeping requirements as optional in any respect. Not only does the law require it, keeping accurate, reliable records regarding payroll matters is simply good strategy. The reason is simple: if an employee claims unpaid wages, especially unpaid overtime, and the employer is unable to counter the claim with any documentation, the "best evidence" rule used by the DOL will generally mean that the wage claimant will prevail on the question of hours worked, unless there is some independent reason to disbelieve the claimant. Following are the types of information for which employers must maintain records for possible inspection by DOL, as specified in 29 C.F.R. 516.2(a):

- employee's full name - this is the same name as appears on Social Security records;
- employee's home address - current address, including the employee's zip code;
- employee's date of birth - this only applies if the employee is under 19 years of age. An alternative is to maintain an age certificate or other proof of the child's age - in Texas, such an age certificate is available from the Labor Law Department of the Texas Workforce Commission;
- employee's gender and occupation - this is to allow verification of compliance with the Equal Pay Act provisions of the FLSA (see also 29 C.F.R. 1620.32);
- workweek applicable to the employee;
- employee's regular rate of pay - this applies to workweeks in which overtime is worked. In addition, the records must also reflect any payments to the employee that are not included in the regular rate;
- wage payment basis - this is the basic pay rate applied to the employee's straight-time earnings;
- hours worked by the employee - the records of hours worked should show hours worked each day and total hours for each workweek;
- employee's straight-time earnings - total earnings on a straight-time basis, excluding overtime pay;
- overtime pay on a workweek basis - this shows total overtime compensation for each workweek in which overtime is worked;
- deductions from and additions to each employee's pay - these records must be maintained individually for each employee and must reflect the types of deductions or additions, the amounts deducted or added, and the dates of deductions or additions;
- total wages paid - this is the total compensation paid to each employee for each pay period, broken down by straight-time earnings, total weekly overtime pay, and deductions or additions to pay;
- pay periods - the records must show the dates on which each employee is paid, as well as the pay period applying to each employee's wage or salary payment; and
- back pay - this relates to any government-supervised back or retroactive pay to employees that is given as a result of employment claims or lawsuits. Such records must reflect the employees receiving the back pay, the amount of the payment, the period covered by the payment, the date such payment is made, and date of receipt of the payment by the employee.

While some wage and hour records must be kept only two years, others require retention for three years under the federal law, and since the Texas unemployment tax rules require a four-year retention period for payroll records, it is a good idea to keep all wage and hour records for at least four years.

The recordkeeping requirements may change in the future. Employers should visit www.dol.gov/whd/ often to stay up with developments in this area of the law.

B. Recording Working Time

As noted above, under 29 C.F.R. 516.2, employers must generally keep accurate records of all hours worked for non-exempt employees (working "off the clock" is never allowed for non-exempt employees). The exact method of recording the time worked is up to the employer, but it must be in a form that can be made available for inspection and copying by the DOL in the event of an investigation. Failure to keep records of hours worked is a risky proposition. Not only would that be a violation of part 516 of the regulations, it would also leave the employer at the mercy of the "best evidence" rule. Specifically, in the area of time worked, whoever has the best evidence of work time will prevail on that point. If an employer keeps no records, it is at the mercy of an employee who has maintained a personal log of hours worked. Unless there is a reason to disbelieve the employee and his or her personal log, that will generally be taken as the best evidence of the time worked, even if the employee may have been overly generous in crediting himself or herself with hours worked.

There are many different ways to record employees' work times. One is by designating a person to serve as timekeeper and manually enter starting and stopping times on a piece of paper. Another is to have employees fill in their own work

times. Employers can have employees punch a time clock. Some companies with advanced systems have employees "swipe" their company ID cards or badges through a device that electronically records the time and enters it into a timekeeping database. Finally, some companies ask employees to enter their own times on their computers, or else use an automated voice-response system in conjunction with a touch-tone telephone to record their times. Regardless of the method used, it is subject to the requirements of part 516 and the "best evidence" rule in the event of a dispute.

If anyone makes revisions to time records, there should be a reliable log of all such changes and who made them. Time records, both original and modified, are subject to potential challenge by employees, so maintain the records in such a way that an outside auditor (such as from the U.S. Department of Labor in a records compliance audit situation) can tell that the revised and unrevised records are true and genuine and reflect what actually happened in terms of time worked, wages paid, and who made what changes at what time. Changes made to electronic time records would presumably need some sort of digital verification and security protocols, so ask your IT staffer to ensure the integrity of the system and that all access and changes are properly logged and allowed only with proper access codes. At some step of the process, it would be prudent to get the employees to sign off on any changes. That can be done electronically, but is, like any step of the process, subject to challenge by an employee who might feel cheated in some way. Have your IT staff work with your timekeeping software vendor regarding security, access, and verification issues.

C. Time Clock "Rounding"

Many employers do not pay employees according to the exact number of hours and minutes they work, but rather utilize some sort of "rounding" or "roundoff" system whereby a certain interval is set that serves as the minimum block of time that will be recognized as a unit of time worked or not worked. Time missed or worked within that interval will not be deducted from or added to the time worked, whereas time missed or worked outside that interval will result in that interval being deducted from or added to the time worked. The regulations on this are found in subpart D of part 785 of the wage and hour regulations. 29 C.F.R. 785.47 explains the so-called *de minimis* rule, stating that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." It notes, however, that the *de minimis* rule applies only in case of intervals of "a few seconds' or minutes' duration", and the employer would need to be able to explain how disregarding such intervals is "justified by industrial realities." In addition, any fixed or regularly-occurring work time may not be disregarded, no matter how small, as long as it can be readily ascertained. 29 C.F.R. 785.48(a) notes that if employees voluntarily clock in early prior to their scheduled starting time, or clock out after their scheduled ending time, they do not have to be paid for any time they are not actually working (i.e., getting a cup of coffee, reading a newspaper, eating doughnuts, etc.). However, employers should avoid letting employees do that, since major discrepancies between the time clock records and the hours for which pay is given may "raise a doubt as to the accuracy of the records of the hours actually worked.", in turn possibly tempting DOL to pay more attention to whatever personal records the employees may have maintained.

Strategic tip: do not allow employees to clock in or out more than a minute or two early or late. If they want to come early or stay late to relax, they can do that if the company approves, but make it clear that no work will be allowed outside of the normal schedule, and they should not clock in until they are ready to work.

As to "rounding" practices, 29 C.F.R. 785.48(b) explains that rounding off work times to the nearest 5 minutes, one-tenth of an hour, or even quarter of an hour is permissible, as long as it works both ways, i.e., both to the advantage and disadvantage of the employee. That way, the system can be said to achieve a balance over time, and the employee is not suffering a detriment by virtue of a system that always rounds off in favor of the company.

DOL's Field Operations Handbook covers this subject in Chapter 30, "Records, Minimum Wage, and Payment of Wages", pertinent excerpts from which appear below:

§ 30a02 Recording working time.

(a) In recording working time, insubstantial or insignificant periods of time outside the scheduled working hours may be disregarded. The courts have held that such trifles are *de minimis*. This rule applies only where a few seconds or minutes of work are involved and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to pay for any part, however small, of the employee's fixed or regular working time.

(b) It has been found that in some industries, particularly where time clocks are used, there has been the practice of recording the employee's starting and stopping time to the nearest five minutes, or to the nearest one-tenth or quarter of an hour. For enforcement purposes, this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of

time, in the failure to compensate the employees properly for all hours they have actually worked.

(c) If a record is kept with respect to each employee employed on a weekly or monthly basis in an establishment or department thereof operating on a fixed schedule, indicating the exact schedule of hours per day and hours per week which that employee is normally expected to work, and if the payroll (or other) records maintained by the employer indicate for each worker or for each group of workers that such scheduled hours were, in fact, adhered to, this will be considered compliance with Reg. 516 (Part 516, the recordkeeping regulations). When fewer or more hours than those fixed by the schedule are worked, the employer must supplement this record by showing the exact number of hours worked on the day and week involved.

(d) The records must also contain a statement made each pay period that, except where otherwise recorded, the employees worked neither more nor less than the scheduled hours. This policy is applicable only where hours of work are actually fixed and it is unusual for the employee(s) to work either more or less than the scheduled hours.

§ 30a03 "Long punching" of hours.

(a) Where time records show elapsed time greater than the hours actually worked because of reasons such as employees choosing to enter their work places before actual starting time or to remain after their actual quitting time, the CO [Compliance Officer] shall determine whether any time is actually worked in these intervals. If an employee came in early for personal convenience and did not work prior to the scheduled beginning time, a recording of the fact that the employee worked, for example, 8 hours that day is all that is required.

(b) The CO may suggest to the employer, but not require, that the punch-time be kept as close to the work-time as possible to avoid any question that work was performed during such intervals.

Note: FOH 30a02(a) and (b) basically correspond to 29 C.F.R. 785.47 and 785.48(b), respectively, while FOH 30a03(a) corresponds to 29 C.F.R. 785.48(a).

D. Use of Automated Timekeeping Systems

As noted in "Recording Working Time" (section D above), employers may use an automated or electronic system for keeping track of employees' work times. In an administrative letter ruling issued on February 6, 1998 (BNA, WHM 99:8120), DOL stated that a timekeeping procedure that utilizes an interactive voice-response telephone system and requires employees to enter starting and stopping times and leave usage on a company intranet-based "timecard" complies with the FLSA's hours worked (part 785) and recordkeeping (part 516) requirements, even if all data are stored in the company's computer system and no paper records are maintained. However, the computer-based system must be able if necessary to retrieve and output the data in a form that complies with part 516, and the recording of working time must meet the guidelines contained in 29 C.F.R. 785.46, 785.47, and 785.48. That ruling affirmed the DOL's stance in a similar ruling issued March 10, 1995 (BNA, WHM 99:8019); in that situation, employees used an automated telephone system to enter number codes through their telephones. Printouts of the time records were posted for four days for the purpose of review and corrections, and following that time, the printouts were discarded. Even though the only records were the ones maintained in the computer system, this procedure was deemed permissible by DOL as long as it affords "an accurate representation of time worked and provided the employer is able to convert the data, or any part of it, into a form which is suitable for inspection."

E. Timecard Policies and Strategies

If employers track employees' work time with time cards, some special precautions and policies are in order. Following are some things that employers may wish to consider:

- require all employees to handle their own time cards;
- prohibit employees from handling the time cards of other employees;
- prohibit any changes or alterations to the time cards that are not pre-approved by designated supervisors;
- prohibit employees from working "off the clock";
- have employees sign their time cards;
- include a certification on each time card to the effect that the time card accurately and completely reflects all time worked during the period in question and that no hours were worked that do not show up on the card.

Conclusions

Employers must pay strict attention to the FLSA's recordkeeping requirements. The most essential principles of wage and hour recordkeeping are:

- a DOL audit will always involve a check of the employer's wage and hour records, which an employer must keep for at least three years;
- the most dangerous thing about not keeping accurate records is not the relatively minor penalties the DOL can impose, but rather that in wage and hour disputes, the DOL will usually give the benefit of the doubt to an employee's claims regarding time worked and pay deductions;
- it is up to an employer to design an accurate and reliable timekeeping system.

Employers may also receive help on these issues by calling the legal staff at the toll-free number for the TWC Employer Commissioner's office: 1-800-832-9394. Finally, the World Wide Web site for the U.S. Department of Labor offers the full text of the FLSA and the accompanying regulations at http://www.dol.gov.

CALCULATING OVERTIME PAY

A. General

Overtime pay for a non-exempt employee depends upon the employee's "regular rate" of pay. Part 778 of the regulations contains all of the various ways to determine an employee's regular rate. Under 29 C.F.R. 778.109, an employee's regular rate of pay is an hourly rate, and under 29 C.F.R. 778.107, it must be at least minimum wage. This is true no matter what pay method is used to determine an employee's pay. Regardless of whether a non-exempt employee is paid by an hourly rate, salary, piece rate, day rate, book rate, flag rate, job or task rate, commission, or by some other method or combination of methods, the pay must be converted into an hourly equivalent to arrive at the "regular rate" for overtime computation purposes. See "Calculation of the Regular Rate of Pay" below for the basic way of computing the regular rate.

B. Calculation of the Regular Rate of Pay

According to 29 C.F.R. 778.109, "the regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions under section 207(e)) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." "Total remuneration" means all wages earned by the employee during that week from whatever work was done and by whatever pay methods are used. For example, if an employee is paid an hourly rate plus a commission, the regular rate would be the straight-time hourly earnings plus the commission for that workweek, divided by the total number of hours worked during the workweek. If on top of that a productivity bonus is paid, the bonus would be added to the hourly earnings and the commission and then divided by the number of hours worked to arrive at the regular rate for that workweek. "Hours actually worked" does not include paid leave or holiday hours.

No matter what pay method is used, the regular rate of pay for overtime calculation purposes must be no less than minimum wage. The following topics describe in detail the methods for calculating overtime pay depending upon the pay method used for an employee. For a brief summary of all of the methods, see the "Conclusions" section at the end of this article.

C. Regular Rate of Pay for Hourly Employees

If a worker gets an hourly rate and nothing more, the regular rate will be the hourly rate. If productivity bonuses are given, they must be included in the regular rate as shown below. If a worker gets a shift differential, i.e., additional pay for working an unusual shift, the hourly rate, including the shift differential, is still the regular rate. The differential may not be counted toward overtime pay that might be due – the regular rate is simply higher because the hourly rate itself is higher. As an example, if the normal hourly rate is $12.50 per hour, and an employee receives a shift differential of $1.50 per hour, the regular rate of pay for that employee would be $14.00 per hour. 29 C.F.R. 778.110 covers the issue of the regular rate for employees who are paid a simple hourly rate. The regulation also gives an example of how to include a bonus in the regular rate. Here is the regulation in its entirety:

> **29 C.F.R. 779.110 – Hourly rate employee.**
>
> (a) Earnings at hourly rate exclusively. If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his "regular rate." For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $6 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $294 (46 hours at $6 plus 6 at $3). In other words, the employee is entitled to be paid an amount equal to $6 an hour for 40 hours and $9 an hour for the 6 hours of overtime, or a total of $294.
>
> (b) Hourly rate and bonus. If the employee receives, in addition to his earnings at the hourly rate, a production bonus of $9.20, the regular hourly rate of pay is $6.20 an hour (46 hours at $6 yields $276; the addition of the $9.20 bonus makes a total of $285.20; this total divided by 46 hours yields a rate of $6.20). The employee is then entitled to be paid a total wage of $303.80 for 46 hours (46 hours at $6.20 plus 6 hours at $3.10, or 40 hours at $6.20 plus 6 hours at $9.30).

D. Regular Rate for Pieceworkers

The regular rate for pieceworkers is computed by taking the total earnings from the piece rate work and dividing that figure by the hours worked. The resultant amount is the regular rate and represents straight-time pay for each hour worked. Since straight time is already figured into the piece rate earnings, including any overtime hours, each overtime hour would need to have additional compensation at half of the regular rate in order to bring the employee up to time and a half.

29 C.F.R. 778.111 explains the method for determining a pieceworker's regular rate and gives examples of how to use this computation method. The regulation also makes clear that if a pieceworker is given a bonus or some other form

of compensation for work, such as waiting time pay, the additional compensation must be added to the piece rate earnings before dividing that total by the number of hours worked to arrive at the regular rate. In case a pieceworker is given a guarantee of minimum hourly pay, the employee is really being paid on an hourly basis in workweeks in which the piece rate earnings fail to equal the minimum guarantee. In that case, the regular rate would be computed on the basis of the hourly rate, plus any additional compensation such as bonuses.

As with any other pay method, the piece rate method may in no case result in less than minimum wage for all hours actually worked, plus time and a half for hours worked in excess of 40 in a workweek.

E. Regular Rate for Day Rates and Job Rates

Some employees are paid a daily rate or a job rate, which is intended to cover whatever hours it takes the employee to perform the work that day or for a particular job. Such a pay method is allowed as long as it results in overall compensation equal to at least minimum wage for all hours worked. Under 29 C.F.R. 778.112, the regular rate is determined by adding together all the daily-rate payments for the workweek, or all the job-rate payments for the jobs performed during the workweek, and dividing that total by the number of hours worked. If the resultant regular rate is below the minimum wage, the employer would have to make up the shortfall. Of course, if additional payments such as bonuses are made, those would have to be added to the daily-rate or job-rate earnings before dividing by the number of hours worked. The total daily-rate or job-rate earnings represent straight-time pay for all hours worked, meaning that overtime hours have to be compensated at only half of the regular rate.

As with any other pay method, the day or job rate method may in no case result in less than minimum wage for all hours actually worked, plus time and a half for hours worked in excess of 40 in a workweek.

F. Regular Rate for Book Rates and Flag Rates

A form of wage payment known by various names, book rate, flag rate, task rate, or stint rate, bears similarities to piece rate payments on the one hand and daily or job rates on the other. In this variation, the employer applies a rate, usually determined by some sort of study or sometimes an industry standard, to various tasks performed by an employee. A common application for book or flag rate pay is found in the case of mechanics working for automobile repair shops. The employer will award four hours' worth of pay, for example, to a mechanic who completes a certain type of repair job on a car. The actual work may take less or more time than four hours. In such a case, the regulations found at 29 C.F.R. 778.312, 778.313, and 778.314 will apply. 29 C.F.R. 778.312 notes that these situations often turn out to be either a daily rate method or a piece rate method with a guaranteed hourly minimum. 29 C.F.R. 778.313 governs how overtime pay is calculated for employees paid a book, flag, or task rate.

As with any other pay method, the book or flag rate method may in no case result in less than minimum wage for all hours actually worked, plus time and a half for hours worked in excess of 40 in a workweek.

G. Regular Rate for Employees Paid a Commission

Employees paid on a commission basis, or who are paid a commission in addition to an hourly rate or salary, are covered by the minimum wage and overtime rules just as any other non-exempt employee. As with other methods for determining the regular rate of pay for overtime purposes, the commission payments must be included with other forms of pay for hours worked in order to calculate the total straight time pay, which is then divided by the hours worked during a workweek in order to arrive at the regular rate of pay for that particular workweek. This basic method applies whether the commissions are paid on a weekly basis or on some other, less frequent basis. Since commission payments often vary from week to week, it is very common for employees paid on a commission basis to have a regular rate that likewise varies from week to week. 29 C.F.R. 778.117 explains the general issues in computing the regular rate for commission-pay employees.

If commissions are paid weekly, add the commission payment to the other forms of pay for that week and divide that total by the number of hours worked that week. Since the commission payment and other forms of pay represent the straight-time earnings for that week, any overtime would be compensated by paying half of the regular rate times the number of overtime hours on top of the straight-time earnings, thus bringing the employee up to time and a half; see 29 C.F.R. 778.118.

If commissions are paid on a delayed basis, extra overtime pay based upon commissions earned for a particular workweek does not have to be paid until the commission amount is determined. 29 C.F.R. 778.119 provides that in case the commission payments can be specifically tied to particular workweeks, the amounts so allocated are added to the other earnings for those workweeks, and the regular rate calculations are carried out as discussed above. If the commissions cannot be allocated to specific workweeks of activity, then the calculation is carried out basically the same as for bonuses that are paid for a quarter, half-year, or year: the commission must be allocated pro-rata to each workweek in the period covered by the commission payment, and in any workweeks in which the employee worked overtime,

the regular rate would be recalculated as discussed above; see 29 C.F.R. 778.120. As is the case with commissions paid weekly, for a workweek with overtime hours, overtime pay equals half of the recomputed regular rate times the number of overtime hours. Put another way, the extra overtime pay would be equal to one-half of the increase in the regular rate due to the commission, multiplied by the number of overtime hours that week. (The regular rate increase only needs to be multiplied by one-half because the commission allocation itself represents the straight-time payment – adding the two together results in the payment of time and a half.) If the hours worked vary significantly from week to week, thus making it unrealistic to allocate equal portions of the commission to each workweek, an alternative method is allowed under 29 C.F.R. 778.120(b) that involves allocating an equal amount of the commission to each hour worked during the computation period (i.e., commission amount divided by total hours in the computation period); the overtime is then calculated by multiplying one-half of that figure (representing the increase in the regular rate attributable to the commission) by the number of overtime hours worked in each workweek during that period. See 29 C.F.R. 778.119 and 778.120 for examples of the above calculations.

As with any other pay method, the commission pay method may in no case result in less than minimum wage for all hours actually worked, plus time and a half for hours worked in excess of 40 in a workweek.

H. Regular Rate for Salaried Non-Exempt Employees

The regular rate of pay for salaried non-exempt employees is always calculated by dividing the salary amount by an hours worked amount. However, the exact amounts and what is then done with the regular rate will vary according to the exact situation. Keep in mind that if a salaried employee is also given a productivity bonus or a commission, or some other type of compensation for work performed, the extra compensation must be added to the salary before dividing the total by the hours worked. As with any other pay method, the salary method may in no case result in less than minimum wage for all hours actually worked, plus time and a half for hours worked in excess of 40 in a workweek.

For detailed information on the various ways that overtime pay may be calculated for a salaried non-exempt employee, see the following topics.

H.1. General Rule for Salaried Employees

Under 29 C.F.R. 778.113(a), to arrive at the regular rate for a non-exempt salaried employee, take the salary and divide it by the number of hours the salary is intended to compensate. If the salary is for a 40-hour workweek, overtime is simple: divide the salary by 40 to get the regular rate, and then pay any overtime hours by multiplying 1.5 times the regular rate. However, if the salary is for a lesser workweek, such as 36 hours, divide the salary by 36 to get the regular rate. If the employee works 40 hours on such a basis, the total pay would be the salary for the 36 hours plus 4 hours times the regular rate. If the employee works 42 hours, the total pay would be the salary for the first 36 hours, plus 4 hours times the regular rate, plus two hours times 1.5 times the regular rate. Finally, if the salary is intended to compensate for 45 hours per week, the regular rate would be the salary divided by 45. The hours past 40 would be compensated at one-half of the regular rate up to 45, and hours past 45 would be paid at time and a half.

H.2. Regular Rate for Semimonthly Salaries

For non-exempt salaried employees who are paid either twice per month (semimonthly) or monthly, the payments must be reduced to their workweek equivalents in order to arrive at the regular rate of pay. Once the workweek equivalent is known, then the general rule for weekly salaries is applied. *(Keep in mind that under the Texas Payday Law, non-exempt employees must be paid at least twice per month, i.e., daily, weekly, biweekly, or semimonthly, and so the provision about monthly salaries will not apply to non-exempt employees in Texas or any other state with a similar provision.)* 29 C.F.R. 778.113(b) provides two main ways for an employer to compute overtime pay for salaried employees paid once or twice per month. The first method involves figuring out the workweek equivalents:

(1) Semimonthly salary – multiply the salary times 24 to get the annual equivalent, then divide that figure by 52 to get the workweek equivalent. Then apply the general rule of 29 C.F.R. 778.113(a) to arrive at the regular rate.
(2) Monthly salary – multiply the salary by 12 for the annual equivalent, then divide that figure by 52 to get the workweek equivalent. Then apply the general rule of 29 C.F.R. 778.113(a) to arrive at the regular rate.

The other main way to pay overtime based on semimonthly or monthly salaries is to figure it on the basis of an established basic rate as provided in section 207(g)(3) of the Act and Part 548 of the regulations. 29 C.F.R. 548.3(a) provides that the employer and employee may agree that the regular rate shall be determined by dividing the monthly salary (or semimonthly salary times 2) by the number of regular working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a situation may not be below the statutory minimum wage. Further requirements for such an established regular rate are found in 29 C.F.R. 548.2.

Once again, Texas employers must pay their salaried non-exempt employees at least twice per month, i.e., either biweekly

or semimonthly.

H.3. Regular Rate for Salaried Employees with Irregular Hours

If an employee is paid a fixed salary each workweek for hours that vary up and down from week to week, the employer may use an overtime calculation method authorized in 29 C.F.R. 778.114. This method is called the "fixed salary for fluctuating workweeks" form of computing overtime. It is easily the most favorable method for employers of computing overtime, but certain requirements have to be met. Many employers favor it because it results in a diminishing regular rate, and thus diminishing overtime pay, the more overtime hours there are in a workweek. For the same reason, many employees do not like this method. Moreover, the regular rate varies under this method from week to week, so some employers and employees do not like the unpredictability of this way of computing overtime pay. A final drawback of this method of pay is that DOL takes the position that it is incompatible with various forms of incentive pay, i.e., bonuses, shift premiums, and other types of incentives based on production or performance. Thus, it is restricted to those who are paid solely by means of a fixed salary (a commission on top of a fixed salary is not a problem, but it must be figured into the regular rate of pay before the overtime pay calculation is done).

For an employer to qualify to use this method, the employee must have a work schedule with fluctuating hours, i.e., not be on a fixed schedule, and must be paid a fixed salary that is meant to be straight-time compensation for all hours worked in a workweek, whether the employee works less than or more than 40 hours per week. In addition, the fixed salary must be paid "pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many." The "understanding" does not require a formal agreement or explanation beyond simple notice that the fixed salary will serve as straight-time compensation for all hours worked (see *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 637 (5th Cir. 2001)). With almost no exceptions, no reduction in the salary may be made for short workweeks. Although the full fixed salary must be paid during short workweeks resulting from a lack of work or authorized absences due to personal business or illness, an employer may make "occasional disciplinary deductions for willful absence or tardiness" if the employee, without authorization, fails to work the available schedule. However, such deductions may not affect either the minimum wage or the regular rate calculation for overtime pay purposes, i.e., the full salary is still divided by the actual hours worked that week to calculate the regular rate of pay. See the DOL Field Operations Handbook § 32b04b(b); see also 29 C.F.R. § 778.304(a)(5), (b); 29 C.F.R. § 778.307; and *Samson v. Apollo Resources, Inc.*, 242 F.3d at 639. Application of available paid leave to time missed during a short workweek is allowed, as noted in several DOL opinion letters, including FLSA2006-15 issued on May 12, 2006. Finally, the salary must be large enough to ensure that the regular rate will never drop below minimum wage. In using this method, the regular rate is determined by dividing the fixed salary by the number of hours actually worked that week (which does not include paid leave or paid holidays). Now, here's where the importance of this overtime method comes in: since the fixed salary is already deemed to compensate the employee at straight time for all hours worked, any overtime hours only need to be paid at "half-time", instead of time and a half. Remember, the employee has already been paid straight time by virtue of the salary, and the straight time is only paid once, so the overtime hours will be paid at half the regular rate, thus bringing the employee's pay up to time and a half for such hours. In workweeks in which the overtime is high, the regular rate will be low, and the employer will enjoy a lower per-hour overtime cost. The drawback is that if work is slow, and the employee is only working 25 or 30 hours per week, the fixed salary must still be paid. Useful examples of how to apply this method are found in 29 C.F.R. 778.114.

I. Employees Working at Two or More Rates

In the situation of an employee who works two different jobs at two different rates of pay, the FLSA allows two different methods of computing the regular rate for overtime calculation purposes: 1) the weighted average and 2) the regular rate associated with the job that caused the overtime to occur. The "default method" under the regulations is the weighted average method, found in 29 C.F.R. 778.115. The other method is allowed under section 207(g)(2) of the Act and is explained in regulation 29 C.F.R. 778.419. The two regulations that deal with those methods are shown below (the first deals with the weighted average method, and the second deals with the other method), along with examples of each:

> **29 C.F.R. 778.115 – Employees working at two or more rates.**
>
> Where an employee in a single workweek works at two or more different types of work for which different non-overtime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in 778.400 and 778.415 through 778.421.
>
> *Example of how to use the weighted average method:*

An employee works 40 regular and 4.5 overtime hours at $10 per hour for clerical work at the office. During the same workweek, she also works eight hours at $8 per hour answering the phone at her house, resulting in 52.5 total hours worked at both jobs during the workweek.

If you are using the weighted average method, you would take her earnings from the clerical job (44.5 hours at $10/hour, or $445.00) plus her earnings from answering the phone at home (8 hours at $8/hour, or $64.00), to get a total of $509.00. You then divide the total earnings by the total hours ($509.00 / 52.5) to arrive at the weighted average regular rate of $9.70 per hour. Now, remember that the total earnings of $509.00 represent the straight-time pay she has earned for the 52.5 hours, i.e., she has already been paid straight time for those hours, and so she only needs half-time for the 12.5 overtime hours to bring her up to the required time and a half. Half-time for the weighted regular rate is $4.85/hour, so multiply that times the 12.5 overtime hours and add it to the straight-time pay to get the total pay for the workweek. That would be $4.85 times 12.5, or $60.63, and that added to $509.00 equals $569.63, the total pay including overtime. A mistake sometimes made is to compute the weighted average correctly, but then apply it erroneously, such as by taking the weighted average, multiplying it by 1.5, and then multiplying that times the number of overtime hours worked and adding that to the straight-time pay. Such a calculation ($509.00 plus 12.5 hours at $14.55 per hour) would result in a figure of $690.88, which would actually result in a large overpayment. The first thing to remember is that when you do a weighted average, it is as if you are pretending that she really worked "x" number of hours at the weighted average rate. The second main thing to keep in mind is that the weighted average times the number of hours worked equals the total straight-time earnings for the workweek, and an employee only needs to be paid the straight time once. Any time you use an overtime calculation method that depends upon a total straight time figure, the overtime hours will be paid at "half time", instead of time and a half. A similar situation exists in the case of employees who are paid a fixed salary for fluctuating workweeks. The salary in that particular case is considered to be straight-time pay for all hours worked, so the overtime hours only need to be compensated at half-time to bring the person up to time and a half.

29 C.F.R. 778.419 - Hourly workers employed at two or more jobs.

(a) Under section 7(g)(2), an employee who performs two or more different kinds of work, for which different straight time hourly rates are established, may agree with his employer in advance of the performance of the work that he will be paid during overtime hours at a rate not less than one and one-half times the hourly non-overtime rate established for the type of work he is performing during such overtime hours. No additional overtime pay will be due under the act provided that the general requirements set forth in 778.417 are met and;

(1) The hourly rate upon which the overtime rate is based on a bona fide rate;
(2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e) (5), (6), or (7); and
(3) The number of overtime hours for which the overtime rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard.
(b) An hourly rate will be regarded as a bona fide rate for a particular kind of work [if] it is equal to or greater than the applicable minimum rate therefor and if it is the rate actually paid for such work when performed during non-overtime hours.

Example of how to use the method allowed under section 207(g)(2):

Same basic situation as above: an employee works 40 regular and 4.5 overtime hours at $10 per hour for clerical work at the office. During the same workweek, she also works eight hours at $8 per hour answering the phone at her house, resulting in 52.5 total hours worked at both jobs during the workweek. The office work was done Monday through Friday for eight hours per day, and 4.5 hours on Saturday. The phone duties at home were done Monday through Thursday, two hours each evening. The company observes a Monday through Sunday workweek.

In this case, the requirements of section 207(g)(2) and regulation 778.419 would have to be met, i.e., the employer would have had to agree prior to the start of the work that overtime would be paid based upon the regular rate associated with the job that caused the overtime, and the other requirements of those provisions would have to be satisfied. In addition, the employer would have to keep very reliable records of the hours worked for both jobs, especially since both jobs may contribute to the overtime total. The important thing is to be able to pinpoint exactly when the employee passes the 40-hour mark for the workweek. In the example given, the employee reaches that point after completion of the evening phone shift at home on Thursday. Thus, all hours worked on Friday and Saturday (12.5) would be paid at 1.5 times the regular rate associated with the clerical work done at the office. Her pay would be

calculated as follows:

32 times $10.00/hours	$ 320.00	Straight time
8 times $8.00/hour	$64.00	Straight time
12.5 OT hours x $10.00 times 1.5	$187.50	Overtime
Total:	$571.50	

Now, imagine that the phone work at home is done Tuesday through Friday. The situation would then be a bit more complicated, since both jobs would contribute toward the overtime. The 40-hour point would be reached two hours into the Friday shift for the clerical work at the office. The six hours remaining at the office on Friday, plus the two hours working the phone at home that evening, plus the 4.5 hours at the office on Saturday, would be the overtime hours for that workweek. The total would still be 12.5 hours, but there would be two regular rates involved. The overtime pay would consist of 10.5 hours at 1.5 times the regular rate for the office work, plus two hours at 1.5 times the regular rate for the phone work at home. Her pay would be calculated as follows:

34 hours times $10.00/hour	$340.00	Straight time
6 hours times $8.00/hour	$48.00	Straight time
10.5 OT hours x $10/hour x 1.5	$157.50	Overtime
2 OT hours x $8/hour x 1.5	$24.00	Overtime

Total: $569.50

One can see from these examples that the end results are often very close to each other and that the result with the second method depends upon the exact mix and timing of the overtime hours.

J. Regular Rate Includes Certain Non-Cash Payments

Under section 203(m) of the Act and part 531 of the regulations, an employer may pay part of the wages in forms other than cash. For example, the wages of a food service employee may include the reasonable cost of meals furnished by the employer in connection with the job. An apartment complex employee may be furnished an apartment and utilities in addition to an hourly wage or salary. In such cases, the employer is allowed to count the reasonable cost of the meals, lodging, or other facilities toward the minimum wage and overtime pay that would normally be payable. 29 C.F.R. 778.116 makes clear that if the compensation includes such non-cash payments (also called "wages in kind"), the reasonable cost of the non-cash items must be included in the employee's regular rate for overtime purposes. The employee's straight-time hourly earnings or salary would be added to the reasonable cost of the non-cash payments, and that total would be divided by the number of hours worked for the workweek in order to calculate the regular rate. The rules for determining "reasonable cost" are found in part 531 of the regulations.

Keep in mind that under section 61.016(b) of the Texas Payday Law, if part of an employee's wages involves "wages in kind", the employer must have written authorization from the employee in order to pay wages in that manner.

K. Regular Rate Includes Certain Bonuses and Incentives; Exclusions from Regular Rate

Many employers pay bonuses or give certain incentives to employees without realizing that such payments must be reflected in the regular rate for overtime pay purposes. Section 207(e) of the Act states that the regular rate includes all remuneration for employment except eight specified types of payments:

(1) gifts and payments in the nature of gifts on special occasions;
(2) vacation, sick, and other leave pay, reasonable expense reimbursements, and other types of payments that are not made as compensation for work;
(3) discretionary bonuses, contributions to certain profit-sharing, thrift, and savings plans, and talent fees;
(4) contributions irrevocably made by an employer to a trustee or third party pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;
(5) extra pay at a premium rate for hours in excess of eight per day or 40 per week, or for hours in excess of an agreed schedule;
(6) extra pay at a premium rate paid for work on Saturdays, Sundays, holidays, or regular days of rest, if the premium rate is not less than one and one-half times the employee's non-overtime pay rate;
(7) extra pay at a premium rate paid for work that falls outside of a schedule established in an employment contract or collective bargaining agreement, if the premium rate is not less than one and one-half times the rate paid for work performed during the employee's normal workday or workweek; or
(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program.

As seen in item 3 above, a discretionary bonus does not need to be included in the regular rate. In order to be considered "discretionary", the employer must retain discretion over two things: whether the bonus will be paid at all, and the amount of the bonus (see 29 C.F.R. 778.211(b)). Bonuses in the form of gifts for special occasions are also discretionary and excludable from the regular rate. Bonuses that are non-discretionary, i.e., are somehow promised so that an employee has the right to expect the payment, must be totaled in with other earnings to determine the regular rate on which overtime pay must be based.

The ways to figure bonuses into the regular rate are covered in 29 C.F.R. 778.209. A bonus, much like a commission paid in addition to an hourly wage or salary, is simply a form of additional straight-time pay for hours an employee has already worked. If the bonus is paid on a weekly basis, the bonus is simply added to the straight-time earnings for the week, and the total is divided by the hours worked to get the regular rate of pay. It is more complicated if a bonus is paid for a longer period of time. In such a case, the bonus must be allocated over the workweeks corresponding to the bonus. If any of those workweeks had overtime hours, extra overtime pay would have to be paid corresponding to the increase in the regular rate due to the bonus. The simplest way allowed under the regulations, assuming that the bonus is given to cover an entire quarter, or half-year, or year, is to allocate the bonus equally over each workweek in that period. For a workweek with overtime hours, the extra overtime pay would be equal to one-half of the increase in the regular rate due to the bonus, multiplied by the number of overtime hours that week. (The regular rate increase only needs to be multiplied by one-half because the bonus allocation itself represents the straight-time payment – adding the two together results in the payment of time and a half.)

Under Section 207(h)(2) of the Act, payments excluded from the regular rate of pay under subsections (5), (6), and (7) of Section 207(e) above may be credited toward the payment of any overtime pay that is due for that workweek.

L. Special Problem: Annual Salary Paid in Shorter Period

If an employee is paid on the basis of a stated annual salary, but the actual work is performed over a shorter period, a special issue arises. This is especially common in the case of school district employees, who are often paid an annual salary for less than a full year's work. DOL's Field Operations Handbook, Section 32b08, contains the following guidance for this situation:

> **§ 32b08 Annual salary earned in shorter period – regular rate.** Certain employment such as that in schools does not normally constitute 12 months of work each year. For the convenience of the employee, the annual salary earned during the duty months is often paid in equal monthly installments throughout the entire year. For purposes of finding the regular rate of pay for OT purposes in such cases, the annual salary is considered in relation to the duty months, rather than in relation to the entire year. Thus, for example, a school bus driver may receive an annual salary of $3000 for 10 months' duty, but be paid 12 equal monthly installments of $250 each. In such a case, he is considered as being paid at the salary rate of $300 per month, or $69.23 per week. The regular rate for OT purposes is found in the usual manner based on this weekly salary. (See FOH 22b11 and 30b18.) [Note: "30b18" does not exist. It should read "30b12". Those two sections of the FOH restate section 32b08 with respect to the salary basis for white-collar exemptions and computation of minimum wage, respectively.]

Overtime Pay - Conclusions

In calculating overtime pay, the most important things to keep in mind are:

- Overtime pay depends upon the employee's "regular rate of pay" for the workweek, which can vary from week to week, depending upon exactly how the employee is paid.
- The regular rate of pay includes all components of the pay agreement, except for very narrowly-defined premium pay outlined in Section 207(e) of the FLSA.
- For all but straight hourly pay or salaries for non-varying workweeks, the general method for calculating overtime is to divide total pay by total hours worked for the workweek, then pay one-half of the resulting regular rate for each overtime hour worked.

Below is a summary of the various overtime pay calculation methods:

- Hourly: pay time and a half over 40 hours.
- Hourly plus bonus and/or commission: regular rate = (total hours times hourly rate) plus the workweek equivalent of the bonus and/or commission, divided by the total hours in the workweek; then pay half of that regular rate for each overtime hour.
- Salary: regular rate = salary ÷ number of hours the salary is intended to compensate.
  - If the regular hours are less than 40: add regular rate for each hour up to 40, then pay time and a half for hours over 40.
  - If the regular hours = 40: pay time and a half for hours over 40.
  - If the regular hours are more than 40: pay hours over 40 at half-time up to the regular schedule, then time and a half past that.

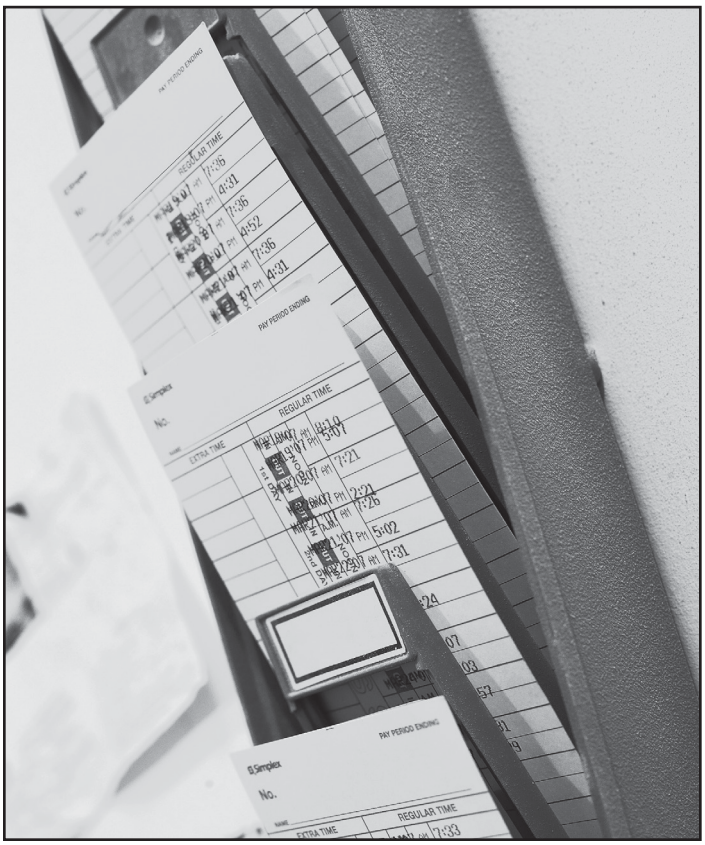
- If the hours are irregular: regular rate = salary ÷ total hours, then pay half-time for all hours over 40.
- Other pay methods: regular rate = total pay ÷ total hours, then pay half the regular rate for each overtime hour.

Employers may also receive help on these issues by calling the legal staff at the toll-free number for the TWC Employer Commissioner's office: 1-800-832-9394. Finally, the website for the U.S. Department of Labor offers the full text of the FLSA and the accompanying regulations at http://www.dol.gov.

DETERMINING HOURS WORKED FOR NON-EXEMPT EMPLOYEES

A. General

The U.S. Department of Labor's regulations for determining what must be counted as hours worked are found in Part 785 of the wage and hour regulations, Title 29 of the Code of Federal Regulations. For the majority of non-exempt employees, overtime will be an issue if the hours worked exceed 40 in a seven-day workweek. In general, an employer must pay employees for all hours in which they are "suffered or permitted to work". Only hours actually worked in excess of 40 in a seven-day workweek are counted toward overtime pay; paid leave hours and paid holiday hours do not count toward overtime pay. Extra hours worked on a day in a workweek do not result in overtime liability unless they result in the total hours for the workweek going over 40 (one notable exception is for non-exempt employees of residential care facilities such as hospitals and nursing homes: a 14-day period may be used if the employer pays overtime for hours in excess of eight in one day or 80 in a two-week period – this is sometimes called the "8/80 rule".) The DOL's official definition of "workweek" in 29 C.F.R. 778.105 provides that it "is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods" that can "begin on any day and at any hour of the day." Partial workweeks at the end of a semi-monthly pay period do not count toward overtime for previous workweeks - each workweek stands alone, as noted in 29 C.F.R. 778.104. Any overtime pay from that workweek would be paid with the pay for the following pay period (see 29 C.F.R. 778.106). Hours tracked with timekeeping devices for employees working normal schedules generally present no problem. The troubles arise primarily in situations involving work outside normal schedules, outside the office, or outside of the usual job duties. This article highlights those specific problem areas.



B. "Suffered or Permitted to Work"

The general rule is stated in 29 C.F.R. 785.11, which notes that work that is "not requested, but suffered or permitted, is work time." The regulation lists the specific example of employees who choose to keep working after the end of their shifts. The reason the worker decides to continue with the work is irrelevant. As long as the employer "knows or has reason to believe that he is continuing to work", the hours so spent constitute "working time" (in a similar vein, working "off the clock" is never allowed for non-exempt employees). 29 C.F.R. 785.12 extends that rule to work performed at home or at other places away from the normal job site, as long as the employer "knows or has reason to believe that the work is being performed". Many employers feel that such time should not be payable as long as the employer has not authorized the extra work, but the DOL's position on that is that it is up to the employer to control such extra work by using its right to schedule employees and to use the disciplinary process to respond to employees who violate the schedule (29 C.F.R. 785.13). This also specifically applies in the case of employees who are permitted or told to work at their desks during meal breaks; as noted in section D, such "breaks" are really work time. It falls on the employer to control whether the employee works during a meal break, or actually takes a break for a meal.

C. Waiting or On-Call Time

Employees who are temporarily idle while waiting for further work in such a way that they are not able to use the time effectively for their own purposes must still be regarded as working, according to 29 C.F.R. 785.15. The DOL's position regarding "on call" time is found in 29 C.F.R. 785.16 and 785.17. In deciding whether time spent "on call" is compensable, DOL and the courts have traditionally used one variation or another of the test of whether an employee is "waiting to be engaged" (non-compensable time) or is "engaged to be waiting" (compensable time) (*Skidmore v. Swift*, 323 U.S. 134 (1944)).

The Fifth Circuit adopted a fairly strict standard for determining whether on-call time is payable in the 1991 case of *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671, *cert. denied*, 112 S.Ct. 882. This case involved a biomedical (life-support) equipment repair technician who was so indispensable to the employer's operation that he was on call 24 hours a day, 365 days a year. The employee was required at all times to wear a beeper, restrict his alcohol consumption, and be able to come to his workplace within 20 to 30 minutes of being "beeped". After more than eleven months of such duty, the employee separated from employment with the medical center and claimed the employer owed him overtime pay for all the time he spent on call. Noting that Bright admitted he was called in only four or five times each week, was paid for all time spent in responding to the calls, and was able at all non-duty times to conduct his personal affairs, including sleeping or resting at home, going shopping, watching television or movies, and going to restaurants, the Court declined to consider the on-call, off-duty time "hours worked" for overtime pay purposes. The Fifth Circuit ruled that the critical question is "whether the employee can use the on-call time effectively for his or her own purposes". Interestingly, this case is cited with approval in many similar decisions by circuits around the country, even by courts that acknowledge, as the *Bright* court did, that the on-call policy in question seemed "oppressive"; for example, see *Martin v. Ohio Turnpike Commission*, 968 F.2d 606, 609 (6th Cir. 1992); *Berry v. County of Sonoma*, 30 F.3d 1174, 1183 (9th Cir. 1994); and *Birdwell v. City of Gadsden, Alabama*, 970 F.2d 802, 808, 809 (11th Cir. 1992). DOL cited the *Bright* case in an opinion letter dated August 12, 1997 (1997 WL 998028 (DOL WAGE-HOUR)).

It is permissible to have a wage agreement whereby employees are paid at a lower rate (at least minimum wage) for compensable on-call time and other types of non-productive work time, as noted in 29 C.F.R. 778.318. However, any such agreement should be clearly expressed in a written wage agreement signed by the employee, and the time so distinguished must be carefully and exactly recorded. Further, if such work results in overtime hours, the overtime pay must be calculated according to the weighted average method of computing overtime pay, as provided in 29 C.F.R. 778.115 (see the topic "Employees Working at Two or More Rates" in the article "Calculating Overtime Pay" in this book). Due to the complexity of the overtime calculation method necessary and the recordkeeping involved, any company attempting this should have the agreement prepared with the assistance of an attorney experienced in this area of the law.

D. Breaks

Breaks are a common source of confusion for employers. As noted elsewhere in this book (see "Fair Labor Standards Act - What It Does and Does Not Do" in the outline of employment law issues for this section of the book), neither the FLSA nor Texas law requires employers to give breaks during the workday, but if breaks are given, certain rules apply under federal law, and employers can impose their own conditions on the use of break time. Some cities in Texas may have their own ordinances on breaks, such as Austin, which in 2010 began to require at least one ten-minute break per four-hour shift for construction workers in that city.

Rest or coffee breaks, defined as 20 minutes or less, are compensable hours worked under 29 C.F.R. 785.18, since they are regarded as being for the benefit of both the employer and the employee. Smoking breaks are not required under Texas or federal law, but if a company allows such breaks, they count as rest breaks. Companies can adopt whatever policies they want to regarding smoking breaks. No matter how many rest/coffee/smoking breaks an employees takes, they are compensable, even if the employee took more breaks than allowed. Meal breaks, on the other hand, are not compensable, as long as they are at least 30 minutes in length and the employee is "completely relieved from duty for the purpose of eating a regular meal" (see 29 C.F.R. 785.19). Shorter meal breaks may be considered valid under special circumstances. Such breaks are a matter of company policy. Since they are optional, an employer can allow meal breaks, or not. If meal breaks are allowed, the employer can impose conditions on them, such as when they occur, how long they are, where they may or may not be taken, and whether any particular consumables are disallowed (such as alcoholic beverages). The most frequent pitfall for employers is thinking that employees have true meal breaks if they are allowed to eat at their desks while answering phones, opening mail, sorting files, and so on. Such duties performed while trying to eat will render the time spent during the meal break compensable. While employers should not insist that an employee actually eat something during a meal break, they may prohibit any kind of work during such time and may require employees to leave their desks or work stations during the allotted meal break times. Employers may control unauthorized work during meal breaks, or excessive or unauthorized breaks, by the disciplinary process.

Only one type of break is actually required under the law. Under the 2010 health care reform law, the FLSA now requires employers to allow reasonable break times for a nursing mother for the purpose of expressing breast milk for her baby during the first year following the birth of the child. Presumably, the same law would allow the mother to nurse her child if employees' children are allowed in the workplace. The law applies only to non-exempt employees, i.e., those who are entitled to overtime pay if they work overtime, and it exempts employers with fewer than 50 employees if to provide such breaks would be an undue hardship for the business. Such breaks do not have to be paid. As to what is meant by "reasonable" in terms of break time, the statute indicates that the break must be allowed "each time such employee has need

to express the milk." For more information, see "Nursing Mothers" in the "Outline of Employment Law Issues" in this part of the book.

Violations of any kind of break policy should be handled just like any other rule violation in terms of corrective action.

E. Sleeping Time

If an employee is on a shift lasting less than 24 hours and is required to be on duty during such a shift, she will be considered as working during the entire time, even if permitted to sleep during such time or engage in personal activities, such as eating meals, when not busy (29 C.F.R. 785.21). Neither the regulation nor the Field Operations Handbook (FOH) explain why otherwise bona fide meal periods may not be excluded from the hours worked. For law enforcement personnel paid according to the partial "tour of duty" overtime exemption under 29 U.S.C. 207(k), 29 C.F.R. 553.223(b) allows bona fide meal break time to be deducted from the hours worked in a shift of less than 24 hours. Under 29 C.F.R. 785.22, if an employee is on duty for a shift of 24 hours or more, the employer and employee may agree to exclude from hours worked the time spent in meal breaks and in "bona fide regularly scheduled sleeping periods", but there is a limit of eight hours on the amount of time that can be excluded as sleeping time. In the case of employees who work at home or reside on the employer's premises, 29 C.F.R. 785.23 allows the employer and employee to reach a reasonable agreement as to the hours worked that fits the circumstances of the job in question and that could potentially exclude hours spent sleeping, eating, or pursuing personal business.

It is permissible to have a wage agreement whereby employees are paid at a lower rate (at least minimum wage) for compensable sleeping time and other types of non-productive work time, as noted in 29 C.F.R. 778.318. However, any such agreement should be clearly expressed in a written wage agreement signed by the employee, and the time so distinguished must be carefully and exactly recorded. Further, if such work results in overtime hours, the overtime pay must be calculated according to the weighted average method of computing overtime pay, as provided in 29 C.F.R. 778.115 (see the topic "Employees Working at Two or More Rates" in the article "Calculating Overtime Pay" in this book). Due to the complexity of the overtime calculation method necessary and the recordkeeping involved, any company attempting this should have the agreement prepared with the assistance of an attorney experienced in this area of the law.

F. Preparatory and Concluding Activities

Time spent in preparatory and concluding activities will constitute compensable hours worked if the activities are an integral part of a principal activity of the work, i.e., if they are closely-related activities which are indispensable to the performance of the principal activity (see 29 C.F.R. 785.24). Such activities might include oiling or cleaning of a machine used in the work, installation of blades or bits in a machine, formatting a floppy diskette or a hard drive, installing new software prior to engaging in word processing, distributing materials or arranging furniture in preparation for a meeting, distributing clothing or safety items to other employees, wiping off tables in a restaurant prior to beginning table waiting duties, removing clothes and showering after working in a hazardous environment, and so on.

In October, 2005, the U.S. Supreme Court issued an important ruling regarding a frequent issue for many employers whose employees must wear specific gear for their work. The Court held that "donning and doffing gear that is 'integral and indispensable' to employees' work is a 'principal activity' under the statute," and that "the continuous workday rule mandates that the time the ... petitioners spend walking to and from the production floor after donning and before doffing, as well as the time spent waiting to doff, are not affected by the Portal-to-Portal Act, and are instead covered by the FLSA," i.e., the employer must consider such time to be part of hours worked. However, the Court also held that the FLSA does not require an employer to pay for "the time employees spend waiting to don the first piece of gear that marks the beginning of the continuous workday" as long as the employer has not directed the employees to report early to wait in such a manner, and as long as such payment is not required either by custom in the industry or by a specific agreement (*IBP, Inc. v. Alvarez*, 126 S.Ct. 514 (2005)).

G. Time Spent in Meetings and Training Programs

This is a particularly difficult area for many employers to understand. The general rule is found in the wage and hour regulations at 29 C.F.R. 785.27, which states the following:

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met:

(a) attendance is outside of the employee's regular working hours;
(b) attendance is in fact voluntary;
(c) the course, lecture, or meeting is not directly related to the employee's job, and
(d) the employee does not perform any productive work during such attendance.

Hence, if all four criteria are not met, the time so spent will be considered compensable.

29 C.F.R. 785.28 explains that attendance is not truly voluntary if it is required by the employer, or if the employee is led to believe that nonattendance would somehow adversely

affect his employment, as would be the case with most meetings called by the employer. 29 C.F.R. 785.29 notes that "training is directly related to the employee's job if it is designed to make the employee handle his job more effectively, as distinguished from training him for another job, or to a new or additional skill."

It is permissible to have a wage agreement whereby employees are paid at a lower rate (at least minimum wage) for compensable training and meeting time and other types of non-productive work time, as noted in 29 C.F.R. 778.318. However, any such agreement should be clearly expressed in a written wage agreement signed by the employee, and the time so distinguished must be carefully and exactly recorded. Further, if such work results in overtime hours, the overtime pay must be calculated according to the weighted average method of computing overtime pay, as provided in 29 C.F.R. 778.115 (see the topic "Employees Working at Two or More Rates" in the article "Calculating Overtime Pay" in this book). Due to the complexity of the overtime calculation method necessary and the recordkeeping involved, any company attempting this should have the agreement prepared with the assistance of an attorney experienced in this area of the law.

G.1. Focus on Meetings

Compensable Meetings

Typical examples of meetings for which an employer would have to compensate employees for their time include:

- General staff meetings
- Safety meetings
- "Get Acquainted" meetings
- Disciplinary meetings
- Any meeting called by the employer, regardless of whether it is held during the employee's regular work hours

Examples of Non-Compensable Meetings

An employer would not have to pay employees for time spent in meetings outside the employee's normal working hours that were completely optional and non-work related for the employees. Such meetings might include:

- Meetings of youth organizations sponsored or supported by the employer
- "Happy hours" and other optional socializing
- Company sports team events
- Special interest or hobby group meetings sponsored or supported by the company

G.2 Focus on Training

New employee orientation and on-the-job training involve compensable work time. If an employee attends a training course on his or her own after hours or on the weekend in order to qualify for a different line of work or possibly for a promotion or transfer, the employer would not have to pay for the time spent in such training. Similarly, 29 C.F.R. 785.30 of the regulations makes clear that "if an employee on his own initiative attends an independent school, college, or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job." The important thing there would be that the employer did not instruct the employee to attend such classes or otherwise make the course a condition of the job. In fact, 29 C.F.R. 785.31 goes so far as to state that if the employer offers for the benefit of the employees a training course "which corresponds to courses offered by independent bona fide institutions of learning", an employee voluntarily attending such courses would not be entitled to pay for time spent in such training even if the courses are directly related to the job or provided free of charge by the employer (however, such time would have to fall outside the employee's regular hours of work, as per 29 C.F.R. 785.27(a)).

However, employers should be careful to distinguish between training that is voluntary or not necessary for a job and training that the employer is required by law or regulation to furnish to its employees. A good example of this is found in the child care industry. State regulations require child care facilities to see to it that employees receive at least 24 "contact hours" of training each year. The U.S. Department of Labor (DOL) takes the position that such training is compensable. DOL explains that since the obligation is on the employer to get the employees trained, the training is not really voluntary and thus represents hours worked. Of course, if a child care worker voluntarily attends additional training beyond the minimum requirement outside working hours, such time would not normally be compensable. Employers in that industry are allowed to apply time spent in mandatory staff meetings devoted to child care issues toward the 24-hour requirement. Since DOL also prohibits employers from making employees pay for the minimum standard training courses, child care organizations would want to take advantage of their right to specify the times and places where compensable training will take place. That means that employers can notify employees that if they decide on their own to go to some expensive training at some out of the way location, neither the time nor the course would be paid. Finally, if a child care teacher has already satisfied the training requirement for the year, no additional training is necessary within that year if the worker is hired by another child care facility.

The converse of the child care training situation is true for

continuing education requirements related solely to the ability of an employee to practice a particular trade or profession, as long as the training is of general applicability and is not designed to fit a specific job with a specific employer (see DOL Opinion Letter WH-504, October 23, 1980). Such training is "portable" and allows the person to find work in that trade or profession with any employer or even on their own. Of course, many such employees would qualify for an overtime exemption in any event.

H. Travel Time

The easiest way to think of the travel time regulations is to remember that basically, any travel on company business that cuts across the normal workday is compensable time worked, regardless of whether such travel occurs on a day the employee is normally scheduled for work.

The wage and hour regulation at 29 C.F.R. 785.33 states that whether time spent in travel must be considered working time depends upon the kind of travel involved. The general rule is found in 29 C.F.R. 785.35, which provides that "normal travel from home to work is not worktime". That means that the normal commute from home to work and vice-versa is not compensable. However, 29 C.F.R. 785.36 states that home to work travel and back again that falls outside of the regular hours may be compensable hours worked. For example, if the worker is called back to work somewhere on an emergency basis for one of the employer's customers and must travel a "substantial" distance, the travel time would be compensable. The regulation does not provide that all such travel time is compensable; the decision would presumably be made on a case-by-case basis. Similarly, a special temporary assignment in another city would involve compensable travel time, according to 29 C.F.R. 785.37, but the employer could disregard the time corresponding to the normal home-to-work commute and the time spent on meals.

Time spent traveling between worksites during a workday is compensable under 29 C.F.R. 785.38. For example, if a worker reports to the main office to start the day and is then told to report to another job site, all time spent traveling to that worksite and back again to the main office will be paid. Some workers normally report to a number of jobsites each day as part of their duties; all such time is compensable. If the worker does not have to report back to the main office after finishing at the last jobsite, but instead returns directly home, the time spent returning home is not compensable.

Many questions arise concerning travel to other locations involving overnight stays. 29 C.F.R. 785.39 states that "travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties." However, if the employee travels as a passenger outside normal working hours, the time is not compensable. An employee who serves as a driver or a pilot for other employees would be paid for the entire travel time. This same rule applies even in the case of travel on days not normally worked. For instance, if the normal hours are 8 am to 5 pm from Monday through Friday, and the employee must perform job-related travel on Sunday from 3 pm to 7 pm, the employer would need to pay only for the time from 3 to 5 pm. Similarly, work performed while traveling must be counted as hours worked under 29 C.F.R. 785.41.

According to a DOL wage-hour opinion letter issued on September 21, 2004, travel between an out-of-town worksite and the employee's home that the employee undertakes for his or her own personal convenience, i.e., voluntarily, is not compensable.

The travel time should be paid at the employee's regular rate of pay; if travel time is paid by agreement at a rate less than the employee's normal pay rate for non-travel duties, exact records of non-travel time and travel time would have to be maintained, and the regular rate of pay would be calculated using the "weighted average" method – see 29 C.F.R. 778.115 and 778.318(b). This lower rate of pay for travel is mentioned in an administrative opinion from DOL dated January 22, 1999 (BNA, WHM 99:8211), which basically states that paying a lower rate of pay for travel time is allowed under the FLSA as long as the rate is at least minimum wage, and that the regular rate for overtime purposes would be the weighted average of the two rates (29 C.F.R. 778.115).

Strategic tip: paying employees a different rate of pay for travel time is generally inadvisable due to the complexity of the overtime calculation method necessary and the recordkeeping involved; in addition, any company attempting this should do so only on the basis of a clear written agreement prepared with the assistance of an attorney experienced in this area of the law.

It is permissible to have a wage agreement whereby employees are paid at a lower rate (at least minimum wage) for compensable travel time and other types of non-productive work time, as noted in 29 C.F.R. 778.318. However, any such agreement should be clearly expressed in a written wage agreement signed by the employee, and the time so distinguished must be carefully and exactly recorded. Further, if such work results in overtime hours, the overtime pay must be calculated according to the weighted average method of computing overtime pay, as provided in 29 C.F.R. 778.115 (see the topic "Employees Working at Two or More Rates" in the article "Calculating Overtime Pay" in this book). Due to the complexity of the overtime calculation method necessary and the recordkeeping involved, any company attempting this should have the agreement prepared with the assistance of an attorney experienced in this area of the law.

I. "Hours Worked" Does Not Include Paid Leave!

Under the FLSA, the only time counted when determining whether and how much overtime was worked is the time the employee actually spent engaged in work. Time represented by paid holidays or paid leave does not count toward hours worked. Thus, if employees who are given paid leave during FMLA-related absences work during a workweek, the paid leave is left out of the equation. It would not be a common situation for an employee to have FMLA-related leave and overtime during the same workweek, although it would be possible.

J. How "Hours Worked" Affects FMLA Eligibility Determinations

In order to determine whether an employee has met the 1250-hour and twelve-month service requirements, the employer must know what hours and time on the payroll to include. The DOL applies essentially the same rules for determining hours worked to the FMLA as it does when verifying an employer's compliance with the overtime statutes under the FLSA.

Periods of time during which the employee is completely relieved of duty are not counted toward the 1250-hour requirement, even if the employer compensates such time under its fringe benefit policies. The 1250-hour requirement counts only hours actually worked. The types of periods excluded from the computation would include:

- paid or unpaid vacation leave
- paid or unpaid sick leave
- paid or unpaid parental leave
- paid or unpaid holidays
- other personal leave
- FMLA leave periods
- furloughs or suspensions

However, any week during which an employee is maintained on the payroll, even if the employee is off work for that week, must be counted toward the twelve-month service requirement. DOL guidance on what to include and exclude from the 1250-hour and twelve-month requirements is found in Wage-Hour Opinion Letter FMLA-70, August 23, 1995.

The same letter ruling also makes clear that for FMLA purposes, there is no distinction between FLSA overtime and non-overtime hours; "an hour is an hour is an hour."
Wage-Hour Opinion Letter FMLA-78, February 14, 1996, notes that full-time teachers are presumed to meet the 1250-hour test, in view of the time spent away from school preparing lessons and tests and grading students' work. The employer may attempt to rebut that presumption, but can do so only with specific work records or documentation of interviews with the employee.

In an interesting letter ruling impacting upon the temporary help industry, Wage-Hour Opinion Letter FMLA-37, July 7, 1994, stated that a temporary help firm and its client employer "are considered joint employers for purposes of determining employer coverage and employee eligibility" under the FMLA, referring to the applicable regulation at 29 C.F.R. 825.106(d). Thus, ruled DOL, "the time that the employee was employed by the temporary help agency would be counted towards the eligibility tests." This ruling was supported in a 1997 court decision, *Miller v. Defiance Metal Products, Inc.*, 989 F.Supp. 945, 4 WH Cases2d 613 (N.D. Ohio 1997). The court concluded that reclassification of an employee from temporary to "permanent" does not alter the FMLA time frame used in determining whether an employee has worked at least twelve months, and that the time frame for a temporary help firm employee who is later hired by the client employer begins to run from the date that the employee is first assigned to work at the client's facility.

According to a policy memorandum issued by the DOL on July 22, 2002, if any employees go on military duty-related leave and return to employment, they must be credited with the hours they *would have worked* but for the military duty, as well as the months they spent in such duty. DOL indicated that in most cases, the calculation 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, any time an employee returns from military leave, the result will most likely be that he or she will be eligible for FMLA leave if they need it upon their return.

Conclusions

The main things to remember about keeping track of hours worked are the following:

- employees must be paid for all time that they are at the disposal of an employer;
- employees do not have to be paid for time they can use effectively for their own purposes;
- if employees work too much time, or work without authorization, they still have to be paid for the time, but the employer can handle it as a performance or disciplinary matter.

Employers may also receive help on these issues by calling the legal staff at the toll-free number for the TWC Employer Commissioner's office: 1-800-832-9394. Finally, the website for the U.S. Department of Labor offers the statute and the regulations at "http://www.dol.gov".

The Fair Labor Standards Act has many exemptions. Some exemptions are extremely broad, as in the case of exemptions from the definition of "employee". Others are more narrow, such as various exemptions from overtime pay. Still other exemptions apply to two or more protections normally afforded by the FLSA. The discussion on compensatory time which follows will focus only on the exemption categories involving overtime.

Compensatory Time

An extremely frequent misconception among private (non-public) employers is that it is permissible to pay non-exempt employees "comp time" in lieu of cash for overtime worked. Not only does the statute on compensatory time apply only to public employers (see 29 U.S.C. 207(o)), but many private employers compound the error by giving compensatory time on a straight-time basis.

If a public employer gives compensatory time to a non-exempt employee in lieu of cash for overtime worked, it must do so on a time-and-a-half basis, and non-public safety personnel are limited to a total of 240 compensatory hours before cash must once again be paid for overtime. Public safety personnel are limited to a total of 480 hours of compensatory time before they must be paid cash for overtime worked.

Alternatives to paying overtime hardly merit the appellation "alternatives". For instance, an employer can give an informal variety of compensatory time during the workweek simply by adjusting the hours worked so that they do not exceed 40 in the week. In addition, there is a little-known exception to the general rules on overtime known as the "time off plan". Buried deep within the Field Operations Handbook at Section 32j16b, this rule states that in the case of a pay period with more than one workweek, if the employee works overtime during one week and is given compensatory time off during a subsequent week or weeks within the pay period, no overtime as such must be paid if the total wages for the pay period equal what the pay would be if the overtime were paid and the other workweeks paid on the basis of actual hours worked. Since many employers are not often readily able to give time off, and since the time off plan does not apply in the situation of an employee paid a fixed salary for fluctuating workweeks (29 C.F.R. 778.114), this exception is practically useless (a more detailed discussion of the time off plan appears below).

How useless is the "time off plan", really?

The "time off plan" is not a viable option for most employers in most situations; the list of reasons follows below. Again, here is the Department of Labor's explanation of the "time off plan", quoted directly from its Field Operations Handbook:

> **§ 32j16b The time off plan.** To comply with the FLSA and to continue to pay a fixed wage or salary each pay period, even though the employee works OT in some week or weeks within the pay period, the employer lays off the employee a sufficient number of hours during some other week or weeks of the pay period to offset the amount of OT worked so that the desired wage or salary for the pay period covers the total amount of compensation, including OT compensation, due the employee under the FLSA for each w/w taken separately. The plan may use a standard number of hours more or less that the applicable statutory maximum w/w. The employer does not pay for OT work in time off, nor does he average hours over a period longer than a week. Control of earnings by control of the number of hours an employee is permitted to work, not payment for OT in time off, is the essential principle of the time off plan. For this reason, a time off plan cannot be applied to a salaried employee who is paid a fixed salary to cover all hours he may work in any particular w/w or pay period.

Drawbacks of the "time off" plan include the following:

1. "Fixed wage or salary" means employers can forget about this for regular hourly workers who normally work variable hours and receive variable pay.
2. Since the Texas Payday Law requires non-exempt employees to be paid at least twice per month (section 61.011(b)), use of the time-off plan would be limited on a practical basis to a two-week pay period.
3. Since the provision calls for both overtime hours worked and time off to be in the same pay period, the only time an employer could take advantage of this plan would be if the overtime were worked in Week 1 of a two-week pay period, so that the time off could be granted in Week 2.
4. The time off would have to be granted at time and a half, not straight time.
5. Many employers do not have the luxury of being able to "lay an employee off" for any amount of time, much less for 1 1/2 times the amount of overtime worked in a previous week.
6. As the final sentence of 32j16b implies, even this limited option is unavailable to employers paying under the "fixed salary for fluctuating workweeks" method for calculating overtime pay (29 C.F.R. 778.114).

How much flexibility does a public employer have with compensatory time policies?

For public employers, the basic authorization to pay

compensatory time in lieu of cash for overtime appears in Section 207(o) of the FLSA, which provides the following in subsection (2)(A): "A public agency may provide compensatory time under paragraph (1) only— (A) pursuant to— (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work."

Courts all across the country have for decades interpreted that provision as allowing public employers to simply dictate that employees will be paid for overtime with compensatory time. In other words, the agreement is formed by the public employer telling the employees they will be paid for overtime with compensatory time off, and the employees agree by staying employed, instead of quitting, as they would have a right to do. It is not really a choice for those who want to remain employed with that public employer.

The DOL's regulation interpreting that provision recognizes that reality, despite its indirect wording. 29 C.F.R. § 553.23(c) states in relevant part: "… The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure." What that boils down to is that a public employer may make acceptance of compensatory time a condition of employment, and the employee may not be coerced or pressured into accepting or keeping the job. Once continued employment is accepted, knowing that compensatory time will be paid, the agreement has been made and will apply.
See http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_553/29CFR553.23.htm.

In a landmark U.S. Supreme Court case, the Court stated: "Nothing in the FLSA or its implementing regulations prohibits a public employer from compelling the use of compensatory time." *Christensen v. Harris County,* 529 U.S. 576, 120 S.Ct. 1655, 1656 (2000). That was in the context of a policy requiring county employees to use their accrued compensatory time if the total accrued amount approached the 240-hour limit. If a city or county can require employees to use up their compensatory time, it can certainly make acceptance of compensatory time in lieu of cash for overtime worked a condition of employment.

Where a public employer can get into trouble is in the situation in which the non-exempt employee works overtime without having been told in advance or advised via a compensatory time policy or agreement that compensatory time will be paid in lieu of cash for overtime, and the employer simply gives compensatory time instead of paying for the overtime in the form of cash. That would be a problem under the law, since no prior "agreement" would have been made.

Before 1998, public employers were relatively limited in how they could control the accumulation and use of compensatory time by non-exempt employees who worked overtime. With exempt employees who were given compensatory time (an optional benefit, usually given on a straight-time basis), the public employer could control the use of the compensatory time any way it saw fit, since such compensatory time was not required by law. However, for non-exempt employees, compensatory time at the rate of time and a half is required if overtime is worked and if the employer does not want to pay cash for the overtime. A 1994 case from the Eighth Circuit, *Heaton v. Moore*, 43 F.3d 1176, 2 WH Cases2d 801, held that public employers can deny an employee's use of compensatory time only where such use would be "unduly disruptive" to the agency's operations; the ruling basically affirmed the DOL's regulation on that point in 29 C.F.R. 553.25(d). Put another way, a public employer cannot control a non-exempt employee's use of compensatory time, since it is the equivalent of cash -- just as an employer cannot specify how an employee spends cash earnings, the employer cannot determine how the employee will spend the compensatory time off.

That changed dramatically for public employers in the jurisdiction of the 5th Circuit Court of Appeals (Texas, Louisiana, and Mississippi), thanks to two 1998 court decisions. The first case was *AFSCME Local 889 v. State of Louisiana*, 145 F.3d 280, 4 WH Cases2d 1355 (5th Cir. 1998), basically stating that a public employer's policy requiring employees to use compensatory time before using vacation time does not violate the FLSA. In that case, the court distinguished *Heaton* and made an interesting comment about not necessarily being in agreement with the *Heaton* ruling, but seeing no need to directly address the Heaton question (i.e., can an employer require employees to use compensatory time when they approach a certain threshold?). In the second case, *Moreau v. Harris County*, 158 F.3d 241, 4 WH Cases2d 1697 (5th Cir. 1998), which was decided not quite four months later, the court called the 8th Circuit's reasoning in *Heaton* "flawed" and ruled that there is no FLSA violation if a public employer enforces a policy

whereby it requires employees to take paid compensatory time off if their compensatory time balances approach a given threshold. The incentive for public employers, of course, is to do just what the Fifth Circuit's *Moreau* ruling allows: use up the compensatory time before the employee passes the 240- or 480-hour limit beyond which cash must be paid for overtime, and also keep the employee from using vacation time, which is often limited by "use it or lose it" policies or statutes that set maximum annual carry-over amounts. On May 1, 2000, the U.S. Supreme Court affirmed the latter ruling under a different case name, *Christensen v. Harris County* (cited above), holding that the FLSA does not prohibit employers from requiring employees to use compensatory time whenever their accrued balances approach certain limits.

Pitfalls of Illegal Compensatory Time

Employees who are paid with compensatory time, when they should be paid cash for overtime, could file wage claims under either the Texas Payday Law, the FLSA, or both. The payday law claim can only cover the 180 days preceding the date of the claim, so it would not cover compensatory time violations that occurred a year or two earlier. For the older violations, the FLSA could be used. Under either law, the employer would have to reckon with paying time and a half for each hour of overtime worked. In addition, under the FLSA, the employer may also have to pay an equal amount in so-called "liquidated damages", and possibly attorney's fees in the discretion of a court. If a court found that the employer had no reasonable basis for believing that it could give compensatory time in lieu of overtime pay, the FLSA claim could go back three years, instead of the usual two. An employer involved in such a claim should attempt to retroactively apply the principles of the "time off plan" noted above if the timing of the pay periods and reductions in hours coincided to the extent necessary to meet the requirements of that procedure.

Effect of Compensatory Time on the Salary Test for Exempt Employees

What the DOL Says About Compensatory Time for Exempt Salaried Employees

The Department of Labor's position on compensatory time for exempt employees is that extra pay above and beyond the salary does not violate the salary basis for the exemption. Perhaps wanting to encourage extra pay for such workers, DOL states that as long as exempt employees receive a guaranteed salary free and clear of any reductions on the basis of quality or quantity of time worked, extra pay or extra leave time for extra work is permissible. 29 C.F.R. 541.604(a) provides that "An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. ... Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off." This same information is found in DOL's Field Operations Handbook, Section 22b01. In other words, an employer is allowed to pay exempt employees who work over a stated minimum number of hours (45, 50, or whatever) in a week will receive extra pay or compensatory time on a straight-time basis for each additional hour. Some companies that have a difficult time attracting and keeping qualified employees find that they must offer additional pay like that as an incentive to join and stay with the company.

Despite the above guidance from DOL, there are two potential problems with awarding salaried exempt employees extra pay or compensatory time on an hourly basis for hours worked beyond a certain minimum specified by the employer. First, some court decisions have declared that extra pay or compensatory time for "overtime" worked by such employees is inconsistent with the salary basis for the exemptions. An example of one such decision is *Brock v. Claridge Hotel and Casino*, 846 F.2d 180 (3rd Cir. 1988), which held in part:

> Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it.

Adding to the confusion, there are also several court rulings that agree with DOL's stance on the matter.
Second, there is a problem that arises when an employer, instead of adding to an exempt employee's accrued compensatory time an hour or two at a time, deducts from the accrued "comp time" bank on an hourly basis. That indicates to some courts that the employer is too interested in the quantity of work performed; if an employee's pay or leave bank is reduced on an hourly basis, it looks like the employee is really an hourly employee, or so the thinking goes. An example of what can go wrong with a situation like that is found in an appeals court decision from the U.S. Second Circuit, *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (1991), *cert. denied*, 506 U.S. 905, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992). However, the DOL has stated in an administrative letter ruling dated February 28, 1995 (BNA, WHM 99:8014) that such a practice does not violate the salary test:

> ...You state that your client wishes to establish a bonus plan to compensate its exempt, salaried employees for inordinate hours worked during seasonal business peaks. The plan would award exempt employees who work more than an average

> number of hours per week with additional time off (bonus time) or pay during the non-peak season... since they are occasionally called upon to work beyond their scheduled hours, this bonus time system was proposed for tracking and rewarding the employees.
>
> Specifically, you state that if an exempt employee works more hours than expected in a given week, his/her accumulated bonus time will be increased in direct proportion to the extra hours worked that week. If an exempt employee works fewer hours than expected, his/her accumulated bonus time will be reduced in direct proportion to the hours below the expected hours for that week. ... If the employee should ever work fewer hours than expected in any given week and not have enough accumulated bonus time to offset the shortage, the accumulated bonus time will be reduced as a negative quantity. ...
>
> Where an employer has proposed a bona fide bonus time benefits plan such as the one described in your letter, it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his/her guaranteed salary. Payment of an amount equal to the employee's guaranteed salary must be made even if an employee has no accrued benefits in his/her bonus time plan account, and the account has a negative balance, where the employee's absence is for less than a full day.
>
> ...it is our opinion that your client's proposed bonus time plan for its exempt employees appears to meet the requirements outlined in the Regulations...

The *Malcolm Pirnie* Case

The employer in *Malcolm Pirnie* maintained a practice of docking exempt employees' salaries or leave balances for partial-day absences. When notified by the DOL that it could not do that, it changed its policy to allow such employees to charge partial-day absences to an "overhead" account (also referred to by the company as a "comp time bank") and reimbursed the employees for the deductions that had been made in the past. The "overhead" account consisted of accumulated compensatory time that the exempt employees had earned on a straight-time basis. The Court ruled that since the employer had deducted amounts from the employees' salaries and leave bank on an hourly basis, the employees were not really "salaried", but rather "hourly". That meant they could not be considered exempt employees and that the employer owed them back overtime pay for overtime they had worked in the past. The Court focused on the definition of "salary", stating that generally, an exempt employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked". According to the Court, "an employer that maintains the discretion to reduce an employee's compensation as a result of the employee's hours...may not consider the employee to be paid on a salary basis." (*Malcolm Pirnie* at 949 F.2d 615.) Further, the fact that the employer's policy required exempt employees to either make up partial-day absences or charge them to personal leave time was, in the Court's opinion, proof that the employees were not salaried, but rather hourly. It is clear from the ruling that the *Malcolm Pirnie* court considered leave time, whether vacation, sick, or compensatory leave, to be part of overall compensation and thus part of the salary.

How to safely reward extra work by exempt salaried employees?

In view of the unsettled state of the law, i.e., the debate between some courts and other courts and/or DOL, it may be safest to find alternatives to awarding compensatory time or extra pay on an exact-correspondence, hour-by-hour basis. One alternative is to simply recognize that the truly exempt employees are generally the best and most reliable employees whom a company can count on to work whatever hours are needed to do a quality job. (Just think: how do exempt employees reach their positions in the first place?) With that in mind, adopt an attitude that it does not matter if an exempt employee misses a few hours here or a few hours there, because it is certain that those missed hours will be made up, and then some, in the future. In other words, if the nature of the job permits, let such employees enjoy flexible schedules and not be subject to the normal timekeeping documentation that other types of employees might need to worry about. Another way to reward those who consistently put in long hours for their salary is to increase their pay. That might seem obvious, but it is often the obvious solution that escapes notice. Short of a pay increase, perhaps the benefits package could be sweetened for such workers. For example, salaried exempt employees may have to work long hours for the agreed-upon salary, but they might also accrue vacation and sick leave at a higher rate than non-exempt employees (that is completely legal). They might also get first choice at vacation dates, or other "perks". Yet another method might be to award a certain amount of compensatory time off for a range of extra hours worked, i.e., avoid a one-to-one correspondence between the extra time worked and the compensatory time given. Finally, perhaps the highest-risk route would be to utilize a policy that reduces compensatory time banks on an hourly basis, despite recent DOL guidance to the effect that reducing compensatory time balances on an hourly basis does not violate the salary

basis; the court decisions are simply too diverse for that to be entirely safe. The foregoing are only a few of the ways for a company to recognize and reward those employees who might otherwise feel like their salary/hourly equivalent rate barely makes their jobs worthwhile, and thereby minimize compensatory time troubles.

Deferred Compensation

Deferred compensation is a common benefit offered to employees by many companies. To determine how to treat deferred compensation under the wage and hour laws, one must look at the basic definitions in the FLSA and its accompanying regulations. The main question, of course, is whether deferred compensation must be included in a non-exempt employee's "regular rate of pay" for overtime calculation purposes. In 29 U.S.C. 207(e), the definition of regular rate includes "all remuneration for employment paid to, or on behalf of, the employee", and deferred compensation is not one of the listed exclusions from that definition. A DOL opinion letter dated January 27, 1969 stated that deferring compensation until a later date would not affect the regular rate calculation. Thus, deferred compensation must be included with the employee's other compensation to determine the regular rate of pay applicable to a workweek in which the employee works overtime.

Student Interns / Trainees

There is no FLSA exception as such for "student intern". The term "intern" appears only once in the FLSA itself, in section 203(e)(2)(A), which exempts Congressional interns from the definition of "employee"; and only once in the regulations, in 29 C.F.R. 541.304(c), where it is explained that medical interns do not have to be paid on any particular basis, just like the situation is with doctors, attorneys, and teachers, as long as they have graduated with a medical degree necessary to practice medicine, i.e., they are no longer "students", except perhaps in a post-graduate program.

To have a better understanding of how student interns are treated under the FLSA, one has to realize that such workers are in essence "trainees". Based on a 1947 U.S. Supreme Court case (*Walling v. Portland Terminal Co.*, 330 U.S. 148), the DOL has a fairly extensive set of rulings and other guidance on "trainees", as explained in the paragraphs below.

Certain types of trainees are completely excluded from FLSA coverage. However, the requirements for such total exclusion are quite stringent. In an administrative letter ruling dated February 22, 1974 (WH-254, BNA WHM 99:1152), the DOL stated that if a person is considered a "trainee", that person is not considered an "employee" and does not have to be paid minimum wage and overtime. The letter gave the following six criteria for the designation of a person as a trainee; commentary on each criterion follows in italics:

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.*

The ruling went on to note that since the trainees' work products were sold by the employer, a vocational-technical school, and thus benefited the institution, and since the work done by the trainees limited the employment opportunities of regular employees who would otherwise be producing those goods, the students were not "trainees" and were thus covered by the FLSA.

These six criteria also appear in the DOL's Field Operations Handbook in section 10b11, and are mentioned in other letter rulings from DOL, two of which are excerpted below, one dealing with security guard trainees and the other dealing with training programs that last 18 months and work performed by mental hospital patients. Government-sponsored employment development programs are addressed in Field Operations Handbook section 10b11a. DOL issued Fact Sheet #71 dealing with this issue in April, 2010 – it may be downloaded at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

With the above criteria in mind, it would probably be important, in any publicity or discussions about the training school, to describe it as a type of school or "academy" that is meant to prepare individuals for entrance into an industry, i.e., any company in an industry, rather than as an orientation period for becoming an employee of a specific company. If the training is part of a government program, it would be important to bill it first and foremost as a benefit to hard-to-place or first-time workers and as a way to help them bridge the gap between government assistance and work, rather than as a way to get public works done that may have been on the back burner for a time due to lack of funding or other resources. Put another way, any productive work done by the individuals is more like a serendipitous by-product of training programs for difficult-to-place individuals, than a primary goal of the program.

The court decisions regarding this issue always use one or more of the above criteria to justify a ruling that certain individuals are not employees for purposes of the FLSA. One court decision found that the persons were trainees during the first part of a training program, but not during the second half, since the first part stressed classroom-type learning under close supervision, but the second half dispensed with the focus on classroom activities and close supervision and stressed activities that were basically indistinguishable from those of regular employees.

A landmark case in this area is that of *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 25 WH Cases 901 (5th Cir. 1982). The case involved a well-known training academy run by American Airlines for flight attendants and other airline personnel; the students received no pay for the training they received both in the classroom and in airplanes. Further, any work they did was secondary to the training program. Importantly, the airline was not obligated to hire the graduates of the program, and other airlines generally considered the training to be a good qualification for hire.

A Fifth Circuit case, *Atkins v. General Motors, Inc.,* 701 F.2d 1124 (5th Cir. 1983), ruled that people who participated in a state-sponsored training program that included hands-on experience and was designed to provide the company with a trained pool of workers were not employees, but rather trainees.

The courts seem to find that the most important determinant is the question of who primarily benefits from the arrangement. If the employer is the primary beneficiary, the individuals will be considered employees, but if the individuals are the ones who primarily benefit from the work experience, they will be considered trainees.

Some illustrative letter rulings in the area of trainees include:

Admin. Op. WH-162, May 3, 1972 (BNA, WHM 99:1087):

> This is in reply to your letter of March 31, 1972, concerning compensable work time of security guard trainees who will receive 40 hours of training required by a services contract before they are allowed to perform work pursuant to the contract...
> ...Whether time spent in training is compensable is discussed on pages 7 through 9 of the enclosed pamphlet, Hours Worked. Under the six criteria given on page 9 for determining the employment relationship of trainees, we would view the security guard trainees as employees. The training is oriented in terms of "company practices, policies, and rules", and is required under the terms of the contract before any employees are permitted to perform work pursuant to the contract. This indicates that the employer derives an immediate advantage from the training. The training is given to persons who will work on the contract, and the employer can fulfill the contract only by employing such specifically trained employees.
> Additionally, the training time is not excluded from consideration as hours worked under any of the

> standards discussed on pages 7 and 8. Therefore, ...the employee should be paid for all time spent in learning his job. Hours worked generally includes the time spent in initial indoctrination and training as well as time devoted to subsequent training...It is not lawful to compensate only those who complete the training and are "hired"...

Admin. Op. WH-229, June 29, 1973 (BNA, WHM 99:1131):

> 1. If all six of the criteria listed on page 3 of the pamphlet, Employment Relationship, are met, the trainees are not employees within the meaning of the Fair Labor Standards Act. The monetary requirements of the Act do not apply where there is no employment relationship.
>
> These tests were derived from two cases adjudicated by the Supreme Court in 1947. These cases involved voluntary participation in training programs. See *Walling v. Portland Terminal Co.*, 330 U.S. 148 [6 WH Cases 611], and *Walling v. Nashville, Chattanooga and St. Louis Railway*, 330 U.S. 158 [6 WH Cases 615].
>
> 2. The phrase you quote concerning persons who "may work for their own advantage on the premises of another" was taken from the *Portland Terminal* case and must be read in context with the other criteria. There is no single rule or test for determining whether an individual is an employee under the Act. The purpose and the manner in which an individual enters a training program are among the factors to be considered in determining whether there is an employment relationship. Whether participation is voluntary is considered in context with the other enumerated criteria. If the work-training activity is voluntary and all six criteria given are met, the trainee would not be considered an employee under the Act. We would need more information to assess the situation given in part (b) of your question concerning a mentally retarded individual whose participation in a training program may not be "voluntary".
>
> 3. We would need more information to respond fully to this question. In general, a program of 18 months of work-training in which the trainee does productive work would not appear to fit under the six criteria. The cases cited above, from which the criteria were taken, involved training programs of seven or eight days' duration. Additionally, other criteria may be used in situations that are different from those in the Portland Terminal case. For example, we have departed from that case with respect to tasks performed by patients in mental hospitals who are required to remain under treatment for extended periods when the tasks they perform have been determined, as a matter of medical judgment, to have therapeutic or rehabilitative value in the treatment of such patients.
>
> 4. Work done in activities centers by resident patients of mental institutions has always been considered as being performed pursuant to an employment relationship between the patient and the institution. Whether the product worked on or produced by the employee is destined for purchase by a profit-making or a charitable organization would have no effect on the determination of employment relationship as such.

Some courts have recently begun to modify those criteria. Here are the most significant cases that have come out recently:

Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015), amended by 811 F.3d 528, at 536 - 537 (2d Cir. Jan. 25, 2016): The court adopted its own seven-part test:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

… The approach we adopt also reflects a central feature

of the modern internship—the relationship between the internship and the intern's formal education—and is confined to internships and does not apply to training programs in other contexts. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting, and, unlike the brakemen at issue in Portland Terminal, all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education. By focusing on the educational aspects of the internship, our approach better reflects the role of internships in today's economy than the DOL factors, which were derived from a 68-year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen. …

Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015): Referring to the existing six-factor test used by DOL, the 11th Circuit court held:

----- begin quote -----

We do not defer to this test because, with all due respect to the DOL and the important work that it does, we do not find it persuasive. First, "an agency has no special competence or role in interpreting a judicial decision." *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F3d 376, 383 (2d Cir. 2015) (citation omitted). Second, as the Second Circuit has observed, the test "attempts to fit Portland Terminal's particular facts to all workplaces, and . . . is too rigid . . . ." Id. Third, while some circuits have given some deference to the test, no circuit has adopted it wholesale and has deferred to the test's requirement that "all" factors be met for a trainee not to qualify as an "employee" under the FLSA. In short, we prefer to take our guidance on this issue directly from *Portland Terminal* and not from the DOL's interpretation of it.

... [t]he Second Circuit's articulation of "a non-exhaustive set of considerations" for evaluation in determining the "primary beneficiary" in cases involving modern internships under the Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., goes far towards fulfilling the function. In particular, the Second Circuit has identified the following factors: (here the 11th Circuit court quotes the seven factors listed in the *Glatt* case from 2015).

The Second Circuit has described this approach as "flexible" and "faithful to *Portland Terminal*," reasoning that nothing in the Supreme Court's decision suggests that any particular fact was essential to its conclusion or that the facts on which it relied would have the same relevance in every workplace. ... We agree with the Second Circuit's reasoning and its interpretation of Portland Terminal. The factors that the Second Circuit has identified effectively tweak the Supreme Court's considerations in evaluating the training program in Portland Terminal to make them applicable to modern-day internships ... .

----- end quote -----

Two recent federal district court decisions cited the *Glatt* and *Schumann* factors with approval and applied them to the situations of cosmetology students (see *Hollins v. Regency Corp.*, 13 C 07686, 2015 WL 6526964, at *6, 2015 U.S. Dist. LEXIS 145813 (N.D. Ill. Oct. 27, 2015), and *Benjamin v. B & H Educ., Inc.*, 13-CV-04993-VC, 2015 WL 6164891, at *1, 2015 U.S. Dist. LEXIS 144351 (N.D. Cal. Oct. 16, 2015) (N.D. Cal. Oct. 16, 2015).

For most modern internships involving interns from higher education programs, employers would be well-advised to apply the seven-part test outlined above to any unpaid internships that might be planned.

Liability Under the Fair Labor Standards Act

Any employee or former employee may file a complaint with the DOL's Wage and Hour Division that an employer failed to meet its obligations under the FLSA. The DOL has the authority to investigate and make a ruling, and if it determines that the employer owes the employee back wages, it may enforce the ruling by a variety of methods:

- conciliation - if the DOL can persuade an employer to cooperate, it may supervise a settlement of the claim between the employee and employer, in which case the employer may be able to escape with only liability for back pay (Section 216(c);
- civil action for back pay and damages - the DOL may sue on an employee's behalf to recover back wages and liquidated damages (Section 216(c);
- injunction - the DOL may apply for an injunction to restrain further violations by the employer or to restrain the sale or transfer of goods produced with labor that was compensated in a way that violated the FLSA (Section 217);
- criminal action - under 29 U.S.C. 216(a), the U.S. Department of Justice may bring a criminal action against an employer in the case of a willful violation of the FLSA; and
- civil actions by employees - employees have the right to file suit in a court of competent jurisdiction to protect their rights under the FLSA (29 U.S.C. 216(c)).

If the DOL determines that there is no merit to the employee's claim, it will issue a "right to sue" letter under 29 U.S.C. 216(b) (a "216(b) letter") notifying the employee of his or her right under that provision to file a civil action in court to recover any amounts that might be due. As a practical matter of enforcement, due to limitations on agency resources, DOL will often issue "216(b) letters" even to those wage claimants who have valid FLSA complaints.

Dealing with FLSA Claims or Audits

Without a doubt, the FLSA is full of potential trouble spots for an employer, and the law gives the DOL enough teeth to be tough when investigating wage claims and enforcing the FLSA. It is good to be prepared with strategies for handling wage and hour investigations involving your company.

A wage claim or DOL audit is never a trifle. Even if you have a solid legal position, you must treat the situation as if you may end up having to pay extra money to employees or ex-employees. While there is no guaranteed formula for success, there are certain things you can do to encourage the wage and hour investigator to at least not view you or your company as a burden:

- Present the requested information in a timely, concise, and organized manner. That will not only make things easier for the investigator (remember, you want the investigator out of there as quickly as possible), but also make your company look more credible and as if it has nothing to hide.

- Do not make charges, allegations, or assertions to the investigator that either have nothing to do with a wage and hour situation, or else deviate too much from standard wage and hour law principles.

- Treat the investigator as respectfully as possible. DOL procedures leave investigators a surprising amount of discretion in the areas of regular rate calculations, pay method determinations, and hours worked, so it is worth an employer's while to be pleasant, cooperative, and informative.

- Be familiar enough with the wage and hour laws to know a good deal when the investigator offers it. Be careful – stonewalling, demanding, or asking for too much can easily backfire! Knowing when to say "OK" is a real art.

- Consider hiring an experienced wage and hour law attorney. This is especially important in case the investigator has signaled a ruling against your company and is only concerned with calculating the amount, or in case the ruling has already gone against your company and you are trying to decide whether a settlement offer from the DOL makes any sense.

Recommendations for FLSA Compliance

While court decisions do not lay out an express road map for avoiding corporate or personal liability under the FLSA, those decisions, as well as court rulings involving other types of employment laws, offer some strategies for minimizing the risk of claims or lawsuits:

- Educate yourself about the intricacies of wage and hour law.
- To the extent possible, train other managers and payroll department staff the same way.
- Do not hesitate to call the DOL and your state's wage payment law enforcement agency for help, advice, and training if possible.
- If you become aware of wage and hour violations, correct them as soon as possible, even if it means extra work for staff.
- If higher-ups hinder your efforts at wage and hour compliance, remind them in a diplomatic but clear way that personal liability can extend to anyone who had a hand in the allegedly illegal pay practice.
- If all else fails, document your wage and hour advice to senior management and advise them of the possible consequences, thus putting yourself on record on the "right" side of the law and arguably removing at least yourself from the liability loop.

THE FLSA'S MOST COMMON PITFALLS

There are certain areas of wage and hour law that cause more confusion for employers than most other areas. Following is a brief outline of those pitfalls and some suggestions for avoiding or dealing with them.

"We're Not Covered - We're Too Small"

Some employers assume that because their business is small, they are not covered by the FLSA. Unlike most other state and federal employment laws, the FLSA does not depend directly upon the number of employees. The FLSA covers individual employees whose work affects interstate commerce, or it can apply to all employees working for an employer that is covered as an enterprise that is involved in interstate commerce. The U.S. Department of Labor (DOL) and the courts have attached broad meaning to the term "interstate commerce". For instance, it is generally assumed that businesses situated along U.S. and interstate highways are involved in interstate commerce, simply because they can easily get customers from out of state by virtue of their easy access from the highway. Similarly, any employee who routinely orders materials or supplies from out of state vendors, or who sells to out of state customers, is assumed to be involved in interstate commerce. In a very real sense, practically anything in connection with our modern, networked economy is going to be sufficient to be considered involvement in interstate commerce. The vast majority of businesses can save themselves a lot of time and legal expenses by going ahead and assuming they and all their employees are covered under the FLSA.

"All Our Managers Are Exempt - They're Salaried"

Some employers make the mistake of assuming that simply because an employee is paid a salary, or is called "salaried" or "exempt", or has a high-ranking job title, the employee will be considered exempt from overtime pay. Few things could be further from the truth. Many non-exempt employees are paid a salary, such as receptionists, secretaries, file clerks, and technicians. In a similar vein, giving an employee a high-sounding job title such as "director of production" or "sales manager" will make no difference, if the employee's job duties do not satisfy the criteria found in the DOL's "duties" test for an exemption category. In short, the DOL looks right past what a person is paid or called, instead focusing on the nature of the job and how the employee does the job.

"We Don't Owe Overtime Because the Salary We Pay Covers All the Time They Work"

A problem similar to the one immediately above occurs when an employer recognizes that an employee is non-exempt and eligible for overtime pay, but assumes that paying the employee a fixed salary that is meant to cover both straight-time and overtime pay will be sufficient to meet the overtime pay requirements. Unfortunately, that assumption is wrong. Regardless of the amount of the salary, and regardless of whether the employee agrees that the salary covers both overtime and non-overtime hours, the DOL and the courts will rule that the employer owes extra overtime pay, since the salary at most can cover only straight-time pay for all hours worked. There are some little-known overtime pay methods that to one extent or another can give the appearance of a set salary that includes overtime pay (and such methods should be attempted only with the assistance of a wage and hour law expert), but upon closer analysis, even those methods fail to fully insulate an employer from the duty of paying extra pay for extra hours worked.

"There's No Overtime Around Here - Our Employees Just Volunteer Some Extra Time"

There is no such thing as "voluntary unpaid overtime" or "donated" time under the FLSA. Any manager who expects or allows his or her staff to put in unrecorded work time, otherwise known as working "off the clock", is a wage claim or lawsuit waiting to happen. It is simply impossible under the FLSA for an employee to waive the right to receive at least minimum wage and applicable overtime pay for all hours worked. An agreement to the contrary (other than a wage claim settlement supervised and approved by the DOL) is null, void, and completely unenforceable. Employers must ensure that all non-exempt employees properly record all time worked and that they are paid for all such time. More information on this topic is found in the article on "Hours Worked" in this book. If an employer has true volunteers (generally accepted as possible only with governmental entities and non-profit charitable organizations), it should have all such individuals sign a volunteer agreement (for a sample, see the "Volunteer Agreement" near the end of the companion book "The A-Z of Personnel Policies").

"We Let Our People Keep Their Own Time Records"

Some employers fail to strictly follow the FLSA's recordkeeping requirements, found in Part 516 of DOL's wage and hour regulations (Title 29, Code of Federal Regulations). Among other things, those regulations require employers to maintain detailed records of hours worked by each non-exempt employee. An employer that allows employees to keep their own time records is only asking for trouble. For instance, if an employee files a wage claim for unpaid overtime, and the employer has no time records to dispute the employee's own records showing that overtime was worked, the DOL and the courts will accept the employee's records as valid under

what is known as the "best evidence" rule, unless there is a good reason to doubt the credibility of such records. Another problem will occur if the DOL audits the employer for compliance with the FLSA; part of any compliance audit is an inspection of the required records, and non-existent records may be cause for further DOL action.

"We Don't Need to Pay Overtime, Because We Give Our Employees Comp Time"

Compensatory time off in lieu of overtime pay is something that governmental employers may use, but private sector employers may not make use of compensatory time. Private employers may use an informal variety of compensatory time by adjusting the schedule within the same workweek to ensure that total hours worked do not exceed 40. However, overtime hours may not be averaged out over a longer period of time except in exceedingly narrow cases of certain employees of residential care facilities, and in the case of certain police, firefighting, and EMS employees. Otherwise, any overtime worked within a workweek must be paid for that workweek.

"They Don't Get Overtime - They're Contract Labor"

The difficulty here is not that independent contractors should be getting overtime pay for excessive hours they might put in on a project – they do not get overtime pay, regardless of how many hours they work, since independent contractors are not "employees" and are thus not covered under the FLSA. Rather, the problem occurs when an employer fails to understand that it takes a lot more than a contract to make a worker an independent contractor. Independent contractor status does not depend upon the existence of a contract specifying that the worker is an independent contractor, or upon what the parties might call the relationship, but rather on the underlying nature of the work relationship. Some employers hire temporary workers to help them with a rush period and think that they are "contract labor" or "contract employees", when in reality such terms are practically meaningless under wage and hour laws and payroll tax laws. If such workers are truly employees, and they work more than 40 hours in a workweek, the employer must pay them overtime pay if they do not qualify for some sort of overtime exemption. There is no way to contract around that; no piece of paper and no amount of explanation will overcome the evidence of an employment relationship if the DOL or the IRS, or a state employment security agency, is examining the situation. For this reason, employers must be very familiar with the various tests for determining whether a worker is an employee or an independent contractor. The IRS test criteria are outlined in Appendix D of the article titled "Independent Contractors / Contract Labor" that appears in the Hiring section of this book.

PREVAILING WAGE ISSUES

Under prevailing wage laws, i.e., those that require payment at prevailing wage rates for labor on federal, state, or other governmental projects, there is no choice but to pay at those levels. Some non-governmental projects involve prevailing wage rates as well, such as projects using union employees, or projects in which a contractor has to offer prevailing wage rates in order to attract enough qualified workers to complete the job. Paying prevailing wage to employees in those latter categories is a matter of contract and supply and demand, while paying at prevailing wage rates for governmental contract work is a non-discretionary statutory obligation. Prevailing wage laws generally specify that all work done on the project must be paid at such rates, and that the obligation to pay prevailing wage applies to subcontractors and contractors alike, regardless of whether the contractor specifies such rates in its contracts with subcontractors (contractors should do that). Thus, a company working under a general contractor on a federal building project of some kind can pretty well assume that the prevailing wage laws will apply.

Under 40 U.S.C. § 3141(2) of the Davis-Bacon Act, the term "wages" includes the regular hourly rate of pay plus optional fringe benefits paid to the employee. In calculating overtime pay, the cash payment for fringe benefits is excluded from the regular rate (see 29 C.F.R. § 5.32(c) and the examples in the Davis-Bacon Act compliance handbook at http://www.dol.gov/whd/recovery/pwrb/Tab16DBCompliance.pdf#page=27), and the weighted-average method of computing overtime pay is used (see the same compliance handbook, pages 27-29).

Travel time on a government-contract prevailing wage job must be paid at the prevailing wage rate associated with that particular job. Travel time on a job not covered by prevailing wage laws may be by agreement, i.e., either at the regular hourly rate of pay, or at a different rate, in which case the weighted-average method of computing overtime pay would be used for any overtime arising from such work.

Employers paying prevailing wage rates are generally required to maintain what are called certified payroll records in order to prove compliance with the prevailing wage laws. While Texas law does not specifically define "certified payroll records", Section 2258.024 of the Government Code provides that contractors must keep records showing that all employees working on public projects have been and are being paid at least the prevailing wage rate for all time worked on the project. Such records are essentially the same as those that would be required under the Davis- Bacon Act, the Service Contract Act, or similar law requiring payment of prevailing wage on public projects. Even though a public works contract might not specifically state that certified payroll records are required, it is a good idea to keep them because the Government Code also gives municipalities the right to inspect a company's records when auditing a contractor for compliance with prevailing wage laws. In addition, the Fair Labor Standards Act requires an employer to keep exact records of all time worked, all wages paid, all wage deductions, and other things – see "Recordkeeping Requirements for Non-Exempt Employees". Regarding certified payroll records themselves, while there is no specific state-mandated form for such purposes, it is likely that the optional certified payroll record form available through the U.S. Department of Labor for Davis-Bacon Act and Service Contract Act compliance purposes would suffice – see this link for DOL Form WH-347: http://www.dol.gov/whd/forms/wh347.pdf. That form contains a link to the instructions for the form. It would be a good idea for any contractor on a public project to check with its public partner on the contract regarding specific recordkeeping requirements for the project. Most cities have contract compliance specialists who can easily help an employer stay up with the rules.

The Texas statute, Government Code § 2258.021, only requires payment of the prevailing wage for similar work in the same locality. The next provision, § 2258.022, provides that the prevailing wage is determined by using a survey of wages paid for similar work in the locality, or by using the rate determined by the U.S. Department of Labor to be the prevailing wage under the corresponding federal law, the Davis-Bacon Act. An employer may call the U.S. Department of Labor at 1-866-487-9243 for assistance in obtaining an appropriate prevailing wage decision for that area. TWC has developed a guide for determining the prevailing wage rate for purposes of Skills Development Fund applications – that guide is online at http://www.twc.state.tx.us/svcs/funds/sdf_pwdr_instruct.pdf.

None of the statutes contain specific restrictions on wage deductions. It is clear that the prevailing wage laws require only that the wage rates be the same as those prevailing for similar work in a particular locality. There is nothing special about prevailing wage levels that would subject them to different rules for wage deductions than those that apply to non-prevailing wages. In other words, the wages of both employees who are paid at prevailing wage levels and those who are paid at other levels are subject to the same rules on deductions for payroll taxes, wage garnishments, wage attachments, voluntary wage assignments, and other types of deductions. Those rules for wage deductions

are found in Part 531 of the U.S. Department of Labor's wage and hour regulations (limitations on deductions from minimum wage), Part 870 (restrictions on wage garnishments), Section 61.018 of the Texas Payday Law, and Texas Workforce Commission Texas Payday Law Rule § 821.28 (40 T.A.C. § 821.28).

Thus, even if an employee is paid a prevailing wage, the employer is still entitled to make deductions from the prevailing wages that comply with all of the applicable guidelines in those statutes and regulations. The subject of federal and state wage deduction issues is covered in detail in the article "Texas Payday Law – Basic Issues" in this book – see the following topics in particular: "Deductions from Pay – General", "Deduction Problems under the Texas Payday Law", and "Texas Payday Law Deduction Summary".

The DOL's resources on the Service Contract Act and the Davis-Bacon Act are found at https://www.dol.gov/agencies/whd/government-contracts/service-contracts and https://www.dol.gov/agencies/whd/government-contracts/construction. The Prevailing Wage Resource Book linked from those pages has many parts with helpful explanations and examples for federal contractors - see https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book.

SALARY AND BENEFIT DISCUSSIONS AMONG EMPLOYEES

How many businesses have a policy like the one below?

Confidentiality of Salary and Benefit Information

> Employees are prohibited from discussing their salary or wage levels and company benefits with other employees. Such information is confidential and may not be discussed in the workplace. Any employee violating this policy will be considered to have committed a breach of confidentiality and will be subject to disciplinary action, up to and possibly including termination of employment.

Look familiar? Chances are good that most companies have either a formal policy similar to the one above, or else have a tradition or practice of responding to pay and benefit discussions with disciplinary action. Those same companies would likely be surprised to learn that such policies generally violate federal labor law. Indeed, the National Labor Relations Act contains a provision, Section 7 (29 U.S.C. § 157), that gives all employees the right to "engage in concerted activities", including the right to discuss their terms and conditions of employment with each other. Section 8(a)(1) of the NLRA (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to deny or limit the Section 7 rights of employees. Based upon those two provisions, the National Labor Relations Board (NLRB) has taken the position for decades now that employers may not prohibit employees from discussing their pay and benefits, and that any attempts to do so actually violate the NLRA. Courts have basically uniformly supported that position. Moreover, those particular sections of the NLRA apply to both union and non-union employees, so there is no exception made for companies where the employees are non-unionized.

Despite the seeming inflexibility of the NLRB's position regarding policies against pay and benefit discussions, there are some limits, as explained below.

One limit involves the manner in which employees exercise their rights to discuss wages or benefits. The law entitles employees to have such discussions, but does not require employers to allow employees to do so during times they are supposed to be working. However, singling pay discussions out for prohibition, while allowing other types of conversations unrelated to work, might be evidence of intent to violate employees' Section 7 rights, so employers should be careful in that regard.

Another limit would concern the content of such discussions. Certain employees may have benefits that could potentially involve privacy issues under other laws, such as the ADA or HIPAA. Discussing such benefits in a way that involves releasing information that should be confidential under such laws, particularly in the case of two employees talking about an uninvolved third party's medical conditions, could potentially lose the gossiping employees the protection otherwise afforded under the NLRA. The NLRB would consider whether employees were on notice that releasing such information violates company policy and the law, and also the extent to which the employer actually keeps such information confidential.

Finally, it is clear that it makes a difference under the law as to how employees obtain the salary and benefit information they are discussing. Employees discussing their own information are protected, as are employees discussing the pay and benefits of others if they obtained that information through ordinary conversations with others. However, if in order to get the pay and benefit information they discuss with others, they access offices or files known to be off-limits to them, or cause others to break access restrictions and give them confidential information, and the company has clearly taken steps to restrict the information and uphold its confidentiality, then they may well find themselves unprotected by the NLRA if they are disciplined, even discharged, for participating in the access violation. A major case on point is that of *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990).

Practical Tips

As an alternative to flatly prohibiting employees from discussing their pay and benefits, consider the following:

- In the context of a general discussion about the importance of devoting oneself to work during work hours, counsel employees that it is all right to discuss various things at work (keep it general – do not single out pay and benefits as topics), but that as in most things, moderation usually works best, and there is a fine line between being informative or conversational and being a busybody, a time-waster, or perceived as self-important. In discussing such a thing, take care not to do it in a threatening manner, such as implying that anyone who talks too much about their job conditions will be shunned by coworkers. That could easily be perceived as promoting a chilling effect on employees exercising their Section 7 rights.
- Do not be afraid to promote what is right in your company. Make it easy for employees to know that your pay and benefit practices are competitive with other companies within your industry, and promote your company's practices regarding advancement opportuni-

ties, merit increases in pay, and open-door policies. The more that employees know where they stand, and the more they feel that they have a stake in the company and its success, the less need they will feel to spend time talking about their pay and benefits.

Use Caution!

Many employers use sample policies that they have found on the Internet or in collections of policies in popular office software, and some employers simply draft their own policies. With some areas of employee relations, that can work. Concerning pay and benefit discussion policies, though, it is not a good idea at all to "roll your own". This area of the law is so little-known by most employers and employees and so fraught with potential problems that any employer considering writing or enforcement of a policy restricting discussion of pay and benefits should definitely consult an employment law specialist who is knowledgeable about NLRA issues before taking any actions.

THE TEXAS PAYDAY LAW - BASIC ISSUES

Introduction

In a nutshell, the Texas Payday Law (TPL) requires an employer to pay its employees in full and on time on regularly-scheduled paydays. The law deals with the timing and manner of wage payments and how to avoid illegal deductions from wages. There are also provisions for a wage claim and appeal process, for collection of wage judgments, and for prevention of future violations of the wage payment laws.

The thrust of the TPL is to require timely payment of wages that are due and payable. In order to determine what is due and payable, the law looks to all factors going into the compensation agreement, including rate, method, and frequency of pay, written and unwritten agreements concerning wages, and state and federal laws regarding wages and hours.

A very large influence on the TPL is the Fair Labor Standards Act (FLSA), the main federal wage and hour law. In order to determine what wages are due and payable, the law must first determine what legal requirements apply, including federal laws requiring payment of minimum wage and overtime. In addition, wage agreements must sometimes be analyzed in terms of their status as contracts. Thus, an understanding of both federal and state laws, as well as general contract law, is essential to avoiding problems under the TPL.

The focus of this article is the allowability of deductions from an employee's pay and how an employer needs to deliver the pay to its employees.

Texas Payday Law Coverage

The Texas Payday Law applies only to employees, not to independent contractors (section 61.001(3)(B)). It covers only private employers; it does not cover governmental employers, i.e., a public employee who has a wage complaint may not file a wage claim under the TPL (see Section 61.003). Unlike many other employment laws, the TPL has no limitations on business size, nature of the business, or number of employees (section 61.001(4)). It applies to any situation in which someone has hired someone else to perform any kind of work for pay under the kind of direction and control that would normally establish an employment relationship. Under current law, there is no limit on the dollar amount of the wage claim that an employee or ex-employee may file.

Pay Agreements

Federal and state laws leave it largely up to employers and employees to work out what the pay or compensation agreement will be. Employers must take care to stick to what the employees have been promised in the way of pay methods and pay rates. A wage agreement can be established by both verbal and written evidence, so all oral and written communications to employees regarding pay should be carefully expressed. Since state payday laws are enforced according to the terms of the wage agreement, employers need to ensure that they say what they mean and mean what they say. Wage agreements that are ambiguous, i.e., can be understood in two or more different ways by reasonable people, will usually be resolved against the employer, since the employer was presumably in charge of how the agreement was reached and is responsible for expressing its intent clearly.

Do not worry about a written wage agreement interfering with an at-will employment relationship. Courts seem to be unanimous that unless an agreement shows a clear intent to create a definite term or duration of employment, the presumption will remain that the employment is intended to be of indefinite duration, i.e., terminable at will by either party. For added security, though, it is a good idea to include a standard employment at will disclaimer in a compensation agreement (**note:** this is only an example. You should consult your own employment law attorney about this type of disclaimer before implementing it in any form of agreement):

Employment at Will Disclaimer

I understand that this agreement concerning my compensation and benefits does not modify the at-will employment relationship between myself and ABC Company; does not constitute a commitment by ABC Company to employ me for any particular length of time; does not commit me to remain with ABC Company for any particular length of time; and does not restrict either ABC Company or myself from ending the employment relationship at any time for any reason, with or without notice.

Under the general common law, an employer must pay an employee according to the wage agreement that was in effect when the work was performed. This general rule finds expression to one degree or another in the Fair Labor Standards Act and in almost every state wage payment statute. If there is no written agreement, agencies and courts will use some variation of the "best evidence" rule to determine what the employer and employee "agreed" to when the employment relationship was formed. Whoever has the best evidence of the rate of pay and the method of pay will usually prevail on those points. In Texas, the common-law rule is known as *quantum meruit*. If a worker performs services for an individual or company, but there is no clear agreement on the rate of pay, method of pay, and so on, the law presumes that the employer agreed to pay a reasonable rate of pay for the type of work performed, and "reasonable" would be up to a judge or jury to decide (see the Texas Supreme Court's decision in *Colbert v. Dallas Joint Stock Land Bank*, 136 Tex. 268, 150 S.W.2d 771, 773 (Tex. 1941)).

Reductions in the pay rate are legal, but should never be retroactive (see below). Remember that pay cuts of 20% or more may give an employee good cause connected with the work to quit and qualify for unemployment benefits. Notice of any changes in the pay rate should always be in writing, for the company's own protection, in order to minimize disputes over the rate of pay.

Some companies have employees sign policies providing for a complete forfeiture of pay for the final pay period if the employee violates an employment agreement or a particular policy. That would not be legal – an employee is not allowed to waive his or her right to minimum wage or overtime pay. It is generally permissible to have the employee agree that in the event of a violation of an agreement or policy, his or her pay rate for the final pay period will be a lower rate (it can be no lower than minimum wage). However, agreements like this are largely untested before the agency and in the courts. While the author has not seen an employer lose with a suitably-worded agreement, some attorneys at TWC have commented that such agreements are suspect from the standpoint that an employee does not know when such a provision might affect his pay because he does not know when to expect a discharge. However, an employer can take a lot of the ambiguity out of such an agreement by making the lower pay rate apply only to work occurring after the violation by the employee. That way, the company can argue that the employee knows when to expect lower pay because the timing of the violation was arguably within his power to control. For suggestions on wage agreement language to address specific problems, see the topics "Frequency of Pay" and "Final Pay" in this book.

Company signatures on pay agreements are not absolutely required, but are generally a good idea. Such agreements are valid without signatures by a company representative, but without the signatures, it can be easier for a former employee to disavow their own signature and claim that their signature was forged. Also, courts often indicate that counter-signed documents show that the company intended for the document to be mutually binding, which is something that generally works in favor of enforceability of whatever agreements are at issue. Accordingly, try to have any such agreement counter-signed by a company representative who is likely to be available to serve as a witness in case the authenticity of the employee's signature ever becomes an issue.

Priority between Pay Agreements and Statutes

As a general rule in employment law, whenever two or more statutes or principles of law apply to an employee's situation, the one that results in a greater benefit to the employee must be applied. In general, wage and hour statutes supply floors below which wages may not go. Wage agreements that do not comply with specific statutes must be ignored to the extent that they conflict with statutory minimums. Wage agreements that exceed state or federal minimums will take precedence under general contract principles and under most state wage payment laws, including the Texas Payday Law. When deciding whether a state or federal wage payment law or a specific agreement takes precedence, an employer can use the following rules of thumb:

1) The FLSA sets minimum wage levels (minimum wage of $7.25 per hour (the Texas minimum wage is the same), a minimum cash wage of $2.13 per hour for tipped employees, overtime pay at one and a half times the regular rate of pay, and a minimum salary level of $684 per week for salaried exempt employees)
2) The Texas Payday Law enforces wage agreements; the term "wage agreement" applies to any agreement or obligation, pertaining to compensation, that is not required under a statute. Thus, the Texas Payday Law would apply to an individual agreement to pay a worker a specific salary, to a collective bargaining agreement negotiated by a union with the company on behalf of the employees in the bargaining unit, and to compensation specifications contained in a government contract.

3) In the absence of a specific wage agreement, the minimums provided in the FLSA would apply and be enforceable under the Texas Payday Law, or if the employer is exempt from the FLSA, the minimum wage provided in the Texas Minimum Wage Act (Chapter 62 of the Texas Labor Code) would apply and be enforceable under the Texas Payday Law. In the case of most companies, the FLSA would apply. If neither law applies, then the common-law principle of *quantum meruit* (see preceding discussion of pay agreements) would apply and be enforceable under the Texas Payday Law.
4) If there is a specific wage agreement that provides more than the minimums in the FLSA, the express wage agreement would take precedence.

As noted above, if there is a wage agreement in effect at a company, whether it is a standalone agreement, part of a larger agreement, or is obligatory under a government contract, and it would provide for premium or extra payments to employees under specific circumstances, then that agreement is what would be enforceable under the Texas Payday Law, since it goes beyond the minimums required under the FLSA.

Frequency of Pay

Regarding timing of wage payments, the TPL requires employers to pay non-exempt employees at least twice per month on regularly scheduled paydays, and exempt employees at least once per month (Section 61.011). "Exempt" has to do with whether the employee meets the requirements for an overtime exemption as a salaried executive, administrative, or professional employee under the FLSA. Pay periods do not have to, nor do they usually, coincide exactly with the FLSA workweek used for keeping track of hours worked for overtime calculation purposes. The paydays must be posted at the employer's office and at any outlying offices where employees normally gather.

If a regular payday falls on a day that the employer is not open for business (weekend or holiday), and employees ask to be paid before the payday, employers sometimes worry that they might have to do that, especially since Section 61.013 of the Act provides that "[a]n employer shall pay an employee who is not paid on a payday for any reason, including the employee's absence on a payday, on another regular business day on the employee's request." The statutory provision is not a model of clarity, because it can be understood by some in such a way as if it requires an employer to pay an employee on a day of the employee's choosing. However, TWC does not interpret it that way, and thus adopted rule 40 T.A.C. § 821.22 that makes it clear that "another regular business day" means a day after the designated payday on which the employee is not paid. Here's the rationale behind that interpretation: logically, whether an employee "is not paid on a payday" cannot be ascertained until the payday has come and gone without the employee being paid. Thus, the regular business day that is acceptable as an alternative would have to be a day after the payday. Of course, the employer does not have to let itself be limited by that deadline – it can pay prior to the deadline, meaning that it could elect to pay the employees before the normal payday. The important thing, though, is that the employer does not have to pay before the payday.

Caution: The next-business-day rule applies only to paydays that fall on days that the company is normally closed for business, or else a company holiday on which the company is not open for business. The wording of the statute is not as clear as it should be. "[N]ot paid on a payday for any reason" could be understood as applying even to a situation involving a company that fails to pay on the regularly-scheduled payday due to reasons within its power to control. TWC has never interpreted that provision as being so flexible. That provision should be understood as being subject to the general requirement that an employer must pay employees on regularly-scheduled paydays, i.e., if the employer is open for business on a day, and the regularly-scheduled payday is on that same day, the employer must pay employees on that day, no matter what.

Paydays may be changed, but it would be best to give employees advance written notice thereof setting out the next three paydays - 1) the last old payday; 2) the first new payday; and 3) the next-following new payday. That way, the risk of confusion will be minimized, and the requirement of paying at least twice each month will be met.

Concerning a change in paydays, especially if the company wants to increase the interval between the end of a pay period and the date on which wages are paid, it would be good to give adequate advance notice of the change (as much advance notice as possible). There is no law that prescribes exactly how a change like this must be implemented. Naturally, a company would want to do it in such a way that employees' financial planning is not compromised. Otherwise, the company will get many complaints, which will take a lot of staff time to deal with. The companies that have the most success and least trouble with a change in paydays seem to be the ones that arrange for a gap-bridging paycheck as a transition from the old paydays to the new paydays. Alternatively, some companies give employees a wage advance that serves as a gap-bridger as described above – the employees all sign a deduction authorization agreement that allows the employer to deduct the wage advance from subsequent paychecks in specified installments, or from the final paycheck in a lump sum. Never charge interest for any

such loan or wage advance - it is too complicated, interest may not take an employee below minimum wage, it makes the employer waste time acting like a bank, and is practically guaranteed to cause complaints and morale problems. Short of that, it is permissible on a one-time basis to have employees wait a few days for the first paycheck under the new pay schedule. That may result in some complaints, but most such complaints go away once the check is issued. Minimize complaints by giving as much advance notice as possible and advising employees to carefully plan for the transition.

The pay periods normally change when a company transitions between a biweekly and a semi-monthly pay plan. Biweekly pay plans feature two-week pay periods, while semi-monthly pay plans involve pay periods that start on specific dates and end on specific dates within each month, resulting in variable pay periods (from 13 to 16 days, depending upon the month and whether it is a leap year). With both types of pay plans, salaried exempt and salaried non-exempt employees receive the same amount on each paycheck (with overtime as needed for non-exempt salaried employees), while the totals for hourly employees will normally vary, especially for employees paid semi-monthly, due to the variance in the number of days worked in each pay period. It is important to remember that the "workweek" for Fair Labor Standards Act purposes does not change and will not be affected by a change in paydays. The workweek is important because that is how overtime is tracked and paid. With semi-monthly pay, overtime can get a bit tricky. Overtime that occurs in a workweek that falls fully within a semi-monthly pay period must be paid with the paycheck covering that pay period, but overtime that falls into a workweek that spans two pay periods will have to be paid with the paycheck for the second of the two pay periods spanned by the overtime workweek.

Although the law requires an employer to pay wages in a timely manner on regular paydays, the question sometimes arises of what penalties might apply if an employer misses a payday, or a paycheck is not honored due to insufficient funds in an employer's account. The following considerations would apply to such situations:

- Although the statute does not provide a specific penalty for late wage payments, it does provide an administrative penalty for a bad-faith failure to pay wages according to the law. The statute limits the administrative penalty to $1000, or the amount in dispute, whichever is less. Failing to pay wages according to the law would include late payment of wages. As a matter of enforcement policy, TWC will generally not impose an administrative penalty for the first instance of failing to pay according to the law. However, a second violation can result in imposition of such a penalty, depending upon the circumstances. Accordingly, if an employer has a history of late payments or other kinds of wage payment violations, paying an employee late can result in an administrative penalty.
- There is no Texas or federal law specifically requiring an employer to reimburse employees for bank charges caused by deposited paychecks bouncing, or by their accounts being overdrawn due to non-payment of wages. However, if such charges effectively reduce their pay below minimum wage, that would arguably violate the FLSA, and the employer could be required to reimburse enough of the fees to restore the pay to the level of minimum wage.
- Practical limit: despite the lack of a specific late wage payment penalty, if late payments, or missed payments, become too numerous and result in enough wage claims to get the attention of TWC, the agency could impose a bonding requirement on the employer, meaning that the employer would have to post a bond in order to continue employing workers in Texas or doing business at all. The Attorney General could also seek an injunction in court to enforce the bonding order.
- Habitual late wage payments, or failing to pay wages at all, is likely to make some employees want to quit. Turnover is expensive for everyone concerned, and if such employees file unemployment claims, TWC is likely to consider the wage payment problems to be good cause connected with the work to quit.

Employers sometimes have problems dealing with employees whose failure to keep up with required documentation impairs the company's operations. Withholding paychecks pending submission of required paperwork is almost always a violation of the timely payment provisions of the Texas Payday Law. The employees' duty to submit the required paperwork is separate from the company's duty to give the employees their paychecks by the statutory deadlines. However, if the missing paperwork relates to time worked, a delay in pay might be unavoidable:

1. If the company has no way of knowing how many hours the employees worked, it is not obligated to issue paychecks, because there would be nothing upon which a pay calculation could be based.
2. If there is a way of knowing the hours, however, the company must calculate the pay based upon what it knows, even if the employees have not technically complied with paperwork requirements.
3. If they turned in incomplete time sheets, the company can use the hours indicated thereon to calculate their pay. The burden would be on the employees to show evidence that they worked hours in addition to those shown on what they submitted. The extra hours could be paid with supplementary paychecks later.

If the missing paperwork is not timesheet-related, the company would have to use other means to obtain cooperation, depending upon the circumstances. It could offer an incentive, such as extra pay, or good recommendations for other jobs, or something else. To avoid future problems like this, a company might consider using a pay agreement similar to the one featured in the topic "Final Pay" in this book. A similar alternative would be to have everyone sign a wage agreement setting the pay rate at minimum wage, with a "compliance bonus" of "x" amount per hour for complete compliance with documentation and other guidelines. The "bonus" amount would be the difference between minimum wage and what the pay would normally be.

Methods of Pay

Any method of pay is allowed, as long as the frequency of payments satisfies the above requirements.

Employers may pay any of their employees an hourly wage, a periodic salary, a commission or bonus, a day rate, a book rate, a flag rate, a piece rate, or on a per job basis. Federal law leaves the frequency of pay up to the employer, but the Texas Payday Law requires "non-exempt" employees to be paid at least twice per month (Texas Labor Code, Chapter 61, Section 61.011(b)). Since Texas follows the "at-will" employment doctrine, the method of pay may be changed at any time, with or without advance notice, as long as there is no express contract or collective bargaining agreement to the contrary. An employee can even be paid according to a combination of the above methods.

The only thing that the average employer needs to worry about is that whatever method of pay is used, the gross pay has to correspond to at least minimum wage for the hours actually worked during a given seven-day workweek in order to comply with the Fair Labor Standards Act (FLSA), the main federal wage and hour law.

Concerning commissions and bonuses, the employer should always use clear written agreements setting out the conditions of such payments. As noted in the section above on pay agreements, commissions and bonuses can be changed, but only prospectively, never retroactively, and changes to written agreements must be in writing.

Delivery of Wages

Delivery of wages is fairly flexible. Wages can be given in person to an employee, mailed by registered mail to a designated address (in time to be received on the payday), deposited electronically into an account (direct deposit), given to a third party who has been authorized by the employee in writing to receive the employee's paycheck, or paid in any other way to which the employee has agreed in writing.

There are some pitfalls, to be sure. For instance, payment of wages by EFT (electronic funds transfer, or direct deposit) involves prior arrangements and paperwork with a bank and is subject to federal and state rules. Payment with a payroll or debit card requires 60 days' advance written notice, and the employer must give the employee information regarding usage fees and on opting-out of the payroll card program and available alternative ways of receiving pay. If the employee receives part or all of the wages "in kind" (in a form other than cash or negotiable money order or check), the employee has to have authorized that in writing in advance of the payment.

Although pay receipts or check stubs, otherwise known as "written statements of earnings", are not required for employees covered by the federal law known as the Fair Labor Standards Act (see sections 62.003 and 62.151 of the Texas Minimum Wage Act - the latter section exempts FLSA-covered employees from the Texas minimum wage laws, including the earning statement provision), it is nonetheless a very good idea to give employees such receipts or check stubs. For one thing, a receipt or check stub can help serve as one of the kinds of wage and hour records required under the FLSA's recordkeeping requirements. For another, giving employees proof of how their wages were computed, including deductions from wages, can help minimize complaints and suspicions on the part of employees about whether their wages were properly paid. The statement of earnings may be in either written or electronic form. If sent via e-mail, consider using some form of password protection and/or encryption, since privacy and identity theft issues are becoming more critical all the time. If sent via regular mail, keep the recent law in mind that requires employers to give employees an annual reminder that they have the right to request the company not to print their Social Security number on any document sent through the mail (section 35.58 of the Texas Business & Commerce Code). Concerning cash wages, an employer should simply ***never, ever*** give wages in cash without at least getting a receipt from the employee that a certain amount was paid in cash on a certain date. Failing to keep such documentation can expose an employer to a claim that wages were not paid at all.

Special Wage Delivery Problems - Deceased Employee and Unclaimed Wages

1. Deceased Employee

Properly paying final wages for a deceased employee requires recognition of the fact that under state law, the death of a person creates a legal entity that stands in place of the person - that entity is the "estate" of the deceased person. Texas probate law provides that an estate is represented by an executor in the case that a

valid will exists, or by a court-appointed administrator if no will exists. The final pay for a deceased employee is the property of the deceased person's estate, and the one who is authorized to receive that property on behalf of the estate is the executor or the administrator. Thus, the final pay would go to the legal representative of the deceased employee's estate.* The probate court will issue letters testamentary to an executor, and letters of administration to a court-appointed administrator (see Section 301.051 of the Texas Estates Code at http://www.statutes.legis.state.tx.us/Docs/ES/htm/ES.301.htm#301.051). If an employer has a final paycheck to deliver and is presented with a copy of such a letter, it should confirm the person's identity, deliver the wages to that person, get the person to sign a receipt for the wages, and keep a copy of the letter for the ex-employee's payroll records. For the special case of a deceased employee who was married at the time of death, the payment may be made to the surviving spouse if that person presents a suitable affidavit that no executor or administrator has been appointed (see Estates Code Section 453.004 at http://www.statutes.legis.state.tx.us/Docs/ES/htm/ES.453.htm#453.004). If the spouse later turns out to not be entitled to receive the wages, he or she will be personally liable to the executor or administrator for the amount in question.

* If the agreed-upon method of wage delivery is by mail, some employers simply mail the final paycheck to the deceased employee's address of record as usual and let whoever handles the mail for the deceased employee take care of ensuring that the final paycheck is properly handled. The problem with that method is twofold: 1) sometimes, people claim never to have received the check, and the employer is left in the uncomfortable position of not knowing whether to pay for a stop payment order on the paycheck and reissue it; and 2) more seriously, the person who handles the mail for the deceased employee, at least initially, may be someone who turns out to be unauthorized to receive or handle property of the estate, and the executor, administrator, or surviving spouse can hold the employer responsible for any diversion of the wages that might occur. That is why the best advice is to hold the final paycheck for an authorized representative of the employee's estate and to get a signed receipt upon delivery.

2. Unclaimed Wages

Unclaimed and abandoned property reverts or "escheats" to the state after the passage of a certain interval of time, depending upon the type of property involved. The state then holds the property in trust for the property owner. In the case of unclaimed wages, the interval of time is one year (see Texas Property Code § 72.1015). Thus, the employer should hold an unclaimed paycheck for one year, and then contact the Unclaimed Property Division of the Texas State Comptroller's Office for instructions on disposition of the wages (the Web site is www.window.state.tx.us/up/).

Fringe Benefits

Little known to many employers and employees, the TPL includes in the definition of "wages" any fringe benefits promised in a written policy of the employer or in a written agreement (section 61.001(7)(B)). The types of fringe benefits covered by that provision are vacation pay, sick leave pay, parental leave pay, holiday pay, and severance pay. The good news is that the law will enforce such fringe benefit payments according to the terms of the written policy or agreement. For example, if there are conditions on use of leave or receipt of severance pay, those conditions will be observed. Thus, whatever the employer has taken care to provide in the policy or agreement is what will be enforced, assuming that the employer has put down exactly what it wants to happen under the policy. Paid leave, paid holidays, and severance pay that are not promised in a written policy or other form of agreement are not enforceable under the Texas Payday Law.

Final Pay

Finally, the TPL regulates the timing of the final paycheck in section 61.014. If an employee is laid off, discharged, fired, or otherwise involuntarily separated from employment, the final pay is due within six (6) calendar days of discharge. If the employee quits, retires, resigns, or otherwise leaves employment voluntarily, the final pay is due on the next regularly-scheduled payday following the effective date of resignation. "Mutual agreement" separations are generally regarded as involuntary, although that result is not inevitable and ultimately depends upon a close look at all the events and circumstances leading to the work separation. Whether a work separation is voluntary or involuntary is determined according to existing rules for deciding the nature of the work separation in unemployment compensation cases. Basically, if the employee initiates the work separation and leaves while continued work is still available, the work separation is voluntary. If the employer initiates the work separation, i.e., the employee has no choice but to leave at a certain time, the work separation will be considered involuntary.

Since the "final pay" includes regular wages, fringe benefits payable under a written policy, and any other component of the pay, it is important to know what part of the pay must be paid at what time. Regular wages are due no later than the regularly-scheduled payday for an employee who resigned, and by the sixth calendar day for an employee who was laid off or discharged. The deadline for payouts of fringe benefits and other components of the pay, such as commissions and bonuses, is the same, unless a different payout schedule is provided in the wage agreement or policy relating to that particular component of the pay. In that case, the payment

schedule outlined in the agreement or policy will determine the deadline for payment.

It is not legal to hold a final paycheck past the deadline for reasons such as failure to return company property, failure to sign timesheets, or similar problems. If the company knows or should know what the pay should be, it must deliver the final pay no later than the deadline, as noted above. Failure to return company property can in many instances be handled via a wage deduction or a property return security deposit. Failure to sign timesheets, or other kinds of rule violations, can be handled via a wage agreement that provides for payment of a lower wage during the final pay period unless certain conditions are satisfied. Such an agreement could, for example, provide something like the following:

> WAGE AGREEMENT
> [The bulk of the wage agreement goes here]
> [Final paragraph:] I understand and agree that my pay rate for the final pay period of my employment will be [specify the amount - it must be at least minimum wage], unless I satisfy the following three conditions: 1) give at least two weeks' advance written notice of resignation to the Company if I leave voluntarily; 2) return all Company property that has been issued to me within "x" days of my final day of work; and, 3) no later than "x" days after my final day of work, give my supervisor any keys, passwords, or other means of access control to enable the Company to access its property, including computer files, that I used while employed. If I satisfy all three of those conditions, the rate of pay for the final pay period will be my usual pay rate.
> /s/ Employee
> /s/ [Company Representative]
> [Date]

The above sample agreement is not an official form or policy of TWC. Such agreements can be extremely tricky and should be reviewed by an experienced employment law attorney prior to having employees sign them.

If an employee gives notice of resignation, and the employer accepts the notice early (before its effective date), the company does not owe any pay for the part of the notice period that was not worked, unless a contract applies that otherwise obligates the employer to pay for time not worked.

Final Pay for Commissions and Bonuses

A common problem is that of what happens with an employer's duty to pay commissions and bonuses once an employee has left the company. The answer depends upon the terms of the commission or bonus agreement. Commission pay agreements are enforceable whether they are oral or in writing, and agreements can be established with a showing of a pattern or practice of paying commissions in a certain way. Thus, the advice to have a clear, signed written wage agreement applies with particular force to commissions. Changes to written agreements must be in writing. A good agreement will avoid the risks of ambiguity by clearly setting out how commissions are earned, when and under what circumstances they are paid, whether "chargebacks" are made and under what circumstances, and what happens to commissions from sales in progress at the time of work separation. Similarly, a bonus agreement should specify exactly how a bonus is earned, how it is calculated, when it is paid, whether it is discretionary in any way (as to the amount, timing, or ability of the company to cancel the bonus altogether under certain conditions), and what happens to a bonus that is not determined or paid out until after an employee has left the company. If the commission or bonus agreement provides for payment of commissions and bonuses in any way after an employee has separated from employment, the deadline for such a payment would be based upon the wording of the agreement. Prior draws against commissions may be offset against the final pay; under 40 T.A.C. § 821.26(d), "[d]raws against commissions or bonuses may be recovered from the current or any subsequent pay period until fully reconciled." The key to protecting the company's interests is to spell out in a clear, written agreement exactly how, when, and under what circumstances commissions and bonuses will be paid, and then follow the written agreement to the letter, because that is how TWC will enforce the agreement in the event of a wage claim concerning such payments.

The Texas Family Code provides that garnishment for support obligations applies to certain post-termination lump-sum payments, such as a bonus, commission, or payout of accrued leave (see Texas Family Code § 158.215): if such a lump-sum payment is $500 or more, the employer must notify the Attorney General's office (do it in writing or electronically - see https://portal.cs.oag.state.tx.us/wps/portal/WageWithholdingResponsibilities#lumpsum) before making the payment so that that agency can determine whether a support deduction should be made. The agency then has ten days after that date to notify the employer about its duty to make the support deduction; if no such notification occurs, the employer may make the payment without the deduction. If, however, the agency informs the employer that the support order would apply to the lump-sum payment, the employer would need to make the deduction. Since such a garnishment would be pursuant to a court order, it would not have to be authorized in writing by the employee.

Severance Pay

Severance pay that is promised in a written policy or other

form of agreement is an enforceable part of the wage agreement under the Texas Payday Law. Under § 821.25(b) of the Texas Payday Law rules, severance pay is additional pay for an employee's past work that is given at the end of the employee's employment, and is usually, but not always, based upon a set formula such as length of prior service. It is a payment that the employer has somehow previously obligated itself to give, either orally or in writing. Only a written severance pay obligation is enforceable under the Texas Payday Law. It is not the same as wages in lieu of notice, which is a post-termination payment that the employer has never previously obligated itself to give. Just like the name implies, it is a payment that is given in lieu of advance notice of termination, and it is not based upon any particular formula, but rather upon whatever arbitrary amount the employer thinks is appropriate to give. It is usually given to "make up for" the lack of advance notice and can be given in a lump sum or in installments. A payment of wages in lieu of notice is not enforceable under the Texas Payday Law, since there was no prior obligation to give it.

As a matter of enforcement policy, TWC's Labor Law Department will enforce whatever severance payment interval and conditions are set forth in the written policy or agreement creating the obligation to make the payment. Example: if in an offer letter, the employer promises the offeree three months' severance pay if the employee's job comes to an end for reasons other than "misconduct", and the letter prescribes the payment intervals as one-third 30 days after the last day of work, the second third 60 days out, and the final third 90 days following the date of the work separation, then the employer will be expected to pay the severance pay in the specified amounts at 30-day intervals for the 90 days following the last day of work, as long as the facts show that the employee resigned, was laid off for economic reasons, or the work came to an end for any reason other than misconduct on the ex-employee's part.

In 2007, the Legislature amended the Texas Family Code to provide that employers who pay severance pay, which under the law would include wages in lieu of notice, must deduct from that payment an amount equal to whatever is specified in a child or spousal support order pertaining to the departing employee (see Texas Family Code § 158.214). For example, if a support order requires a monthly garnishment of $100, and two months' severance pay or wages in lieu of notice is given, the employer should deduct $200 from such payment for purposes of complying with the support order. Since such a garnishment would be pursuant to a court order, it would not have to be authorized in writing by the employee. For details, see the Attorney General's office Web site at this link: https://portal.cs.oag.state.tx.us/wps/portal/WageWithholdingCalculateAmount#severance.

Accrued Leave Payouts

Payouts of accrued leave are required under the Texas Payday Law only if such a payment is promised by the employer in a written policy or agreement. The payout would be controlled by the wording of the policy or agreement. If no such policy exists, the company would not owe such a payment. A sample policy for accrued leave payouts might look something like this:

> Unused paid leave is forfeited when an employee separates from employment. However, employees who are laid off for economic reasons, or who resign with at least two weeks' advance written notice, will receive the balance of any unpaid leave remaining at the time of the work separation. Paid or unpaid leave time may not be counted toward such a notice period.

To illustrate, assume that a company has a written policy similar to the above example - on a Wednesday, the employee gives what she says is two weeks' notice ("I'm quitting and taking the final two weeks as vacation"), but admits she's starting a new job on the following Monday. Clearly, that would not be two weeks' notice, since 1) taking a vacation is not the same as working out a notice period and 2) even if she were to work until the new job started, there would not be two weeks of work possible within that time. In such a case, the company could legally deny the accrued leave payout otherwise payable under the written policy.

Under the same policy, an employee who is terminated for any reason other than an economic layoff would have no claim to accrued leave when leaving the company. For a more detailed policy regarding accrued leave payouts, see "Vacation and Sick Leave" in the section of this book titled "The A to Z of Personnel Policies".

In general, an employer is not required to pay an employee for whatever portion of a notice period that the employee does not work - see "Quit or Discharge - Close Cases" in the article "Types of Work Separations".

When a company is acquired by another company, there is a work separation for purposes of the unemployment compensation program and the Texas Payday Law, and if the company being acquired has a written policy promising a payout of accrued paid leave, the acquisition will trigger the acquired company's duty to make the payout under that policy.

A 2007 amendment to the Texas Family Code provides that garnishment for support obligations apply to certain post-termination lump-sum payments such as a payout of accrued leave, a bonus, or a commission, (see Texas Family Code §

158.215): if such a lump-sum payment is $500 or more, the employer must notify the Attorney General's office (do it in writing or electronically - see https://portal.cs.oag.state.tx.us/wps/portal/WageWithholdingResponsibilities#lumpsum) before making the payment so that that agency can determine whether a support deduction should be made. The agency then has ten days after that date to notify the employer about its duty to make the support deduction; if no such notification occurs, the employer may make the payment without the deduction. If, however, the agency informs the employer that the support order would apply to the lump-sum payment, the employer would need to make the deduction. Since such a garnishment would be pursuant to a court order, it would not have to be authorized in writing by the employee.

Deductions from Pay

Deductions - General

Most employers and employees understand that federal minimum wage is $7.25 per hour (the Texas minimum wage is the same) and that whatever wage payment method is used, it must boil down to at least minimum wage for all hours worked, plus time and a half for hours worked in excess of 40 in a seven-day workweek. (There are several exceptions to the seven-day workweek standard, such as for employees of police, fire, and EMS departments, and for employees of hospitals and residential care facilities, but the vast majority of employees will be covered by the seven-day workweek.) The greatest source of confusion and trouble with minimum wage lies in the question of what deductions an employer may make from an employee's pay without violating the minimum wage requirements. The deductions are not listed all in one place, but appear in the statute itself, the regulations, DOL's Field Operations Handbook (FOH), and case law. (Note: some of these deductions are also allowable from the salaries of exempt employees, while others would violate the salary basis for the overtime exemptions. The focus of this section is on deductions from non-exempt employees' pay, whether they are paid on an hourly, salary, commission, or other basis.)

Allowable Deductions Under the FLSA

Under the Fair Labor Standards Act, allowable deductions from minimum wage include:

Meals, Lodging, and Other Facilities

Under restricted circumstances, the employer may deduct the reasonable cost of meals, lodging, and other facilities furnished to the employee in connection with the employment, provided, among other things, that the employer does not profit thereby (see 29 U.S.C. 203(m) and 29 C.F.R. 531.29; recordkeeping requirements are found in 29 C.F.R. 516.27; also see FOH, Sections 30c00 – 30c09, mentioning restrictions on deductions and some narrowly-defined administrative costs associated with certain facilities that can be included as a credit against minimum wage).

Employer expenditures for meals, lodging, and other facilities furnished to employees fall under the category of "payments in kind", regulated by the Texas Payday Law (Section 61.016(b) of the Texas Labor Code), and deductions for such costs must be authorized in writing by the employee. If no deductions are made, but the payment in kind makes up part of the wages, the Texas Payday Law requires the employer to have written authorization from the employee to pay that part of the wages in kind.

Tip Credits

Under Section 203(m), an employer need pay a "tipped employee" only $2.13 per hour, since the law assumes that tips will make up the difference between that amount and minimum wage (this did not change with the recent increase in the minimum wage). A "tipped employee" is defined as someone who earns at least $30 per month in tips (29 U.S.C. 203(t)). If such an employee feels that the tips do not make up the difference, he or she may request a review of the problem by the DOL under 29 C.F.R. 531.7.

Since the tip credit is in cash and the actual tips are paid not by the employer, but by customers, this would not be a "payment in kind", as is the case with a deduction for lodging furnished to an employee. Even though paying a tipped employee $2.13 per hour can be thought of as the end result of deducting the tip credit of $5.12 per hour from the required minimum wage of $7.25 per hour, the tip credit does not have to be authorized in writing by the employee in order to be valid under the Texas Payday Law, since it is specifically authorized by the federal statute. However, Section 203(m) provides that the tip credit may not be used toward payment of minimum wage "unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips." New disclosure requirements for tipped employees, adopted by DOL in 2011, are found in 29 C.F.R. § 531.59(b): prior to taking the tip credit, the employer must notify tipped employees of the following: the amounts of the cash wage paid and tip credit taken; that the tip credit may not exceed the value of the tips actually received; that all tips received by the employee must be retained by the employee except for amounts contributed toward a valid tip-pooling arrangement; and that the tip credit will not apply to any employee who has not been informed of these requirements. Regarding

tip-pooling / tip-sharing agreements, see "Tip-Pooling / Tip-Sharing" in the Outline of Employment Law Issues in this part of the book.

The tip credit of $5.12 per hour does not vary for overtime hours. A minimum wage tipped employee who would get $10.88 per hour in the absence of a tip credit would get $5.76 for each overtime hour with the tip credit.

Voluntary Wage Assignments

Deductions for voluntary wage assignments, i.e., for things that benefit the employee, may take an employee's wages below minimum wage, provided the employer does not profit thereby (includes such things as employee contributions to a health or retirement plan (see 29 C.F.R. 531.40(c)) and FOH, Section 30c10(a)).

Employers in Texas are under no statutory obligation to honor voluntary wage assignments (see *Reef v. Mills Novelty Co.*, 126 Tex. 380, 89 S.W.2d 210 (1936), in which an attempted assignment of a sales employee's commission pay did not bind an employer whose contract with the employee prohibited an assignment of commissions without the employer's consent). An employer may be under a contractual obligation to do so, however. That would be the case if the employer had contracted with a third party, such as a health care insurance provider, to deduct wages for insurance plan contributions and remit them to the insurance carrier in return for coverage for the employees. That is not the case, though, if the employer's company had no prior business relationship with the beneficiary of the assignment, for example, a payday loan company that makes a short-term loan to an employee. In such a case, it would be optional on the employer's part to comply with the wage assignment. If the employer refused to comply with the wage assignment, the alternative for the payday loan company would be to go to court against the employee and seek to enforce its rights in a civil lawsuit.

This type of deduction must be authorized in writing by the employee to be valid under the Texas Payday Law.

Loans and Wage Advances

Repayments of loans and wage advances from the employer to the employee may take an employee below minimum wage; it is up to the employer to document the existence of the loan or advance (deduction allowed for principal only - no interest or administrative fees - see FOH, Section 30c10(b) (1988)). Here is the relevant text of FOH §30c10(b):

> 30c10 Voluntary assignment of wages, loans, and advances.
>
> (b) While loans and cash advances made by an employer are not "facilities", the principal may be deducted from the employee's wages, even where such a deduction cuts into the minimum wage or overtime due under FLSA. Deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. The existence of the loan or advance shall be verified to the extent possible.

This category would include any instance in which the employer advances money to the employee to pay for something on the employee's behalf for which the employee would normally be personally responsible. This category also includes wage overpayments.

This type of deduction must be authorized in writing by the employee to be valid under the Texas Payday Law.

Special precaution for loans and wage advances: employers should never loan money or advance wages to an employee without treating the occasion like a bank would. That means securing the employee's written agreement on a separate loan or wage advance document listing all the particulars of the transaction, such as amount loaned or advanced, date of transaction, full name and social security number of the employee, the amount and frequency of repayment installments, and what happens to an unpaid balance remaining when the employee leaves the company. Finally, find out what legal formalities are necessary in Texas and your other states of operation to make a valid promissory note and include such language in the loan or wage advance agreement, so that if the employee fails to satisfy the repayment obligations, the company will have the option of taking the ex-employee to civil court.

Special precautions for insurance premium advances: some employers may from time to time pay an employee's usual contribution toward a group health plan. The reason may be an attempt to comply with the Family and Medical Leave Act, if the FMLA applies, or simply a desire on the part of an employer to help the employee out during a leave of absence. Whatever the reason, the employer ends up giving the employee what amounts to a loan, the proceeds of which are applied to a benefit for the employee. If the employer wants to be able to recoup that money, it would be well-advised to include some special wording about this kind of situation in the employee handbook and the wage deduction authorization agreement. The policy in the health benefits section of the employee handbook might read as follows:

> During a leave of absence of less than ["x"] weeks' duration, unless the employee has previously arranged to pay the insurance premiums in advance or during the leave, the employer will advance to the employee an amount equal to the premium payments required to maintain the employee's health insurance in force. The

> amount so advanced will be treated as an advance of future wages payable, and the advance will be deducted from any paychecks the employee might receive following the employee's return from the leave of absence. The amount to be deducted will be [one-third of / one-half of / the amount so advanced] from the employee's [first three paychecks / first two paychecks / first paycheck] following the date of the employee's return from leave. If the employee separates from employment prior to repaying the advance in full, any unpaid balance remaining from the advance at the time of the employee's separation from employment will be deducted in full from the employee's final paycheck.

The above excerpt is merely an example of how such a policy might be worded and serves only to illustrate the concepts involved. The actual wording depends upon whether and to what extent the employer might wish to have such a procedure and on what the wage payment laws require in the employer's state or states of operation other than Texas. In addition, corresponding language should go into the wage deduction authorization agreement, and the employees should be required to sign the agreement as a condition of continued employment. New hires can be required to sign such an agreement as a condition of hire.

If the employer does adopt such a policy, it should be prepared to pay the health insurance premiums for all similarly-situated employees or else face possible charges of discriminatory treatment. The practice could be restricted to employees out on health- or family-related absences, or even only to employees out on FMLA leave.

Also in the category of a loan or wage advance would be an employer's payment to a third party of a fine or fee on behalf of the employee: "An employer may also count as wages any sums paid to a third party at the request of the employee. The payment by the employer to the third party is equivalent to a loan to the employee, or an advance against his salary. Accordingly, deductions to recoup the outlay must be counted as wages." *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973).

Not included as a loan or wage advance would be the extension of "store credit" to an employee for the purchase of goods or services from the employer. Thus, deductions or set-offs for debts owed to the employer for goods and services cannot take the employee's pay below minimum wage. See B*rennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1370 (5th Cir. 1973), and *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974).

Vacation Pay Advances

Vacation pay advances are afforded the same status as loans and wage advances - see the DOL's Field Operations Handbook, Section 30c10(c) (1988), as well as DOL opinion letters, FLSA-834, issued on October 11, 1984, and FLSA2004-17NA, issued on October 6, 2004. Here is the relevant text of FOH §30c10(c):

> 30c10 Voluntary assignment of wages, loans, and advances.
>
> (c) In the situation where an employee is granted vacation pay prior to that individual's anniversary date, or the established date of entitlement, with the understanding that such pay constitutes an advance of pay and the employee quits or is terminated before the entitlement date, the employer may recoup the advanced vacation pay, even where such recoupment cuts into the minimum wage or overtime pay required under FLSA.

This type of deduction must be authorized in writing by the employee to be valid under the Texas Payday Law.

Uniforms and Uniform Cleaning Costs

Under severely restricted circumstances, the reasonable cost of uniforms and associated cleaning costs may be deducted from wages, or the employee may be expected to purchase clothes that are consistent with a dress code, even if the deduction or cost takes the employee below minimum wage. If supplied by the employer, it must be clear that such clothes are furnished as a convenience to the employee (generic clothing suitable for off-duty use), and that those particular outfits are not a condition of employment or otherwise required for the job (see 29 C.F.R. 531.3(d)(2)(iii), 531.32(c), and 531.35; also FOH, Section 30c12 (1988)). The cost of specially-branded company clothes may not take an employee below minimum wage. Below are relevant portions of FOH §30c12:

> **30c12 Cost of furnishing and maintaining uniforms.**
>
> *(a) Where uniforms are required by law, employer, or type of work*
> If the wearing of clean uniforms is required by law, by the employer, or by the nature of the work, the financial burden of furnishing or maintaining these clean uniforms may not be imposed upon the employees if to do so would reduce their wages below the minimum wage (see 531.3(d)(2), 531.32(c), and 531.35).
> *(f) Definition of "uniforms"*
> (1) Although there are no hard and fast rules ..., the following principles are applicable:
> a. If an employer merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered to be

uniforms.

b. On the other hand, where the employer does prescribe a specific type and style of clothing to be worn at work, e.g., where a restaurant or hotel requires a tuxedo or a skirt and blouse or jacket of a specific or distinctive style, color, or quality, such clothing would be considered uniforms.

c. Other examples would include uniforms required to be worn by guards, cleaning and culinary personnel, and hospital and nursing home personnel.

(g) Employee elects to buy additional uniforms, in excess of number required

Where an employer supplies, free of charge, or reimburses the employees for a sufficient number of uniforms required to be worn, and all or some employees elect to purchase additional uniforms in excess of the number required, the employer will not be required to reimburse the employees for costs incurred in purchasing uniforms in excess of the required number.

This type of deduction must be authorized in writing by the employee to be valid under the Texas Payday Law.

Employee-Owed Payroll Taxes

Another type of deduction allowed from minimum wage is for employee payroll taxes, such as income tax withholding and FICA, as well as any other taxes owed by an employee, but paid by the employer on the employee's behalf (see 29 C.F.R. 531.38 and FOH, Section 30c14).

A deduction for required payroll taxes (FICA and withholding) does not need to be authorized by the employee to be valid under the Texas Payday Law. A deduction for other payroll taxes paid by the employer on the employee's behalf would need to be authorized in writing by the employee.

Union Dues

Union dues that are authorized by the worker under a collective bargaining agreement may be deducted from an employee's wages even if the wage goes below minimum wage (see 29 C.F.R. 531.40(c)).

Deductions for union dues must be authorized in writing by the employee to be valid under the Texas Payday Law.

Court-Ordered Garnishments or Statutorily-Required Wage Attachments

Under DOL regulation 29 C.F.R. 531.39, deductions for court-ordered garnishments and other wage attachments required by law may take an employee below minimum wage. Common examples are payroll taxes (withholding tax, FICA); bankruptcy court garnishments; court-ordered child support or "spousal maintenance" payments (alimony) (an employer may charge an administrative fee of up to $10.00 per month on child support payments – see V.T.C.A. Family Code, Section 158.204); IRS tax levies (26 U.S.C. 6331(a, d), 6334(d)); and guaranteed student loan wage attachments (20 U.S.C. 1095a; in addition, a state law, V.T.C.A. Civil Practices and Remedies Code, Section 63.006, allows employers to deduct from current wages a limited amount each month (the actual cost, or $10.00, whichever is less) as an administrative fee in connection with a student loan wage deduction). Limitations on the amount of money that can be deducted due to multiple wage attachments and/or garnishments, except for bankruptcy garnishments and IRS tax levies, are found in Title 29, C.F.R., Part 870. For limitations on tax levies, see IRS Publication 1494 (http://www.irs.gov/pub/irs-pdf/p1494.pdf). There is no limit on the amount a bankruptcy court may order garnished from wages; the bankruptcy trustee takes the previously-mentioned limitations into account when distributing the wages garnished from the debtor.

The garnishment and wage-attachment exception to the minimum wage law does not include administrative fees associated with handling such matters - see the topics on deductions for interest, administrative fees, and other costs to the employer below for details.

This type of deduction does not need to be authorized by the employee to be valid under the Texas Payday Law.

Special caution relating to garnishments: Federal law prohibits an employer from discharging an employee due to "any one indebtedness" that results in a garnishment order, i.e., a single garnishment. While it is true that neither federal nor state law limits an employer's ability to discharge an employee who has two or more garnishments against his pay, it is not recommended to base a discharge on garnishments, since nothing would bar Texas state courts from deciding in a future case that public policy would be best served by forbidding such actions by employers. In addition, the DOL has stated that counting a warning for a single garnishment against an employee for purpose of a progressive disciplinary policy that results in the employee's discharge would violate the federal law (Wage and Hour Opinion WH-31, April 28, 1970).

Cash Shortages Due to Misappropriation

Finally, the employer may deduct the amount of cash shortages that are provably the result of theft or other misappropriation by the employee, even though such a deduction might take the employee below the minimum wage level; the employer bears the burden of proving that the employee was personally and

directly responsible for the misappropriation (see *Mayhue's Super Liquor Stores, Inc. v. Hodgson,* 464 F.2d 1196 (5th Cir. 1972). Ordinary cash register shortages, losses of money due to ordinary negligence, and losses due to damage, destruction, or loss of equipment may not be deducted from the wages of employees to the extent that the deductions would take employees below minimum wage.

This type of deduction must be authorized in writing by the employee to be valid under the Texas Payday Law.

Focus on Misappropriation Deductions

The *Mayhue's Super Liquor Stores* case merits a special look because it illustrates how a court can signal that common sense should prevail in certain situations. In *Mayhue's*, the Fifth Circuit ruled upon an employer's policy of making employees, as a condition of continued employment, sign agreements to make "voluntary" repayments of cash register shortages. The Court held that such agreements were not voluntary and that such deductions are illegal to the extent that they reduce an employee's wages below minimum wage for the pay period in question. The Court had the following observation, however, regarding the difference between making deductions to cover cash register shortages, which violates the FLSA if the wage goes below the FLSA minimum, and deductions to cover money wrongfully taken by the employee himself or herself:

> ...If the agreement required only repayment of money that the employee himself took or misappropriated, it obviously would not collide with the Act. As a matter of law, the employee would owe such amounts to the employer, and as a matter of fact, the repayment of moneys taken in excess of the money paid to the employee in wages would not reduce the amount of his wages... In such a case, there would be no violation of the Act because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum...

The Fifth Circuit's dictum in this case has never been questioned in a published court opinion; on the contrary, a number of cases around the country have expressly supported it (see *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973); *Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974); *Conklin v. Joseph C. Hofgesang Sand Co., Inc.*, 407 F.Supp. 1090, 1093 (W.D. Kentucky 1975); *Marshall v. Gerwill, Inc.*, 495 F. Supp. 744 (D. Md. 1980); *Marshall v. Hendersonville Bowling Center*, 483 F.Supp. 510, 516 (M.D. Tennessee 1980); *Donovan v. 75 Truck Stop, Inc.*, 1981 U.S. Dist. LEXIS 15449 (M.D. Fla. July 20, 1981); and *Phillips v. Trans Health Mgmt.*, 2004 U.S. Dist. LEXIS 30945 (S.D. Tex. July 15, 2004)). Of course, the employer's ability to require repayment of misappropriated money would depend directly upon its ability to prove that the employee was, in fact, guilty of taking the money (conviction, guilty plea, written admission, unmistakeable video proof, and the like). A further cautionary note would be that this rule would apply only in the case of misappropriated money; no court has suggested it would apply to misappropriated materials, supplies, equipment, or other similar assets that might belong to a company. Finally, keep in mind that this kind of wage deduction must be authorized by the employee in writing to be valid under the Texas Payday Law. Item 7 in the sample wage deduction authorization agreement in this book suggests one example of how a company might obtain such authorization.

Miscellaneous FLSA Deduction Problems

Some common types of deductions made by employers will violate the FLSA if they take an employee's pay below minimum wage, such as deductions to cover the cost of tools, safety equipment, and uniforms that do not fall within the definition of "facilities"; disciplinary deductions (such as "fines" for tardiness, rule violations, or poor work); deductions to cover the cost of items lost or damaged by the employee (see 29 C.F.R. 778.304, .306, and .307); and deductions to cover ordinary cash register shortages not caused by some type of misappropriation (see the discussion on the *Mayhue's* case above).

Sometimes the question arises whether different rules apply in the case of minors, or child labor. Although the FLSA does provide certain limitations on the hours and duties of workers younger than age 18, and although a sub-minimum "training wage" is allowed under restricted circumstances for workers age 19 or younger, the above rules for deductions from pay apply to all employees, regardless of age.

Deduction Problems under the Texas Payday Law

Lawful and Authorized in Writing

Under section 61.018 of the Texas Payday Law, all deductions, other than payroll taxes, court-ordered garnishments, and other deductions either required by law or specifically authorized by statute, must be both lawful and specifically authorized in writing by the employee. There are two main problem areas with deductions under the Payday Law. One consists of cases stemming from deductions that are allowed under the law, such as the ones detailed above that can take an employee below minimum wage, but for which the employer has failed to get written authorization from the employee. The other category consists of claims resulting from deductions that the employee may have authorized in writing, but which violate state and/or federal laws. That would be the case, for example, with deductions that violate

the minimum wage or overtime laws, that have to do with debts arising from illegal transactions (such as illegal gambling and contraband), or that violate certain other laws providing limitations on what employers can take from an employee's pay, such as the limitations on the amounts to be deducted for child support garnishments, IRS tax levies, or student loan wage attachments (see V.T.C.A. Family Code Section 158.009, 26 U.S.C. 6334(d), and 20 U.S.C. 1095a(a)(1), respectively).

Wage Overpayments

A type of wage deduction that defies easy classification is that of a deduction to offset an overpayment of wages, which was specifically found in the case of *Benton v. Wilmer-Hutchins I.S.D.*, 662 S.W.2d 696 (Tex.App. - Dallas 1983; *overruled on other grounds* in *Orange County v. Ware*, 819 S.W.2d 472, 474 (Tex. 1991)), to violate the restriction on attachment of current wages in the Texas Property Code (V.T.C.A., Property Code, Section 42.001(b)(1)). The Texas Supreme Court's Orange County decision held that self-help by a creditor-employer, i.e., the offsetting of mutual debts between an employer and employee, did not amount to a garnishment that would be covered by the Texas Constitution, but acknowledged that it might be limited by some other form of law. The only other generally applicable and potentially relevant law in this situation would be the statute regarding attachment of current wages in the Texas Property Code (V.T.C.A., Property Code, Section 42.001(b)(1)). The Texas Supreme Court did not mention that statute, but cited a specific provision of the Local Government Code, Section 154.025, which prohibits a county from issuing a warrant (in the *Orange County* case, a paycheck warrant) to an individual who is indebted to the county. One might assume that the Texas Supreme Court would be aware of the Property Code provision cited above, and thus that the Court felt that the specific Local Government Code provision overrode the more general Property Code section. Unfortunately, the *Orange County* decision raised more questions than it clearly answered, and three justices dissented from the majority vote. In the absence of a specific provision such as the one that applied in *Orange County*, it would be most prudent to expect the Property Code provision to apply. The *Benton* court emphasized that its problem with the wage deduction to offset a previous wage overpayment stemmed from the employer's unilateral action in making the offset, i.e., without a clear prior agreement from the employee that such a deduction could be made. The implication is that if an employer complies with the Texas Payday Law and obtains the employee's written authorization to make such a deduction from wages, the *Benton* case would not stand in the employer's way.

Concerning the FLSA, minimum wage would not be a problem, since the wage overpayment would fall into the same category as loans or wage advances (confirmed in a DOL letter ruling dated March 20, 1998 (1998 WL 852662) and in a similar ruling dated October 8, 2004 (see opinion letter FLSA2004-19NA at http://www.dol.gov/whd/opinion/FLSANA/2004/2004_10_08_19FLSA_NA_recoup.htm)). Thus, as long as the employer is able to document the employee's receipt of such wages in advance of the date the wages were due, it should have no FLSA problem in making that sort of wage offset, even if it takes the employee's pay below minimum wage. However, since it represents a deduction from wages, it would need to be authorized in writing by the employee in order to be valid under the Texas Payday Law. In addition, every employer should cover this subject in a written policy (see the sample wage deduction authorization agreement and sample wage overpayment/underpayment policy at the end of the "A - Z" section of this book).

Deductions for Interest

Some employers loan money to their employees and charge interest on the outstanding balances. Charging interest on such loans is legal, as long as the interest rate itself does not violate state usury laws. As noted above, the employer may deduct installment payments from the employees' paychecks that include both principal and interest as long as the employee has authorized such deductions in writing for purposes of the Texas Payday Law. There would be a problem under the FLSA, however, with a deduction for interest that resulted in an employee's effective hourly rate going below minimum wage for a particular workweek. Interest charged on such a loan would amount to a profit on the transaction, and the FLSA and accompanying regulations clearly state that the employer may take only the "reasonable cost" of facilities (including loans) as a credit against minimum wage, not anything over and above that which would constitute a profit.

To the extent that a deduction for interest does not violate the minimum wage laws, an employer is allowed to make such a deduction as long as the employee has authorized it in writing in accordance with the Texas Payday Law.

Deductions for Administrative Fees

Texas law authorizes an employer to make certain deductions from pay for costs incurred in servicing a garnishment or wage attachment order. These are known as administrative fees. They include:

- Court-ordered child support - an employer may make a deduction for an "administrative fee" of up to $10.00 per month - see V.T.C.A. Family Code, Section 158.204; and
- Court-ordered spousal maintenance (alimony) - an employer may make a deduction for an "administrative fee" of up to $5.00 per month - see V.T.C.A. Family Code, Section 8.204; and
- Guaranteed student loan wage attachments - V.T.C.A.

Civil Practices and Remedies Code, Section 63.006, allows employers to deduct from current wages a limited amount each month (the actual cost, or $10.00, whichever is less) as an "administrative fee" in connection with a student loan wage deduction).

The FLSA, the regulations, and the Field Operations Handbook are silent on whether a deduction for an administrative fee associated with an otherwise legal deduction may itself take the employee's pay below minimum wage. However, the list of allowable deductions in Part 531 of the regulations is very exclusive. The fee would not be any kind of "facility", since it could not fairly be said to benefit the employee in any way. Hence, the Field Operations Handbook provisions allowing certain administrative costs associated with "facilities" to be deducted from minimum wage would be of no help. The regulations allowing deductions for garnishments ordered by courts or required under law do not mention anything about associated administrative fees, and the Field Operations Handbook is likewise silent on that topic. Significantly, attorney's fees incurred by an employer in association with a garnishment order may not be deducted from the employee's pay, if such a deduction would take the employee below minimum wage (Wage-Hour Opinion WH-84, October 12, 1970). The best course of action is to assume that DOL would not permit such a deduction from minimum wage, since administrative fees are merely permissible under state law, not required under either state or federal law. Since it would not be allowed under the FLSA, it would not be for a "lawful purpose" and would also violate the Texas Payday Law.

According to the current legal interpretation by TWC's Labor Law Department, as long as a deduction for one or more of the above administrative fees does not violate the minimum wage laws, the employer does not need written authorization from the employee, since the above state laws specifically supply such authorization. Of course, the employer should keep detailed documentation to support the amounts deducted. However, since the Labor Law Department's interpretation does not have the same force and effect that a formal rule, a Commission precedent, or an Attorney General Opinion would have, employers may well want to practice caution and include the above administrative fees in whatever standard wage deduction authorization agreement the company uses.

Deductions for Other Costs to the Employer

In general, almost all costs that an employer might incur in providing a workplace for and meeting various needs of its employees, in complying with workplace regulations that impose a duty on the employer (such as supplying employees with safety equipment required under OSHA regulations), and in paying for the expenses of an ongoing business operation, will be regarded as part of the normal cost of doing business that may not be deducted from an employee's wages to the extent that it would take the employee's pay below minimum wage, or result in payment of less than one and one half times the regular rate of pay for any overtime hours. The general rule is found in DOL wage and hour regulation 29 C.F.R. 531.32(c). That provision notes that expenses for things that are primarily for the benefit and convenience of the employer are not considered "other facilities" and thus may not be credited toward payment of the minimum wage. Regarding overtime pay, 29 C.F.R. 531.37(b) states "[w]here deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made." Subsection (a) of the same regulation provides that the deduction for expenses may "not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek." Together, those two provisions mean that even if the employee is paid more than minimum wage, deductions for expenses incurred for the employer's benefit and convenience may be made down to minimum wage only for the non-overtime hours; overtime hours must be compensated at one and one half times the full regular rate of pay. The general rule is outlined in several provisions of DOL's Field Operations Handbook (FOH) in Chapter 30 (Minimum Wage):

DOL Field Operations Handbook (excerpts)

> **30c03 Primarily for the benefit of the employee.**
> (a) The crediting by an employer of facilities furnished to employees as wages will depend upon whether such facilities are furnished primarily for the benefit or convenience of the employee, as determined by WH. Where the primary benefit of such facilities is to the employer's business interest, credit will be denied. The following are commonly viewed as furnished primarily for the benefit or convenience of employees:
>
> (3) Transportation
>
> a. ... transportation which is an incident of or necessary to the employment is not an "other facility".
>
> 30c04 Primarily for the benefit of the employer.
> The following are examples of items not considered bona fide "other facilities" under Section 203(m) and Part 531 [of the regulations], because they are provided primarily for the benefit or convenience of the employer:
>
> 1. Electric power used for commercial production in the interest of the employer.
> 2. Telephones used for business purposes.
> 3. Taxes and insurance on the employer's building which is not used as lodging furnished to the employees.

4. Medical services and hospitalization which the employer is obligated to furnish under workers' compensation law or similar Federal, State, or local laws.
5. Rental of uniforms where the wearing of a uniform is required by law, the employer, or by the nature of the work.
6. Business-related travel expenses. (See 29 C.F.R. 778.217.)
7. Necessary tools or uniforms used in the employee's work.

30c13 Deductions from wages of migrant and seasonal agricultural workers.
(d) - In *Marshall v. Glassboro Service Association, Inc.*, the Third Circuit affirmed the district court's judgment that money advanced to farm workers for transportation costs from Puerto Rico to the mainland was primarily for the benefit of the employer and therefore could not be deducted from the workers' wages to the extent it reduced the wages below the statutory minimum. ... The U.S. Supreme Court denied review. The Court of Appeals also ruled that, regardless of the manner or method by which the employer sought to pass on to its employees certain transportation costs, where the effect was to bring the wage rate below the statutory minimum, such practice was unlawful.

[Note: several other provisions of Section 30c13 emphasize the same principle; even though the section is nominally titled as having to do with seasonal and migrant workers, it is clear that the same principle would apply to any worker covered by the FLSA minimum wage provision.]

The only exceptions to this general rule are found in DOL's FOH Sections 30c05 and 30c06 and have mainly to do with things like depreciation and operational costs attributable directly to meals, lodging, and other facilities. DOL wrote in an opinion letter dated January 21, 1997 that "it is our longstanding position that the cost of uniforms and safety equipment required by the employer is a business expense of the employer. Thus, even if the employees purchase these items, this cost may not reduce their wages below the minimum wage, nor decrease their overtime compensation." The same rule would apply to drug and alcohol testing costs; since such costs are usually borne by the employer, wage deductions for such expenses may not take the employees below minimum wage. A DOL opinion letter of September 10, 1998 noted that an employer does not have to pay mileage expenses employees incur during work, "so long as at least the full minimum wage is paid free and clear for all hours worked." That position coincides with the rule cited in DOL opinion letters WH-92 of November 10, 1970 and WH-531 of June 27, 1990 that expenses relating to transporting employees during a workday may not be counted toward minimum wage, i.e., the employer must both pay the full minimum wage and reimburse any out-of-pocket transportation expenses that would effectively reduce the employees' pay below minimum wage if left unreimbursed. As noted in the topic on direct deposit of expense reimbursements, such reimbursements are not counted as part of wages (see also the topic on "Expense Reimbursements" in the Outline of Employment Law Issues in this part of the book). In general, any employer contemplating such deductions should definitely consult with legal counsel before proceeding.

To the extent that a deduction for a miscellaneous cost to the employer does not violate the minimum wage laws, an employer is allowed to make such a deduction as long as the employee has authorized it in writing in accordance with the Texas Payday Law.

Wages in Kind

An employee whose wages are paid in part with meals furnished in connection with the job, by being able to live in housing provided by the employer, or with "other facilities" is considered to be paid "in kind". Special considerations apply when wages are paid in kind. Section 61.016(a) of the TPL states that wages shall be paid either in cash, by a check that is negotiable for cash at the full face value, or by electronic funds transfer. Section 61.016(b) states that payment of wages "in kind or in another form" is acceptable if the employee has agreed in writing to take the wages in such a manner. The Texas Payday Law thus takes a stricter position than the prevailing court decisions under the FLSA take, i.e., under the state law, written acceptance of lodging as part of wages is required, whereas under the federal law, employee acceptance is not required. Thus, even if a deduction or credit for lodging costs that would reduce an employee's pay below minimum wage or cut into an employee's overtime pay might be legal under the FLSA, the employer would still have to have the employee's written consent to receive part of the wages in the form of meals or lodging in order to comply with the state wage payment law. The Texas Workforce Commission, which enforces the TPL, also takes the position that to be valid, the lodging deduction must also comply with the federal recordkeeping standards found in Part 516 of the federal wage and hour rules, most specifically, section 516.27.
The written authorization for wages paid in kind may appear as part of a standard wage deduction authorization form that lists all the various wage deductions that will be made.

Electronic Fund Transfer of Wages

The issue of whether an employer can require employees to accept pay via direct deposit of wages into personal bank accounts is a bit more complicated than it looks. The technical answer may boil down to "yes" or "no", but in practical reality,

most employers can convince most, if not all, employees to sign up for direct deposit.

Department of Labor Interpretation

One potential complicating factor is the U.S. Department of Labor's position regarding direct deposit found in Section 30c00 of its Field Operations Handbook:

> Section 30c Payment of Wages
> 30c00 Method of Payment
>
> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them. (Field Operations Handbook, 12/9/88)

DOL is obviously concerned that forcing employees to accept direct deposit violates minimum wage laws if there is a charge to the employees that effectively takes their wages below minimum wage. Presumably, DOL would not have that concern if the direct deposit bank account charge did not have that effect.

EEOC Considerations

There is also a risk that under some circumstances, requiring employees to accept direct deposit of wages may raise an issue of disparate impact on minorities. The EEOC may feel that if statistical evidence shows that more minorities than non-minorities have trouble getting and keeping a bank account, then a direct deposit requirement by the employer would have a disproportionate impact on minorities. The solution would be to work with the employee to find a bank that would open a free account for wage deposits, or else the employer can cover any bank charges for the employee.

CFPB Statute and Rule

Federal law clearly states that an employer may not require an employee to accept direct deposit of wages at a particular financial institution. Title 15 of the U.S. Code, Section 1693k, provides the following:

§ 1693k. Compulsory use of electronic fund transfers

No person may—

(1) condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers; or

(2) require a consumer to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of employment or receipt of a government benefit.
http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001693---k000-.html

The Consumer Financial Protection Bureau regulation interpreting that provision quotes the statute almost exactly:
12 C.F.R. § 1005.10 Preauthorized transfers.

(e) Compulsory use--(2) Employment or government benefit. No financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of a government benefit. (http://www.ecfr.gov/cgi-bin/text-idx?SID=d788471f8ff6e0ba2aa4cc7def694fb0&mc=true&node=se12.8.1005_110&rgn=div8)

Useful clarification appears in the CFPB staff interpretations for 12 C.F.R. § 1005.10:
SUPPLEMENT I TO PART 1005—OFFICIAL INTERPRETATIONS

Paragraph 10(e)(2)--Employment or Government Benefit

1. Payroll. An employer (including a financial institution) may not require its employees to receive their salary by direct deposit to any particular institution. An employer may require direct deposit of salary by electronic means if employees are allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their salary deposited at a particular institution (designated by the employer) or receiving their salary by another means, such as by check or cash.
((http://www.ecfr.gov/cgi-bin/text-idx?SID=80c7a0d95364ec5cb0f35511596be251&mc=true&node=ap12.8.1005_136.1&rgn=div9)

Thus, according to CFPB staff, there would be no problem under the Electronic Fund Transfer Act with requiring employees to accept direct deposit of wages by EFT if they are allowed to choose the bank at which the depository account will exist.

Texas Law on Direct Deposit of Wages

In 2003, Texas law was amended by HB 3308 to add a direct deposit provision to Section 61.017 of the Texas Payday Law. New subsection (c) provides that an employer may elect to pay wages via direct deposit to employees who maintain suitable bank accounts, as long as the employer gives at least 60 days' advance written notice of the adoption of the direct deposit wage payment system and obtains from the employees whatever information is required by their banks to

commence such deposits. Direct deposit wage payment was already possible under the Texas Payday Law - the change was basically to make that option clear. However, the problem with the amendment is twofold:

1) The state law does not overcome whatever objections the DOL and the EEOC may have toward such a system under the federal laws they enforce.
2) The new provision allows direct deposit of wages for employees who already have bank accounts. It does not expressly state that an employer may require an employee who does not maintain a bank account to establish one. This ambiguity will probably leave many employers in doubt as to their position regarding direct deposit of wages.

Practical Tips for Direct Deposit

As anyone who has managed employees can confirm, there are some employees who simply will not opt-in to such a system. Some employees with bank accounts do not trust direct deposit and want to see a physical paycheck that they can personally deposit. Some employees do not have bank accounts because they cannot afford bank fees, or because they do not trust banks, or because they are concerned that a bank account makes it too easy for the government to track them (people of the "leave me alone" persuasion, or those avoiding child support or alimony judgments, are the two main categories there). There are some ways to overcome the objections for some people, such as by establishing no-cost bank accounts for employees who request such an accommodation and can demonstrate financial need, or by making clear that in the case of mistakes by banks, the employer will immediately pay wages by an alternative method, such as a check or cash. Some employers even arrange with employees, who object to direct deposit, to pay wages with debit cards, which can be readily used just like cash. Wage payment by debit card would have to be approved by the employee in writing, however, under Texas Payday Law Section 61.017(b)(5). ("An employer may pay wages by ... delivering them to the employee by any reasonable means authorized by the employee in writing."). Watch out, though, for debit cards that result in a fee to the employee each time they are used; such fees could easily be seen as de facto deductions from wages that might cause problems under the Texas Payday Law ("might" because there are no precedent decisions or court rulings on this point) and would cause problems under federal minimum wage laws for those who are paid at or near minimum wage ("would" because of clear guidance from DOL on out-of-pocket expenses that effectively reduce the pay below minimum wage). Keep in mind that a federal agency, the Consumer Financial Protection Bureau, has issued an opinion that an employer may not require acceptance of wages via a payroll card (since that would be the same as mandating the financial institution at which the wage deposit account will be maintained - see the FDIC rule quoted above). The CFPB's official guidance on payroll cards is online at http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf. Finally, anticipate in your policies and/or wage agreements how potential problems such as identity theft and loss or replacement of debit cards should be handled.

Tips and Strategies

It is best to have all employees sign a wage deduction authorization agreement (see an example of such a form in the section of this book titled *The A to Z of Personnel Policies*) listing many of the various types of deductions from pay that might be made and the amounts (as specific as possible) that would be deducted in case those situations were to arise. In addition to the wage deduction authorization agreement, certain deductions should be individually and specifically authorized in writing to give the employer the greatest amount of protection in case a wage claim is filed. Those would include any type of loan or wage advance; before the money changes hands, the employer should have the employee sign a detailed receipt and repayment agreement specifying what the installment payments will be and what happens to a balance remaining when an employee leaves the company. Similarly, before an expensive piece of equipment is checked out to an employee, the employee should sign a form acknowledging receipt, promising return of the item in good shape, and specifically authorizing a deduction from pay in a specific dollar amount in case of damage or non-return of the item.

Texas Payday Law Deduction Summary

Required by Law – no authorization needed:

- Court-ordered child support and alimony
- Guaranteed student loan wage attachment
- IRS tax levy
- Withholding tax
- FICA tax
- Any garnishments mandated by a federal court (such as in bankruptcy cases)

Allowed/Authorized by Law – Written Employee Authorization Needed

- Child and spousal support administrative fees*#
- Student loan wage attachment administrative fee*#
- Meals, lodging, and other facilities*
- Voluntary wage assignments*
- Loans*
- Wage or salary advances*
- Vacation pay advances*
- Wage overpayments*
- Uniform and uniform cleaning costs (including hard hats, steel-toed boots, required tools, and the like)*
- Union dues*
- Misappropriated cash*

- Any other deduction for a lawful purpose - examples:
  - Store inventory sold to employees on credit – treat this as a loan and get a written repayment agreement from the employee*
  - Personal use of company equipment or accounts – if possible to do so in advance, treat this as a loan and get a written repayment agreement from the employee*
  - Damage or losses caused by the employee*
  - Employee physicals and drug screens (minimum wage issue)*
  - Non-work-related training paid for by the company – treat this as a loan and get a written repayment agreement from the employee; the same applies to education loans and relocation expenses advanced to an employee
  - Employee's traffic tickets, bail, and court costs paid by the employer – before paying anything like this, the employer should get a written agreement from the employee to the effect that the payment is a loan or wage advance

* See the discussions above regarding restrictions on these types of deductions.
# Written authorization recommended - see the discussion in the section of this article on "Deductions for Administrative Fees".

Conclusions

The two main laws limiting deductions from pay are the Fair Labor Standards Act and the Texas Payday Law. In addition, other laws and court decisions sometimes influence wage deductions. A careful employer will watch for situations in which an employee's pay may be reduced for one reason or another and consider whether the deduction potentially involves a reduction below minimum wage and/or must be authorized in writing by the employee before the deduction is made. While some types of deductions are fairly predictable and straightforward, many other kinds of deductions are extremely complex and restricted. Before going ahead with a policy regarding wage deductions, it may be advisable to have the policy and procedures reviewed by an employment law attorney who is familiar with both federal and Texas wage and hour laws.

Employers may also receive help on these issues by calling the legal staff at the toll-free number for the TWC Employer Commissioner's office: 1-800-832-9394. TWC's website is at http://www.twc.state.tx.us or http://www.texasworkforce.org. Finally, the website for the U.S. Department of Labor offers the full text of the FLSA and the accompanying regulations at http://www.dol.gov.

MINIMIZING THE RISK OF WAGE CLAIMS

Anyone who has ever had to prepare a paycheck knows how complicated it can be to figure out the requirements of various federal and Texas laws regarding how to properly pay employees. The risk of a wage claim under the Fair Labor Standards Act or the Texas Payday Law makes compliance with the laws all the more important. This article will offer some tips and best practices for avoiding most claims, and for minimizing the risk of claims that are filed.

"Best Evidence" Rule

In wage claims, one of the most important things to keep in mind is the so-called "best evidence rule". It is most often relevant in claims involving allegations of breach of a wage agreement or failure to pay for all hours worked. Under that rule, whoever has the best evidence of a wage agreement, or of hours worked, or of some other aspect of a wage claim, will prevail on that point. Thus, an employer should always strive to have the best evidence when it comes to wage and hour matters. The good news is that strict compliance with wage and hour regulations usually has the beneficial side effect of helping the employer have the best evidence for use in defending against a claim.

Wage Agreements

It is difficult indeed to think of a situation in which it would not be a good idea to have a clear, written wage agreement with each employee. With such an agreement, as long as the conditions in the agreement themselves meet wage and hour law standards, all that an employer needs to do in order to not fear losing a wage claim over an alleged breach of a wage agreement is to follow the agreement. Set out each condition for earning pay. Be as specific as possible as to amounts, payment method, and payment intervals. Written agreements are even more important if there is more than one component to the compensation, such as hourly wage plus commission, or salary plus bonus. Whatever the specifics, outline them carefully and specifically and follow them exactly as time goes on. Changes to written agreements should always be in writing and signed by the employee.

Recording Working Time and Work Performed

Proper recordkeeping is not only mandatory under the FLSA, it is essential if an employer is to have the best evidence of hours worked. Become familiar with the requirements of Part 516 of the U.S. Department of Labor's wage and hour regulations (Title 29 of the Code of Federal Regulations). An employer that has sloppy or incomplete records of time worked can literally find itself at the mercy of an employee who claims to have worked extra time for which he or she was not paid. There is no need for such a thing to happen. Adopt a reliable timekeeping system – there are many available that involve varying degrees of technology and expense – learn it, apply it, and insist that employees use it consistently and properly. Failure of an employee to use the employer's system properly is usually not a workable reason to avoid paying for time that the employee claims, if there is some evidence of the work being done and no particular reason to disbelieve the claimant, but such failure can legitimately result in appropriate corrective action for failure to follow known work rules.

Disputes over time records should be worked out one-on-one with the employee if possible. Changes should be initialed by the employee. Avoid any appearance of coercion, since that can destroy the value of a disputed time record. Employees should sign their time records, even digitally if necessary. Include a statement above the signature line to the effect that the employee agrees that the record shows all time that he or she worked. The statement could be something like this: "The above record is a full and complete record of all time that I worked during the pay period shown. I certify that I did not work any time that is not shown on the above record."

Documentation of the work performed by each employee is important and should correspond to other records of time worked and earnings. In wage claim situations, employees sometimes claim that some work they performed was unpaid, while the pay they received was for certain things for which the employer believed the employee had already received pay. The employer must be able to counter such allegations with reliable documentation. For example, trucking companies should keep exact and detailed records showing which amounts were paid with which checks for which miles driven on which dates - otherwise, employees might be able to argue that certain checks were meant to cover miles other than the ones for which they are claiming payment. All pay documentation should be complete and consistent, including complete records of time worked, records of work performed, and records of wages paid and deductions made.

Document the Payment of Wages

Related to the issue of good recordkeeping for time worked is the practice of maintaining good documentation proving that your company has properly paid its employees. Employers that cannot prove they have paid their employees are at risk of wage claims from any employees who decide to claim that they never received their pay. ***The riskiest practice is to pay in cash, without a pay stub or receipt for the payment.*** This problem is sometimes seen in situations where the employer believes that the worker is "contract labor", or else a casual temporary worker to whom the normal rules do

not apply. In most situations, of course, the worker will be an employee, and if he or she files a wage claim, the employer will be without a defense if it does not have clear proof of the wage payment. Although Texas law does not require a check stub or pay receipt along with the pay, it is a good idea, because it can help prevent fraudulent wage claims and minimize concerns among employees that their pay may not have been calculated correctly.

Enforce Your Work Schedules

A frequent problem involves employees who work through scheduled breaks, or show up early and start working, or stay late and continue working past their normal ending times. Employers sometimes think it is permissible to not pay employees for such unauthorized or unneeded work time. Unfortunately, that is not how DOL or TWC would view the matter in a wage claim situation. Under longstanding wage and hour regulations relating to hours worked, employers must count as hours worked any time that they either know or should know the employee is working. DOL's stance on that is particularly blunt: employers may not simply sit back and accept the benefit of employees' work time without paying for it, and if an employer knows or should know that an employee is working without authorization, the only solution is to use the employer's power to enforce its rules. Put another way, employees working unauthorized or unneeded time is not a pay matter -- it is a disciplinary matter. The company has to pay for such work time, but does not have to be happy about it; the employer may administer appropriate corrective action to ensure that such a problem does not happen again. Handle such problems as what they are: rule violations.

Get Written Authorization for Wage Deductions

Under the Texas Payday Law, there are three categories of legal deductions from wages:

- deductions ordered by a court (garnishments for child support, alimony, and federal bankruptcy orders are the most common);
- deductions required or specifically authorized by a statute (such as payroll taxes, IRS tax levies, guaranteed student loan wage attachments, and administrative fees for certain garnishments or wage attachments); and
- deductions made for an otherwise lawful purpose and authorized by the employee in writing.

Notice that written authorization is only required for deductions in that third category. As it turns out, most problems under the Texas Payday Law have something to do with failure to get written authorization for such deductions. Every employer should have every employee sign a standard wage deduction authorization agreement covering the most common reasons why deductions might need to occur. There is an example of such an agreement in the section of this book titled "The A to Z of Personnel Policies".

Make a Clean Break with Departing Employees

One of the most frustrating situations for employers is that of a wage claim from an employee who the company thought was gone. We have seen several cases in which an employer believed that a former employee had either quit or was discharged, only to receive a wage claim notice claiming that after the work separation, the employee continued to work and earn wages that were never paid. Employers often lose such cases if they cannot document that the employee received clear notice that he or she was no longer on the payroll. For this reason, it is generally a good precaution to issue employees a formal notice of work separation listing the ending date of employment, clearly explaining that the employee is no longer an employee and is no longer on the payroll after that date, and letting the employee know when the company will issue the final paycheck. Give the separation notice to the employee in a manner that is documentable and verifiable, because if the employee decides later to claim that no one told him or her that they were no longer on the payroll, and that they were performing some kind of vague and usually unverifiable "duties" for the company, the employer may find itself unable to effectively counter such a claim.

The federal and Texas wage and hour laws are very technical and generally employee-oriented, so it is no wonder that many employers have problems complying with all of the requirements. However, getting pay-related agreements in writing, and sticking to written policies and agreements, should help an employer avoid the majority of wage claim situations that might arise.

LEGAL ISSUES FOR MILITARY LEAVE

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 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. Generally, a job must be held open for up to five years, but during times of a declared national emergency, the time for holding the job open must be extended until the emergency declaration is revoked. This is relevant because the national emergency declared on September 14, 2001 is still in effect.
- The law gives that protection to every type and variety of employee.
- 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.
- If a replacement employee is laid off due to the rehiring of a veteran and files an unemployment claim, Texas law allows the employer to obtain protection from chargeback of such unemployment benefits.
- 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 reserves or National Guard.
- Employers must make up to 24 months of continued health plan coverage available to employees under COBRA when they are absent on military leave. 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 leave.
- 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 has a very detailed fact sheet on employers' responsibilities under USERRA on its Web site at http://www.dol.gov/vets/programs/userra/userra_fs.htm. Employers may also call the Veterans' Employment and Training Service for Texas at 512-463-2814 for assistance with USERRA issues.

Military Leave Documentation

- The basic documentation that can be furnished at the time of giving notice of military duty leave may take any format. Notice of military duty can be oral or written. See DOL regulation 20 C.F.R. § 1002.085.
- Documentation to support reemployment upon the employee's return from military duty may be required by an employer - see DOL regulation 20 C.F.R. § 1002.121.
- DOL regulation 20 C.F.R. § 1002.122 excuses late submission of reemployment-related military paperwork, as long as the delay is not attributable to the employee.
- Reemployment documents are listed in 20 C.F.R. § 1002.123.
- The Department of Defense regulation on this subject is 32 C.F.R. § 104.6(a)(2)(i)(A) - it strongly encourages employees to give written notice of deployment or duty "since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled".
- Another subsection of that same regulation encourages prompt notice, preferably at least 30 days in advance: 32 C.F.R. § 104.6(a)(2)(i)(B) - "Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. DoD strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."
- DOD has a sample written notice form for employees to use – it is online at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=6905e581c5125c925a25e177f5632911&rgn=div9&view=text&node=32:1.1.1.4.53.0.58.7.46&idno=32.

Duty to Pay Wages?

USERRA does not guarantee benefits or compensation that

would not have been paid in any event to 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 military-duty employee leaves for military training in the middle of the week, and the company requires 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 letting an employee on military leave 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 leave. 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

The U.S. Department of Labor issued an important policy memorandum on July 22, 2002, pertaining to military veterans and their rights under the Family and Medical Leave Act. 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 out the 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 leave, 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 FMLA regulation 29 C.F.R. § 825.126). The U.S. Department of Labor has made a poster on the new law available at http://www.dol.gov/whd/fmla/NDAAAmndmnts.pdf.
- The NDAA of 2008 also created 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; the NDAA also put an outside limit of 26 weeks of all types of FMLA leave in a "single 12-month period" - see http://www.dol.gov/whd/fmla/NDAAAmndmnts.pdf and FMLA regulation 29 C.F.R. § 825.127(c).

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 an unpaid suspension for a violation of a safety rule of major significance (example from the regulations: lighting a match in a coal mine). Partial-day deductions from leave and compensatory time balances are OK, according to many different 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 in the case of suspensions without pay for infractions of workplace conduct rules, pursuant to a written policy that applies 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, holiday, "bad weather day," and the like), or a disciplinary suspension for a reason other than a 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 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, ensure that your 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 exempt salaried employees - rationale: if an exempt salaried employee 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 "burn" any leave time at all? Although difficult to quantify, morale and turnover issues definitely matter.

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.

Remember, just because the FLSA allows a pay deduction doesn't necessarily mean that an employer can make it without further adieu. 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 employee 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 all you have to do is verify that the deduction in question is one of those that is allowable under the FLSA as noted above. There should also be a reference to that in the paid leave policies as well.

EMPLOYEE PRIVACY RIGHTS AND IDENTITY THEFT

We live in a wonderful age in which information flows quickly and abundantly, giving savvy businesses a better chance to stay on top of things, effectively manage change, and anticipate future trends. Much of the improvement in the speed and availability of information is due to advances in computers and to the growth of the Internet. However, our information and technology resources have a dark side that many do not yet realize is there, an aspect that some are all too willing and able to exploit. That aspect is invasion of privacy, the potential for which has never been greater than now and can only grow in the future.

There are several areas of concern, some of which have to do with privacy issues in the workplace, some with privacy in our personal lives, and some with both our work and private lives. This article is meant to introduce you to some of the privacy issues that will be of increasing importance to employers and employees.

First, we make a few assumptions that we think are widely acknowledged. Employers are custodians of a great amount of personal and private information relating to their employees. A related fact is that like it or not, employees depend upon their employers to do the right thing with that information. Finally, there are many reasons why third parties want to get at that information, some bureaucratic, some financial, some nosy, and some even downright dangerous.

In dealing with these realities, employers should try their best to keep some important basic principles in mind:

- Good starting point: all information relating to an employee's personal characteristics or family matters is private and confidential.
- Information relating to an employee should be released only on a need-to-know basis, or if a law or court requires the release of the information.
- All information requests concerning employees should go through a central information release office within your organization.

Common Misconceptions

Many employers and employees share common misconceptions about privacy in the workplace. One widely-heard misconception is that either the "Freedom of Information Act" or the "Privacy Act" forbids a company from releasing an employee's personal information, including a Social Security number (SSN). In actuality, those federal laws generally do not apply to a private employer's actions. They either obligate federal government agencies to release, or forbid them from releasing, certain private information about citizens to outside parties. Without significant exception, employee information furnished by employers to federal agencies, such as with payroll information to the IRS, is exempt from public disclosure.

What about Texas state law? The Texas equivalent to the Freedom of Information Act is the Public Information Act (PIA - formerly known as the Open Records Act). It, like the FOIA, applies only to government agencies. Private employers are not covered. Now, it is well-known that employers must furnish payroll information to the TWC in the form of wage reports. The private information, i.e., information tied to specific employees, is exempt from disclosure under the PIA. That means, among other things, that TWC is not permitted to release sensitive employee (or company) information to the public.

Can private companies be forced to reveal private information concerning employees? Generally not, although under certain circumstances, a company could be ordered by a court to turn over certain employee information to either the court or to the other side in a lawsuit. Even with that, your attorney would still be able to argue for limitations on the release or use of such information.

Where's the Danger?

Most risk associated with invasion of privacy stems from loose, ill-advised practices on the part of an employer. Employers sometimes pay much more attention to protecting business secrets than they do to protecting their employees' privacy. In reality, employees are among the greatest assets of any company, and an employer should put as much care into protecting their privacy as it does into protecting its trade secrets from disclosure.

The worst type of invasion of privacy is probably "identity theft", in which someone else using a victim's personal information incurs obligations in the victim's name, leaving that person with a tangle of financial problems to sort out. In a recent incident, a dishonest former employee found a box full of employee personnel information lying completely open and unattended in an ordinary company warehouse. She took the information, mainly name, address, birth date, next-of-kin, and SSN records, and used it to apply for fake credit cards and other credit applications for herself and some like-minded cronies. The company's employees starting getting collection calls from various credit bureaus and stores, wanting to know why bills they had never heard of had not been paid. It took quite some time before the affected employees even realized they were all more or less in the same boat. After much investigation, time, and trouble, most of the credit problems

were sorted out, and the former employee was arrested. However, many of the employees are still having to explain the situation to credit companies and banks.

A similar thing happened in the case of an employee whose personal information was given out over the phone to a caller who claimed to be checking on a credit report. That person sold the information to a network of fraudulent operators, and multiple bogus credit cards were issued in the employee's name to several different people. The resulting credit card bill avalanche is still being sorted out by civil and criminal investigators in two states.

Much worse was the case of a person who lost his driver's license, reported in the February, 2000 issue of "HR News", the journal of the Society for Human Resource Management. Apparently, a thief picked the license up and used it to establish a new identity. Somehow, it got associated with the victim's SSN, and after the thief racked up some other criminal acts, the victim's identity was thoroughly tainted. He first noticed problems when applying for another job – an employer that seemed very interested suddenly refused to return his calls. Persisting, he was finally told to never contact the company again, since he was an "unsavory character". Even after years of trying to set things straight, even with a letter from the police stating that he had committed no crime, he still could not get a job.

Texas employers need to be aware of a new statutory provision that became law in 2003 and took full effect on January 1, 2006, having to do with use of social security numbers as employee identifiers. Texas Business & Commerce Code § 501.001(a, b) are the most relevant provisions, generally prohibiting an employer from printing employee SSNs on any materials sent by mail, which of course includes paychecks sent by mail. There is a "safe harbor" for printing the SSN on paychecks if 1) that was the practice prior to January 1, 2005, and 2) the employer makes an annual disclosure to the employee that upon the employee's written request, the SSN will no longer be included the paychecks. An exception also exists for the mailing of IRS- and TWC-related forms, such as W-2s and quarterly wage reports, and any other official government forms that require the employer to include SSNs.

Another Texas law, Business & Commerce Code § 521.053, requires a business that loses sensitive personal information of customers, employees, or others through hacking or other means of unauthorized acquisition by others to promptly notify the victims of such a breach of security, so that the victims can take steps to protect themselves from identity theft.

Finally, Business & Commerce Code § 503.001 governs the use of biometric identifiers for commercial purposes, which would include the use of identifiers such as fingerprints, voiceprint, retinal or iris scans, and facial recognition data for access, time-tracking, and other employment-related uses. That law requires prior notice to and consent from employees before employers obtain such information. Further, such information may not be sold or disclosed to another person unless the employee consents for identification purposes in the event of the employee's disappearance or death, or else the disclosure is required or permitted by law. The biometric information must be destroyed no later than one year after the need for the identifier ends (such as the separation from employment of that employee), or within one year of the last date that the particular record is required by law to be kept. Violations of this statute may be subject to a civil penalty of up to $25,000 for each occurrence.

Identity theft is a federal crime, regarded as a felony offense and punishable by a fine, time in prison, and/or restitution to the victim. Any suspected misuse of personal data should be reported to the Federal Trade Commission (FTC) at 1-877-438-4338 (toll-free call) for assistance.

Other Forms of Privacy Invasion

Employers must also be concerned with newer technology such as camera phones (also known as cell phone cameras), digital cameras, and digital movie recorders. In just a few seconds, 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. Similarly, such technology can be used to quickly and efficiently conduct industrial espionage. Many employers are now banning the use of such devices in the workplace unless the company has given the employee express permission to use them. 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. For an example of how such a policy might be worded, see the sample policy titled "Internet, E-Mail, and Computer Usage Policy" in the companion book "The A-Z of Personnel Policies."

MONITORING EMPLOYEES' USE OF COMPANY COMPUTERS AND THE INTERNET

Business-related use of the Internet has grown by leaps and bounds in the last few years. At the same time, more and more employees must use computers in their work at least part, if not all, of the time. All in all, this increasing use of technology has helped fuel an unprecedented expansion of the state and national economies. However, along with the benefits, there are several risks for employers. This article will examine some of the basic issues and offer some solutions to business owners who are mindful of the risks involved. First, let's look at some of the risks of the electronic revolution.

Electronic Mail

Electronic mail, or e-mail, has become the communication medium of choice for many employees and businesses. No one doubts its time-saving qualities, but employers must consider the dangers as well:

- Employers can be liable for employees' misuse of company e-mail
- Sexual, racial, and other forms of harassment can be done by e-mail
- Threats of violence via e-mail
- Theft or unauthorized disclosure of company information via e-mail
- E-mail spreads viruses very well

Internet

The Internet is like a super-network connecting countless other computer networks around the world. Literally millions of computers are connected to this vast resource. Every imaginable type of information is available on the Internet if one knows where and how to search for it. As with any kind of resource, it has its good and bad sides. Not surprisingly, employers have had some problems with employees' use of the Internet:

- Unauthorized access into for-pay sites
- Sexual harassment charges from display of pornographic or obscene materials found on some sites
- Trademark and copyright infringement problems from improper use or dissemination of materials owned by an outside party
- Too much time wasted surfing the World Wide Web
- Viruses in downloads of software and other materials from Web sites

Company Computers

Even with company computers that are not connected to the Internet, employers are finding problems with employees abusing the privilege of having computers to use at work:

- Software piracy - employees making unauthorized copies of company-provided software
- Unauthorized access into company databases
- Use of unauthorized software from home on company computers
- Sabotage of company files and records
- Excessive time spent on computer games
- Employees using company computers to produce materials for their own personal businesses or private use

Many employers wonder what they can do to protect themselves against these kinds of risks and to ensure that company computers and networks are used for their intended purposes. Fortunately, Texas and federal law are both very flexible for companies in that regard. With the right kind of policy, employers have the right to monitor employees' use of e-mail, the Internet, and company computers at work. Doing so successfully requires both a good policy and knowledge of how computers and the Internet work.

Policy Issues

Monitoring employees' use of company computers, e-mail, and the Internet involve the same basic issues as come into play with general searches at work, telephone monitoring, and video surveillance. Those basic issues revolve around letting employees know that as far as work is concerned, they have no expectation of privacy in their use of company premises, facilities, or resources, and they are subject to monitoring at all times. Naturally, reason and common sense supply some understandable limitations, such as no video cameras in employee restrooms, and no forced searches of someone's clothing or body, but beyond that, almost anything is possible in the areas of searches and monitoring. Let's turn to some specifics.

Every employer needs to have a detailed policy regarding use of company computers and resources accessed with computers, such as e-mail, Internet, and the company intranet, if one exists. Each employee must sign the policy – it can be made a condition of continued employment. The policy should cover certain things:

- Define computers, e-mail, Internet, and so on as broadly

as possible, with specifics given, but not limited to such specifics
- Define the prohibited actions as broadly as possible, with specifics given, but not limited to such actions
- Remind employees that not only job loss, but also civil liability and criminal prosecution may result from certain actions (illegal pornography, participation in spamming operations or other scams, involvement in computer hacking (see 18 U.S.C. § 1030, among other laws))
- Company needs to reserve the right to monitor all computer usage at all times for compliance with the policy
- Right to inspect an employee's computer, HD, floppy disks, and other media at any time
- Right to withdraw access to computers, Internet, e-mail if needed
- Consider regulating camera phones (also called cell phone cameras); such phones have been implicated in gross invasions of other employees' privacy and in theft of company secrets
- Make sure employees know they have no reasonable expectation of privacy in their use of the company's electronic resources, since it is all company property and to be used only for job-related purposes

How to Monitor Compliance

Here is where you as an employer must know at least a few things about computers and the Internet. Naturally, you will leave many of the technical details to certain trusted computer experts on your staff, or you can contract with one of any number of private computer services companies out there. However, you should be armed with some technical knowledge so that you can make better use of the experts' time and be able to tell whether your efforts are successful.

Have your information technology department or computer person set up software monitoring capabilities. Some software can only detect which computer was used on a network, not who used it. An alternative would be to set up a "proxy server" – users have to log in with their own user names and passwords. With regard to the Internet, specific sites can be blocked by Web site addresses and keywords. Some software can analyze the hard drive of each computer on a network, thus establishing who might have unauthorized software or files on their computer.

Where to look for unauthorized computer and Internet activity? On PCs, look in C:\Windows\ for the following folders:
- Cookies - contains "cookies" left on the employee's computer during visits to Web sites - cookies are little files that let Web sites know whether someone has visited the site before
- History - this records the name and Web address of every site visited by the employee
- Temporary Internet Files - this folder contains a copy of every Web page, graphic image, button, and script file found in or on each Web page visited by the employee
- Start Menu: "Documents" – this shows what is in the user's "Recent" folder (recently-opened or recently-used files)

On Macintosh computers, look in the folder for the ISP (Internet Service Provider), then in the folder for the Web browser, then in either "Cache f" or the above names, depending upon what browser the employee uses. The "Apple" menu on Macs also has a "Recent" folder that shows what files the employee has worked on most recently.

With the files found in the above folders, it is possible to reconstruct an employee's entire Web surfing session.

Other places on the computer may yield clues. On PCs, look in the "Recycle Bin" – some people forget to empty that folder when they delete files. Using whatever graphics application you find on the computer, click "File" and look at the recent files in use - you may be surprised at what images the employee has viewed. On Macs, look under "Recent Documents" or double-click the "Trash" icon to see deleted files.

There are some warning signs for computer abuse:
- the employee spends a lot of time online, more than is reasonably needed for the job, yet is strangely non-productive
- you hear a lot of hurried clicking as you approach, and the employee greets you with a red face
- the Temporary Internet Files folder is filled to capacity
- the employee's computer crashes more than anyone else's – viruses and excessive demands on RAM
- an increase in spam e-mail from employees leaving their addresses all over the Internet ("spam" is unsolicited commercial e-mail).

Why Companies Should Be Concerned

Abuse of company computers, networks, and the Internet can leave a company at real risk for an employee's wrongful actions. If an employment claim or lawsuit is filed, it is standard for plaintiff's lawyers and administrative agencies to ask to inspect computer records. Deleting computer files does not completely erase the files – there are many traces left on the user's computer, and forensic computer experts can easily find such traces and use them against a company. Tools exist to make data unretrievable, but not many people are aware of such tools or of how to use them.

An employee in a large semiconductor manufacturing firm was arrested several years ago on charges relating to illicit photos of children after a coworker alerted company managers and the managers called law enforcement authorities. Upon

detailed inspection, his office computer was found to have hundreds of illegal images stored on the hard drive. The company's quick action probably prevented what could have been legal problems for the employer itself. In a Central Texas county, a sheriff's department employee was fired after many sexually explicit images were found on his office computer. The department had no problem searching his computer, since it had a well-written policy regarding computer and Internet usage.

The expectation of privacy in workplace electronic systems is important even in the criminal justice context. In the case of *U.S. v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007), *en banc rehearing denied*, 497 F.3d 890 (2007), the Ninth Circuit Court of Appeals found that despite an expectation of privacy in work computers (absent a clear policy to the contrary), the employer can give consent to official searches of such computers, so illegal photos of children found on an employee's office computer are admissible as evidence in a criminal case. In a very similar case, *U.S. v. Barrows*, 481 F.3d 1246 (10th Cir. 2007), the Tenth Circuit held that the same result applies, even if the computer is the personal property of the defendant, if the defendant brought the computer to work and took no steps to shield its contents from public inspection (important facts: the defendant used the personal laptop for his work and connected it to the employer's network).

Focus on E-Mail

A good e-mail policy will let employees know that the company's e-mail system is to be used for business purposes only* and that any illegal, harassing, or other unwelcome use of e-mail can result in severe disciplinary action. Let employees know that monitoring will be done for whatever purposes. If unauthorized personal use is detected, note the incident and handle it as any other policy violation would be handled. Whatever you do, do not allow employees' personal e-mail to be circulated at random by curious or nosy employees. Such a practice could potentially lead to defamation and invasion of privacy lawsuits. Have your computer experts attach a disclaimer to all outgoing company e-mail that warns of the company's monitoring policy, lets possible unintended recipients know that confidential company information might be included, and disavows liability for individual misuse or non-official use of e-mail. Here is an example of such a disclaimer:

IMPORTANT MESSAGE

Internet communications are not secure, and therefore ABC Company does not accept legal responsibility for the contents of this message. However, ABC Company reserves the right to monitor the transmission of this message and to take corrective action against any misuse or abuse of its e-mail system or other components of its network.

The information contained in this e-mail is confidential and may be legally privileged. It is intended solely for the addressee. If you are not the intended recipient, any disclosure, copying, distribution, or any action or act of forbearance taken in reliance on it, is prohibited and may be unlawful. Any views expressed in this e-mail are those of the individual sender, except where the sender specifically states them to be the views of ABC Company or of any of its affiliates or subsidiaries.

END OF DISCLAIMER

* Under recent NLRB rulings, employees have the right to use company e-mail systems during non-duty times to discuss with coworkers their terms and conditions of employment. The sample computer, e-mail, and Internet use policy in the "The A-Z of Personnel Policies" section of this book includes a note to that effect.

Court Action

A significant court case in the area of e-mail is *McLaren v. Microsoft Corp.* (No. 05-97-00824-CV, 1999 WL 339015 (Tex.App. - Dallas 1999, no pet.)), in which a state appeals court in Dallas ruled that an employee had no claim for invasion of privacy due to the employer's review and distribution of the employee's e-mail. The court noted that having a password does not create reasonable expectation of privacy for an employee, and that since the e-mail system belonged to the company and was there to help the employee do his job, the e-mail messages were not employee's personal property. In addition, the court observed that the employee should not have been surprised that the company would look at the e-mail messages, since he had already told the employer that some of his e-mails were relevant to a pending investigation.

Another court ruled in 2001 that an employer did not violate the federal law known as the Electronic Communications Privacy Act of 1986 (amended by the USA Patriot Act in 2001) when it retrieved an employee's e-mail sent on a company computer to a competitor company in order to encourage the competitor to go after the employer's customers (*Fraser v. Nationwide Mutual Insurance Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001)). The employee had sent the e-mail, the recipient at the competitor company had received it, and so the employer had not intercepted the e-mail while it was being sent, which is the only thing protected by the ECPA. On December 10, 2003, the Third Circuit Court of Appeals affirmed that part of the federal district court's judgment (352 F.3d 107).

The New Jersey Supreme Court issued a decision in March, 2010 illustrating how important the company's e-mail policy is in determining whether an employee has a reasonable

expectation of privacy in e-mail communications and whether an employer steps over the line when reading or monitoring such communications. In *Stengart v. Loving Care Agency*, 990 A.2d 650 (New Jersey 2010), the ex-employee had used a company laptop to communicate with her attorney via a web-based e-mail system in which she had a personal, password-protected account; she did not store the password on the computer. After she left the company, the employer hired a computer forensics expert to make a mirror image of the hard drive. Inspection of the hard drive revealed the e-mails, which the company and its attorney read and used in the course of responding to the employee's lawsuit, even though they were clearly communications between the ex-employee and her attorney, and the e-mails included a standard disclaimer about unauthorized recipients being obligated to destroy the communication, not review it, and notify the sender of the error. The company had a fairly broad computer use policy, but did not define what types of e-mails might be covered, allowed "occasional" personal use of company computers without a notice that any such use would be subject to monitoring, and did not warn employees that information sent, received, or viewed on the computer is stored on the hard drive by the computer's software. Based upon the policy's ambiguity, and on the importance of upholding the principle of attorney-client privilege, the Court ruled that the company's action was an invasion of the employee's privacy and that the company's attorney could potentially be subject to discipline under rules regarding attorney conduct. For a similar case, see *Pure Power Boot Camp, Inc. et al, v. Warrior Fitness Boot Camp, L.L.C., et al.*, 759 F.Supp.2d 417 (S.D.N.Y. 2010).

An important note here: an employer can do anything with e-mail messages sent and received on company computers, even including intercepting them during the process of transmitting or receiving, as long as it has notified employees that they have no expectation of privacy in the use of the company e-mail system, that all use of the e-mail system may be monitored at any time with or without notice, and that any and all messages sent, relayed, or received with the company's e-mail system are the property of the company and may be subject to company review at any time. All employees may be required to sign a policy acknowledging that they have no expectation of privacy in anything they do on work computers and authorizing the employer to monitor, view, intercept, inspect, copy, store, and further distribute any transmissions that employees send or receive using company electronic equipment or Internet access. For an example of how such a policy might be worded, see the sample policy titled "Internet, E-Mail, and Computer Usage Policy" in the "The A-Z of Personnel Policies" section of this book.

Evidence of Misconduct

If an employee is disciplined or discharged based upon computer or Internet problems, have your company computer experts collect both digital and printed copies of whatever e-mail messages or computer files contain evidence of the violations. The evidence can then be used to defend against various kinds of administrative claims and lawsuits, such as an unemployment claim or discrimination lawsuit.

Conclusion

For business owners, technology makes things both easier and harder. Every company has to ensure that its electronic resources are used properly and not abused by employees. The more that you as an employer know about computers and the Internet, the better off, and safer, your company will be.

MONITORING EMPLOYEES' TELEPHONE USE

Some employers concerned with excessive use of business phones for personal calls adopt policies allowing them to monitor employees' calls that are made over company phone lines. Other companies may need to monitor employees' phone calls in order to evaluate customer service within their company. Whatever the reason for monitoring calls by employees, employers need to be aware of certain legal issues. One is that an employer has the right to monitor its own phone system in order to ensure that employees are using the system for its intended purposes (this right involves the so-called "business extension exception" to the federal wiretapping law – see 18 U.S.C. § 2510(5)(a)). That means that employers have the basic right to listen in on calls, and even record the calls; however, due to the federal law known as the Electronic Communications Privacy Act (amended since by the USA Patriot Act of 2001), the employer needs to let the employees and the calling public know that such monitoring may be taking place. Another issue is that of invasion of privacy – an employer does not have the right to listen in on what are obviously private, personal conversations past the time that the nature of the call becomes clear. In other words, once an employer has established that an employee is discussing private matters over the phone, it should not continue listening after that point. The appropriate thing to do if such a call violates the employer's policy is to document the incident and treat it as a disciplinary matter. Not all situations in which private matters are overheard will constitute the common-law offense of invasion of privacy, but employers should be careful and give personal discussions a wide berth. In general, if an employer eavesdrops on a clearly private phone call and overhears personal, intimate, private details about a person's life, and a reasonable person would find that the disclosure of such information is offensive or embarrassing, the employer would be at risk in an invasion of privacy lawsuit. A final issue is that of consistency. As with any employer policy, a phone use policy should be reasonable, should strike a balance between the needs of the company and the needs of the employees, and should be enforced in a fair and consistent manner. Giving proper attention to those issues should enable a company to ensure that its phones are used in the most business-efficient way possible.

Not many court rulings exist on the issue of telephone monitoring in workplaces; the following cases illustrate the important things to keep in mind. In the case of *Simmons v. Southwestern Bell Tel. Co.*, 452 F.Supp. 392 (W.D. Okl.1978), affirmed, 611 F.2d 342 (10th Cir. 1979), the court held that an employee had no expectation of privacy in making personal calls from a testdesk telephone that was dedicated to business use only, especially since he was under a policy prohibiting personal use of such a phone and had been warned for making such calls from that phone, and the company had the right under that policy to monitor any and all calls to and from the phone in question, including the employee's personal calls. In *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979), the Tenth Circuit Court of Appeals held that " ... the evidentiary matter before the trial court when it granted summary judgment in favor of the defendant on the wire interception claim showed that the defendant had requested the telephone company to install a monitoring device which would permit the defendant to listen in on telephone conversations between its employees and its advertisers, and others. This was a part of the service rendered by the phone company on request. As indicated, the reason for the installation was the concern by management over abusive language used by irate customers when called upon to pay their bills, coupled with the possible need to give further training and supervision to employees dealing with the public. The installation was not done surreptitiously. Rather, all employees were advised in advance, in writing, of the proposed installation, and there was no protest. In our view, the present case comes squarely within the exception provided in 18 U.S.C. § 2510(5)(a), and it is on this basis that we affirm the summary judgment granted the defendant on the second claim." In 1980, the Fifth Circuit mentioned the James case with approval and noted that " ... interception of calls reasonably suspected to involve non-business matters might be justifiable by an employer who had had difficulty controlling personal use of business equipment through warnings. ... Were the business justification less compelling, the absence of any company policy or prior warnings concerning use of company telephones might be more significant." *Briggs v. American Air Filter Co.*, Inc., 630 F.2d 414 (5th Cir. 1980), notes 8-10.

The Eleventh Circuit's 1983 decision in *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, favorably noted the *Briggs* case and stands for the proposition that an employer should not listen to a personal call any longer than it takes to establish that it is not a business call: "The consent and business extension exemptions are analytically separate. Consent may be obtained for any interceptions, and the business or personal nature of the call is entirely irrelevant. Conversely, the business extension exemption operates without regard to consent. ... This consent (to a policy on monitoring of sales calls) included the inadvertent interception of a personal call, but only for as long as necessary to determine the nature of the call. So, if [the supervisor's] interception went beyond the point necessary to determine the nature of the call, it went beyond the scope of Watkins' actual consent. (*Watkins*, 581) ... We hold that a personal call may not be intercepted in the ordinary course of business under the exemption in section 2510(5)(a)(i), except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not. In other words, a personal call may be

intercepted in the ordinary course of business to determine its nature, but never its contents. (Watkins, 583)."

A more recent case is an unpublished 2000 decision from a federal district court in northern Texas, *Oyoyo v. Baylor Health Network, Inc.*, No. Civ. A. 3:99CV0569L, 2000 WL 655427 (N.D. Tex., May 17, 2000). The company in that case had reviewed the employee's telephone records and monitored her phone calls. It had also made photocopies of her personal calendar in her office. The employee sued for alleged invasion of privacy on the employer's part. The federal district court ruled in the employer's favor, holding that the employer's actions were not unreasonable. First, the company provided the phone to the employee for business purposes – it was not the employee's personal phone. Second, the employer had been concerned about the employee's alleged non-business use of the phone (excessive personal calls, including personal long-distance calls made on the company phone). Third, the employee had posted her personal calendar on her office wall, thus showing that she herself did not consider it to be private. When the supervisor noticed that the employee had written derogatory comments on the calendar, she photocopied the pages for documentation. As the court observed, an employee "cannot have any reasonable expectation of privacy in items that she admittedly made no effort to keep private." All in all, none of the employer's actions constituted invasion of privacy.

The above cases highlight the importance of letting employees know in a written policy exactly what kind of telephone monitoring the company will do. If the company tells employees that all phone calls, whether business or personal, will be monitored, and the employee consents by signing the policy and remaining with the company, then any monitoring will be allowed, and the business extension exception to the wiretapping statutes will not be relevant or needed. If the company's policy provides only for monitoring of business calls (quality assurance, training, random sampling of customer service, and so on), then the business extension exception will apply, and the company may listen in on any calls, but must stop listening as soon as it becomes apparent that a call is personal. The company may make a record of how many personal calls an employee receives, and may take corrective action toward an employee based upon excessive personal calls, but should not listen to such calls any longer than necessary. As in all aspects of employee relations, a good policy and good documentation are key to handling telephone monitoring in an appropriate manner.

GENERAL RECORDKEEPING REQUIREMENTS

Most Texas and federal laws have recordkeeping requirements for employers. The requirements center around three main duties:

1. The basic duty to keep certain kinds of records;
2. The duty to keep records in a certain form and readily available for inspection; and
3. The duty to keep the records for a specified period of time.

This brief article will focus on the third set of requirements, i.e., how long employers should maintain records under various laws. [*Note: not all records that apply to all companies are covered here. The types of records listed below are only the most common ones that apply to the majority of companies. Specialized records for certain highly-regulated industries will have their own retention requirements. Employers maintaining such records should consult their regulatory agencies for detailed information concerning those records.*]

Statutory Requirements

- Wage and hour laws (FLSA) - while some payroll records need be kept only two years (29 C.F.R. § 516.6), most must be kept for at least three years (29 C.F.R. § 516.5); to be safe, keep all payroll records for at least three years after the date of the last payroll check (but see the four-year requirement under Texas' unemployment compensation rules (40 T.A.C. § 815.106(i))).
- Unemployment compensation - keep all records relating to employees' wages and other compensation, as well as all unemployment tax records, for at least four years (40 T.A.C. § 815.106(i)).
- Family and Medical Leave (FMLA) - keep all payroll, benefit, and leave-related documentation for at least three years after conclusion of the leave event (29 C.F.R. § 825.500(b)).
- I-9 records - keep all I-9 records for at least three years following the date of hire, or for one year following the employee's date of last work, whichever point is reached last (8 C.F.R. § 274a.2(b)(2)(A)).
- New Hire reporting - report all new hire information within 20 days of hire (1 T.A.C. § 55.303(d)).
- Hiring documentation - under EEOC rules, all records relating to the hiring process must be kept for at least one year following the date the employee was hired for the position in question; if a claim or lawsuit is filed, the records must be kept while the action is pending (29 C.F.R. § 1602.14).
- Disability-related records (ADA) - keep all ADA-related accommodation documentation for at least one year following the date the document was created or the personnel action was taken, whichever comes last (29 C.F.R. § 1602.14).
- Benefit-related information (ERISA and HIPAA) - generally, keep ERISA- and HIPAA-related documents for at least six years following the creation of the documents (29 U.S.C. § 1027 and 45 C.F.R. § 164.530(j)(2)).
- Age-discrimination documentation (ADEA) - keep payroll records for at least three years, and any other documents relating to personnel actions for at least one year, or during the pendency of a claim or lawsuit (same as the requirements for payroll records and ADA documentation).
- OSHA records - keep OSHA-related records for at least five years (29 C.F.R. § 1904.33(a)).
- Hazardous materials records - keep these for at least thirty years following the date of an employee's separation from employment, due to the long latency period for some types of illnesses caused by exposure to hazardous materials (Texas Health and Safety Code, § 502.005(d)).
- State discrimination laws - keep all personnel records for at least one year following an employee's last day of work (same as EEOC timeline, as per Texas Labor Code, § 21.303).
- IRS payroll tax-related records - keep these records for at least four years following the period covered by the records.

Common Law Requirements

There are no common law requirements as such for how long employers should keep certain kinds of records. However, there is a practical aspect to the issue: each common law cause of action is subject to a specific statute of limitations, meaning that there is a time limit within which such a cause of action must be brought, or else it is "time-barred". The most common causes of action in the category of common law include defamation, intentional infliction of emotional distress, breach of contract, fraud, tortious interference with an employment relationship, and invasion of privacy. The statutes of limitation vary widely and range from one to four years under Texas law.

Other Needs

Companies that offer certain types of retirement benefits will need to be able to verify and tabulate the earnings that retirees had while employed, and the need for that could arise decades after the pay was earned. Similarly, pay-disparity lawsuits under the Lily Ledbetter Fair Pay Act of 2009 could be filed 10, 20, or more years after an alleged act of discrimination occurs, and evidence of

specific earnings amounts could be quite important to the company's case. Thus, with regard to earnings amounts and dates, it might be best to find a way to keep such records in digital format on media that can last a very long time. See also EEOC regulation 29 C.F.R. § 1620.32.

How to Deal With So Many Time Limits

Clearly, there are many different recordkeeping requirements for different situations. Employers can rightly wonder whether they can be in good shape under one requirement, but out of compliance under another law. For that reason, most employment law attorneys advise their clients to keep all employment-related records for at least seven years following the date of an employee's work separation. Doing that will exhaust all possible statutes of limitation for various common law causes of action in Texas, and will keep an employer safe under federal and Texas statutes as well. The only exception is fairly easy to remember: if any employees are exposed to hazardous materials, keep the documentation relating to the exposure for at least thirty (30) years following the employee's work separation.

Conclusion

While some employers view the recordkeeping requirements as a bothersome hassle, the fact is that for an employer that complies with the laws, the records are the company's best friend in a claim or lawsuit situation. Properly-maintained records increase an employer's credibility and help the employer prove that it complied with state and federal laws with respect to its employees.

HARASSMENT ISSUES IN UNEMPLOYMENT CLAIMS

Harassment issues are common in unemployment claims. They manifest themselves in two main ways. First, employees who quit because of alleged harassment will have to show that the harassment gave them good cause connected with the work to quit when they did if they want to avoid disqualification. Second, employees who are fired for allegedly harassing other employees can be disqualified if their employers prove that the harassment occurred and show how the employees knew or should have known they could be fired for such a reason. For various reasons, employers have trouble defending against these kinds of claims.

Employees Who Quit Due to Alleged Harassment

There are many kinds of harassment: racial, sexual, religious, ethnic, age-based, disability-based, and general harassment or bullying. Any smart employer will do its best to prevent harassment of any kind from occurring, not only because it can cause good employees to quit and the others to develop morale problems, but also because harassment often makes employers liable under federal and state laws. Here is a list of the best things to do, starting with the very best:

1. ***Prevention.*** Preventing harassment in the first place is by far the ideal solution. Maintain a work atmosphere in which employees feel accepted and supported and in which everyone knows that harassment of any kind will not be tolerated. Have all employees attend education programs to train them on the many forms harassment can take and how the company will help them respond to any such problems.

2. ***Investigation and Action.*** Let employees know how to report harassment and that it is not only their right, but their duty, to report harassment to responsible management whenever it happens to them or they witness it occurring. Investigate promptly. Take effective remedial action to prevent reoccurrences or retaliation. Document all the steps your company takes, and let the complaining employee know how important it is to you that they feel comfortable at work.

3. ***Defend against Claims.*** If you have taken the above steps, you should not have to worry very much about UI claims. Assuming you have taken the employee's complaint seriously, and have taken prompt, effective remedial action to prevent reoccurrences and retaliation, if the employee nonetheless quits, he or she will have a harder time proving that they had good cause connected with the work to quit. Use your documentation to show that you did the best you could to ensure that the complaint was dealt with effectively and that the employee was fairly treated.

If the employee quits without taking advantage of their rights under your harassment policy, you should argue that a reasonable employee would not have quit without affording the employer a chance to address their problems. If the employee quits without any notice whatsoever about the alleged problems, point that out and argue that your company had no opportunity at all to try to correct whatever problems allegedly existed.

In any voluntary leaving case involving alleged harassment, an essential witness will be whoever the alleged harasser is, unless you plan on conceding the fact that the harassment occurred. Other essential witnesses will be any employees who actually saw what went on between the employee who complained and the alleged harasser.

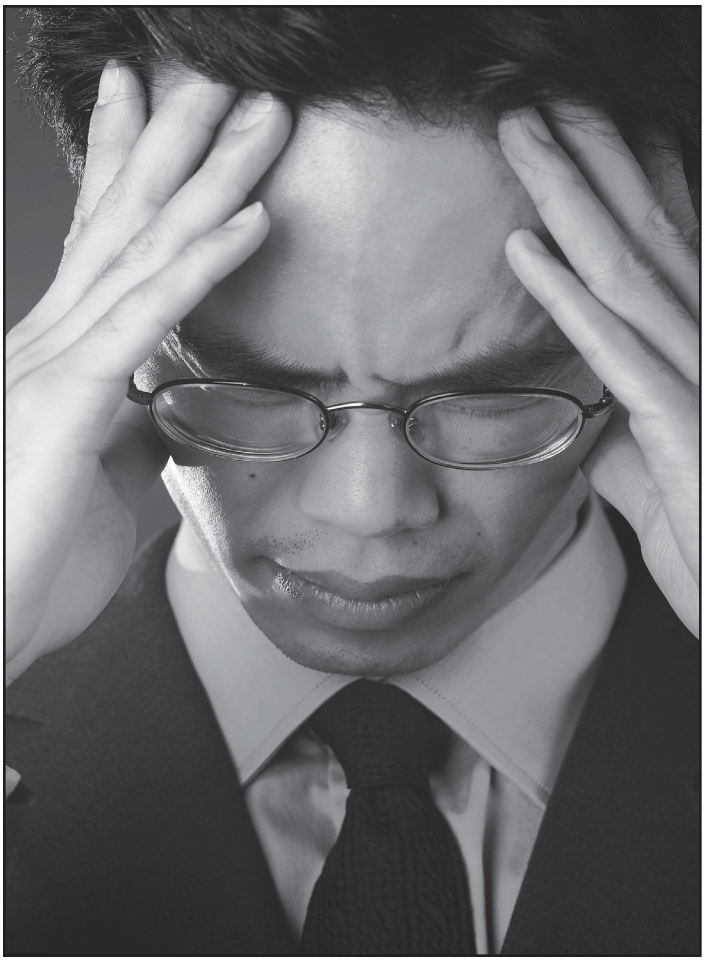
Employees Who Are Fired for Allegedly Committing Harassment

An employee should not be fired for alleged harassment until and unless a complete and thorough investigation is done that shows it more likely than not that the employee indeed violated your harassment policy. In harassment cases involving claimants who have been discharged, the following evidence is crucial:

1. Copy of your harassment policy
2. Proof that the claimant knew about the policy
3. Documentation of the investigation you did
4. Documentation of any prior counselings or warnings given to the claimant
5. Firsthand testimony from eyewitnesses to the harassment

The last category is where most employers lose their harassment cases. Many employers show up at the appeal hearings with only secondhand testimony from a human resources employee who is looking at file documents. Other employers present written statements from the employees who complained about harassment, but do not present those witnesses in person. Such employers always lose their appeals, ALWAYS, (as in every time), if the claimant is giving an otherwise credible denial of having committed any harassment. Here's point number 5 again: to win a harassment case, you must present firsthand testimony from eyewitnesses to the harassment. "Eyewitnesses" means exactly that: people who actually saw the harassment occur. In some cases, the only eyewitnesses will be the victims of the alleged harassment. Sometimes, other coworkers will have witnessed the harassment. Do not make the mistake, as some employers have, of thinking that the law requires you to keep the victims' identities confidential, even in the context of an administrative claim or lawsuit.

There is no law requiring confidentiality in such a context. Sometimes, employers do not present the victims as witnesses out of a desire to protect their feelings or safeguard them from retaliation by the claimant. Only you, the employer, can judge how important it is to protect the victims and/or prevail in an unemployment claim. Just remember: there is no form of evidence in a case like this that has greater weight than firsthand testimony subject to cross-examination. It may help to keep in mind that all appeal hearings are held by telephone (unless a party is hearing-impaired), and so the victims at least do not have to be in the same room as the claimant. Also, remember that criminal laws protect people from harassment, stalking, and assault - do not hesitate to consult the police if the danger of retaliation ever appears to become real.



HARASSMENT - MINIMIZING LIABILITY

Due to three key Supreme Court decisions on sexual harassment in 1998 (*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); and *Oncale v. Sundowner Offshore Services, Inc.*, 524 U.S. 75 (1998)), it is more important than ever before for employers to know how to minimize the chance of being held liable for harassment that violates federal and state discrimination laws. What applies to sexual harassment can easily be applied to other forms of harassment that violate discrimination laws, such as racial, ethnic, religious, age-based, and disability-based harassment. In all cases, liability can, under some circumstances, be unavoidable, and in other situations, it can be avoided, but in all instances, if proper steps are taken, it can be minimized.

The 1998 Supreme Court decisions had several key lessons:

4. Any sexual harassment between any employees can lead to liability, not just a man harassing a woman, or a woman harassing a man, but also a man sexually harassing another man, or a woman sexually harassing another woman.
5. If the harasser is in some kind of superior position in the company compared to the victim of the harassment, and a tangible job action occurs that is unfavorable for the employee, there is no way for the company to escape liability, even if it did not know of the harassment and had no way of knowing about it.
6. If the harasser is in some kind of superior position in the company compared to the victim of the harassment, but no tangible job action occurs that is unfavorable for the employee, the company can escape liability if it can show that it was not negligent in allowing the harassment to occur. See the discussion below.
7. If the harasser is not in a superior position in the company compared to the victim, the company can escape liability if it can show that it was not negligent in allowing the harassment to occur. See the discussion below.

How to Minimize the Risk of Liability in a Harassment Claim or Lawsuit

You will notice from the above points that a major weakness in a harassment claim involving harassment by supervisors against lower-ranking employees exists if a tangible job action results that is adverse to the employee. Make sure that authority to take actions such as termination, transfer, changes in shifts or duties, or changes in pay rests only with carefully-selected individuals, not with average supervisors, and that all employees know that! Further, you should ensure that any adverse job actions against employees are carefully reviewed before becoming effective.

You will also notice that a major defense to liability in a harassment claim or lawsuit is showing that your company was not negligent. The Supreme Court decisions reaffirm lower court rulings from around the country in stating that a company that takes certain steps can minimize the risk of liability for harassment:

First Step: Develop a Policy

Every company should adopt a clear written policy on harassment and make sure that every employee reads, understands, and agrees to the policy. The policy should:

- define harassment in its various forms;
- make it clear that no form of harassment will be tolerated;
- notify employees of how to report harassment;
- stress that it is not only a right, but a duty, to report harassment to responsible management;
- warn employees of the disciplinary actions that could result from violations of the policy; and
- provide a framework for investigation and remedial actions in harassment situations.

Concerning notification to employees of how to report harassment, the policy should provide for the situation of what to do if the alleged harasser is in the employee's chain of command. Many companies try to designate one specific employee, usually in the human resources department, to receive and handle all harassment allegations; the rationale behind that is to give employees the feeling that they will not have to put their jobs at risk by complaining to their supervisors, to encourage quality investigations by having a more neutral person handle them, and to ensure consistency in investigations and results.

Outside of the harassment policy context, your general personnel policy should make it clear to employees that ordinary supervisors do not have the power to hire and fire, to set pay or change pay, to transfer, to change shifts, or to deny promotions. Make it clear that such authority to take tangible job actions exists only with certain employees and that adverse job actions will be reviewed before becoming effective.

Second Step: Educate the Employees

Have all employees attend education programs to train them on the many forms harassment can take and how the company will help them respond to any such problems. The programs should go over the company's harassment policies in detail and ensure that each employee is familiar with the ways to report and deal with harassment. The company should place notices, in addition to the ones required under federal and

state laws, reminding employees about the policy and of the ways to report harassment.

Third Step: Prompt and Effective Remedial Action

Take prompt and effective remedial action to prevent reoccurrences or retaliation. Such action can include separation of the employees by temporary reassignment or transfer or letting the complaining employee or alleged harasser have paid time off. Whatever you do, do not do anything that would seem or appear to place the complaining employee in an unfavorable position. You might seriously consider asking the complaining employee what he or she would like to see happen to provide relief or remedy in the short term. However, you are not obligated to do whatever the employee demands. Do not accuse the alleged harasser of harassment at this stage, since unfounded accusations can boomerang against your company in the form of a defamation lawsuit. Simply inform the alleged harasser that an investigation will take place. Document all the steps your company takes, and let the complaining employee know how important it is to you that they feel comfortable at work.

Fourth Step: Investigate Thoroughly

Treat each harassment complaint seriously. Let the complaining employee know that the complaint will be investigated and dealt with. It is fairly common for an employee to complain and then to ask that no investigation be done, either to spare the harasser some job trouble or to spare the complainant the trouble of going through a troublesome process. Never make the mistake of honoring such a request! Tell the employee that the policy requires an investigation and that one will occur, and then do the investigation.

The investigation should involve not only the complaining employee and the alleged harasser, but also any employees who might have witnessed the harassment. When questioning employees, do not start out by asking "did you see John harass Mary?", because they might have seen something they do not consider harassment, but that would still be a matter of concern. Ask witnesses if they were in a certain area on a certain date, whether they noticed any other employees there, whether other employees were doing something that was perhaps out of place or questionable, and exactly what it was that they saw. That way, you are more likely to get candid answers, and you may turn up evidence of wrongdoing you did not suspect. Document the investigation: who was questioned, when, where, who else was present, what was said, and so on. Remind anyone who is questioned that they are to keep the investigation absolutely confidential and that revealing the allegations or discussions to anyone else could violate other employees' rights to privacy.
Keep the investigation documentation in a separate, confidential investigation file separate from the normal personnel file. This is to minimize the chance that unauthorized people will find out about the allegations and possibly publicize them in such a way that your company becomes liable to the alleged harasser for defamation.

Fifth Step: Take Action and Document It

At some point, you will have to decide what happened and whether some action beyond the temporary steps you have already taken is necessary. The law does not require you to find that harassment occurred. If the investigation does not justify such a finding, let the complaining employee know of your conclusions, thank him or her for using your process, and reassure the employee that no retaliation or harassment will occur as a result of the complaint being filed. If the finding is that harassment occurred, take the appropriate action under your policy. Some harassment may warrant termination, but other forms of harassment may merit only a counseling of the harasser, a formal warning, a permanent transfer, a suspension, a demotion, or some other adverse job action short of discharge. Whatever you do, document it and place the documentation in the investigation file.

The question often arises of what the personnel file should reflect concerning action taken against someone disciplined for harassment. It is usually best to simply state in the personnel file that a certain action was taken for "violation of the harassment policy", or words to that effect, and to give a reference to further documentation in the investigation file.

Companies that follow these steps should find themselves in a much better position in court or before the EEOC in case of any legal action for harassment. Since the Supreme Court rulings are so clear that liability results from a tangible job action in the case of a supervisor harassing a subordinate, your general personnel policies should make it clear that authority to change the terms and conditions of employment is vested only in certain carefully-designated people and that ordinary supervisors have no such authority - all employees must be aware of these facts! In general, use your policy and your documentation to show that you did the best you could to ensure that the complaint was dealt with effectively and that the employee was fairly treated; that if harassment occurred, it was without any knowledge or approval on the part of the company; and that no tangible adverse job action resulted against the employee. If the employee quits without taking advantage of their rights under your harassment policy, you should argue that a reasonable employee would not have quit without affording the employer a chance to address their problems. If the employee quits without any notice whatsoever about the alleged problems, point that out and argue that your company had no opportunity at all to try to correct whatever problems allegedly existed.

CASE STUDIES IN SEXUAL HARASSMENT

Sexual harassment is one of the most frequently-discussed topics in employee relations today. There is good reason for that: no other kind of claim has quite the scare and shock value that a sexual harassment claim carries. That is because most people associate sexual harassment with sexual overtures, unwelcome touching, or outright assaults on an employee. Such actions are usually accompanied by promises of favorable treatment at work or by threats of unfavorable treatment. However, that form of sexual harassment is rare compared to the much more frequent situation of a hostile work environment. A hostile work environment, as far as sexual harassment is concerned, arises from any conduct in the workplace that has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile, or offensive working environment. In many ways, employers have a harder time dealing with the latter type of sexual harassment because it can be so hard to spot, whereas the former variety of sexual harassment, the so-called "quid pro quo" harassment, is fairly easy to recognize. This article is intended to highlight some cases that illustrate both types of harassment.

Not all interesting cases arise in court. One of the cases most illustrative of both types of sexual harassment was an unemployment claim. A female employee who had been discharged from her former employer filed for and received unemployment benefits, a decision which the employer appealed. At the Appeal Tribunal hearing, the employer's president stated that she fired the claimant for not going directly to her with complaints of sexual harassment from a male supervisor and for allegedly circulating a petition to get rid of him. The claimant stated that she was unsure of the employer's chain of command and procedures for reporting complaints such as hers. She took her complaints to a supervisor in the marketing department, who told her to go to yet another manager, who the claimant thought was the alleged offender's direct supervisor. That manager assured the claimant and a co-complainant that their jobs would not be endangered by their reports.

To justify her dismissal of the claimant, the president submitted a copy of the employer's progressive disciplinary policy, which stated in part: "Inability or unwillingness to work harmoniously with other employees calls for two written warnings followed by discharge." The president did not follow that policy, stating at the hearing that she felt the claimant's failure to go directly to her was serious enough to merit discharge.

The Commission ruled that neither of the employer's two stated reasons for firing the claimant were grounds for disqualifying her from unemployment benefits. The employer had no firsthand evidence to prove that the claimant circulated a petition to get rid of the alleged harasser, so that charge went nowhere. The charge of failing to report sexual harassment directly to the president was unsuccessful for several reasons.

First, the employer never refuted the claimant's testimony to the effect that the supervisory structure of the company and the correct procedures for reporting sexual harassment were never made clear to her. Second, the employer did not rebut the claimant's testimony to the effect that she did not feel the president would be receptive to such a complaint, in view of the president's comment at one point that the claimant and other female employees could celebrate Halloween by reporting to work unclothed and serving as "pull toys" for the alleged harasser.

Third, a female supervisor testified at the hearing and admitted that the claimant had informed her of the alleged harassment, yet she failed to report the complaint to the president and, according to the claimant, even told the claimant to "blow it off". That same supervisor also admitted that she herself complained once to the president that the same alleged harasser had touched *her* inappropriately at work. Of course, this testimony was not much help to the alleged offender, who was at the hearing, but who gave only a vague and not very credible denial of sexual harassment against the claimant.

Fourth, the president acknowledged that she did not discuss the allegations of sexual harassment with the claimant before discharging her. That shows that the employer gave the claimant no chance to explain her side of the situation and possibly show why discharge would not be the best thing to do. If she had done that, she might have had a chance to reconsider before putting her company at risk.

Fifth, in explaining the reasons for firing the claimant, the president mentioned that the claimant had "turned her in to the EEOC". The fact that the president considered the EEOC complaint important enough to mention in conjunction with various reasons for firing the claimant only highlighted the problem with the employer's basic position with regard to sexual harassment. Making a complaint to EEOC can in no way be considered an act of misconduct. Even if an employer were to adopt a rule prohibiting employees from consulting EEOC, such a rule would be void, i.e. unenforceable as against public policy. In fact, it is a violation of the Civil Rights Act of 1964 to discharge a person in retaliation for filing an EEOC claim.

Finally, the employer did not give a satisfactory explanation

for why it did not follow its own progressive disciplinary policy in the claimant's case. Even if the claimant had intentionally ignored a known policy, the disciplinary policy called for two written warnings prior to discharge. The claimant was fired for a first offense, no prior warnings having been given. The employer did not explain how the claimant could or would have known that the stated policy would not apply to her.

Lessons to be drawn from this case:

- adopt a clear policy on sexual harassment;
- educate all employees on the various forms sexual harassment can take and on the harm it can cause;
- have an organized procedure for quickly and effectively dealing with such complaints and ensure that everyone knows about it;
- follow not only the sexual harassment policy, but also the disciplinary policy - if conflicts exist between the two policies, be careful how you resolve them; and
- set the example for the employees - the best policy in the world will be useless if management lets employees see through its actions that it does not take the problems seriously, or worse, as in the president's case, if management is part of the problem.

Bottom line: if the employer in this case had taken a different attitude toward the sexual harassment complaints of the claimant and had had a clear and effective policy in place to deal with such problems, the claimant may not have felt she needed to turn to the EEOC for help. Letting employees know you are more interested in preventing sexual harassment than in protecting the company's position if it occurs is probably the best thing a company can do for itself to avoid trouble with agencies such as the EEOC.

One of the most well-known sexual harassment cases in recent decades was that of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), decided by the U.S. Supreme Court. The Supreme Court held that a sexual relationship is "involuntary", even if the victim fails to make a complaint until after leaving the employer, if the relationship is unwelcome. A supervisor with the bank propositioned the female plaintiff in that case, his subordinate, during her first year with the bank. Fearing she would lose her job if she refused his advances, she went along with a sexual relationship for two years. Among other things, he fondled the plaintiff in front of other employees, followed her into the restroom when she was there by herself, and even exposed himself to her on some occasions. She did not report the problem to higher management because she was afraid. The Court held that the plaintiff could recover damages from her employer by showing that the harassment was 1) unwelcome and 2) severe enough to create an "abusive working environment". The plaintiff in this case won on both counts.

It is possible to win a "quid pro quo" harassment case. A case involving the U.S. Postal Service held that an employer can fight a claim by showing that the decision affecting the employee was reached for legitimate business reasons and was without any input from the alleged harasser.

In the area of "hostile work environment", courts have also ruled both ways. Isolated harassing comments, even though offensive, will not necessarily support a sexual harassment claim. Harassing comments, if repeated and having a demonstrably harmful effect, may well cause liability. By the same token, a single attempt to date a subordinate was insufficient to establish liability. Courts are in agreement that continually subjecting an employee to lewd and derogatory language will make an employer liable for damages.

In another interesting case, an employer was held liable for harassing actions committed by some of its male employees toward a female employee. They had made unwelcome sexual advances and remarks toward her. A lower court had ruled that she could not have been offended by such conduct, since she had once posed nude for a motorcycle magazine. The appeal court reversed that ruling, reasoning that since the female employee considered the male workers' conduct unwelcome, and since a reasonable woman would have considered such conduct offensive, it made the employer liable. This is only one of several rulings that make it clear that courts apply what is known as a "reasonable woman" standard, which differs from the reasonable person standard in that if a woman is the victim of the harassment, what matters is what a reasonable woman in such a position would think of the conduct in question.

It used to be that an employer that did not know about acts of harassment committed by its workers would be protected from liability as long as it acted quickly to deal with the problem as soon as it found out what had happened. That view has changed over the years to make an employer strictly liable for the acts of its managers and other supervisory personnel. Now, in order to escape liability for a manager's or supervisor's harassment against an employee, an employer needs to show not only that it took prompt and effective action once it learned of the harassment, but also that its policy discourages acts of harassment, makes it clear that such conduct is outside the scope of employment of any employee, encourages reporting of such acts, and provides an effective way of dealing with the allegations. An effective policy and effective enforcement of the policy can help an employer escape liability in case of a lawsuit. Courts are in agreement that a policy for resolving sexual harassment complaints is ineffective if the one making the complaint has to first go through the alleged harasser to do it.

Some illustrative court cases:

- A female flight attendant complained about harassment by a pilot. The airline investigated fully, issued the pilot a written warning and advised him to stay away from the flight attendant, and concluded that some of her allegations were baseless. The court held that the employer acted reasonably and was not obligated to believe every one of her accusations.
- In another case, the employer promptly investigated the plaintiff's allegations against a coworker and placed the harasser on 90-day probation with a written warning. The plaintiff sued the employer, claiming the employer should have taken harsher measures. The court ruled in the employer's favor, reasoning that the employer had acted reasonably and was not obligated to fire the offender to escape liability.
- On the other hand, a court ruled that an employer who knew of obscene cartoons depicting the plaintiff failed to act reasonably when he waited until she complained to take the offending pictures down.
- Also, one spectacular case of incredibly bad judgment involved an employer which fired the plaintiff, a waitress, after she complained of sexual harassment by a cook. The employer reasoned that it was easier to replace a waitress than a cook. Needless to say, the employer lost.
- In a case showing that an employer may be liable for the acts of its customers, a waitress was sexually harassed by several male customers, all personal friends of the restaurant owner. The waitress told her employer she would not wait on those people in the future and that she had consulted an attorney about her legal rights. The employer fired her, despite the fact she had always been a satisfactory employee. The EEOC ruled that the employer had the ability to remedy the situation, but failed to do so. He could have told the customers that such conduct would not be tolerated in the future and could have relieved the waitress of the duty to wait on them. The employer's failure to take any corrective action made it liable on the waitress' sex discrimination charge.
- Another case held that even though an employee had posed unclothed for a magazine distributed nationally, the trial court in a harassment case could reasonably find that the employer's harassing conduct was not invited or solicited. *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959 (8th Cir. 1993). (That is not a new concept: one hundred years earlier, the Iowa Supreme Court had made a similar ruling, holding that "in a prosecution for seduction, evidence that the prosecutrix allowed men to kiss her good-night and hug her does not indicate a want of chastity on her part to such an extent as to overcome a verdict of guilty." (*State v. McIntire*, 56 N.W. 419 (Iowa 1893))

In a case ideally suited to teach how not to handle a sexual harassment situation, *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 86 FEP Cases 1409 (11th Cir., September 28, 2001), a restaurant employer managed to do just about everything as wrongly as it could be done, and in so doing showed how important common sense is in the area of employee relations. A restaurant's manager and a subordinate employee, a female server, carried on a consensual relationship for a while, but then the subordinate broke off the relationship. Thereafter, the manager refused to work with her, but still sought encounters with her, brushing up against the server on several occasions in a sexual way, threatening to hurt her and her child, and on the final occasion confronting her in the office and propositioning her. They argued for about a quarter of an hour, after which the server was able to leave, but when she later went to her car, he followed her out and prevented her from closing her car door, while begging her to reconsider the breakup. On the following day, the manager asked the server whether she would report his behavior, which she did, telling the general manager, a second manager, and a regional manager. She even requested a transfer.

Here's where the plot thickened: the female employee went on vacation, whereupon the general manager told the manager that the general manager's supervisor was considering firing both the manager and the server. ("No, no", you whisper, "not the server - fire the manager!" Alas, they cannot hear you...) At the trial (of course, there was a trial - remember, this article is about managers who did not do the right thing), the harasser testified that the general manager asked him whether he could tell him anything that would justify getting rid of the server, since the employer would rather not fire him, but instead wanted to "get rid of the b----". ("No, no", you shout, "it's not too late - this is a no-brainer - fire the manager!" Sadly, they still cannot hear you ....) The harasser then obligingly told the general manager about the server giving away food for free in order to get free tans at a salon. (Aahhh, yes, the last refuge of a desperate manager - dig just deeply enough to find something, anything, to use against an employee and then lower the boom - there's no chance anyone would view *that* as a trumped-up charge, right?)

The general manager recommended that the regional manager terminate the server based upon that report, even though neither of those two higher managers had bothered to confirm the manager's report about the food giveaways. Unfortunately for the employer, the evidence at the trial showed that the employee giving away free food was someone else and that the manager, desperate to save his own position, had not actually witnessed the server doing such a thing. In other words, he based his report on secondhand, hearsay statements from others.

The female server won her lawsuit charging the employer with illegally retaliating against her for filing a complaint about sexual harassment. As the court observed, just because the server and the manager had had a consensual relationship in

the past, their prior history did not give the manager a "free pass" to harass the server at work later. In addition, the court held that the jury could properly conclude, as it did, that the harassment crossed the border between personal animosity, which is not illegal, and sexual harassment, which is illegal.

Lessons to be learned from this case:

- consider having a policy forbidding excessive fraternization between supervisors and subordinates, as well as between any two coworkers to the extent that their relationship spills over into the workplace and has the potential to reduce anyone's productivity;
- you don't need a law to tell you that regardless of whether a manager is acting against employees out of personal animosity or sexual harassment, the manager is bad news;
- don't ever try to do a favor for someone like the manager in question, because at the ensuing trial (and with a manager like the one in this case, you just know there's going to be a trial!), the manager will turn around and bite your hand by testifying that you offered to "get rid of the b----" for him;
- if you have to ask around for reasons to fire someone, that's probably a good sign that you don't have enough to go on, so you'd better forget it;
- if you do decide to listen to what a known "toucher" tells you about one of his victims, at the very least try to independently confirm his story before using it as the basis for discharging the victim; and
- before you fire someone, if you hear a little voice telling you to "be careful", please listen to that voice and bounce the situation off of someone else who can advise you from a neutral, professional standpoint!

PREGNANCY RIGHTS IN THE WORKPLACE

Employers have many questions regarding employee pregnancy issues. Here is an outline of the basic things to keep in mind about the rights of a pregnant employee:

Fewer than 15 employees:

1. If a business has fewer than 15 employees (counting anyone who works for the business, performing services for pay, for each working day in each of twenty or more calendar weeks in the current or preceding calendar year), it is not covered by any employment law relating to pregnancy or disability, and the business would be free to handle the situation in any way it deems appropriate. Of course, a business not covered by such laws would still want to treat its employees as fairly and consistently as possible, if for no other reason than to minimize complaints, unnecessary turnover, and the risk of unfavorable publicity. Businesses with 15 or more employees should see the comments below.

15 or more employees:

2. If the business has 15 or more employees, it is covered by state and federal pregnancy and disability discrimination laws, which require non-discriminatory treatment of pregnant employees and reasonable accommodation for employees with disabilities. Disability laws can come into play for a pregnant employee if the pregnancy becomes complicated and results in something that can turn into a disability, such as gestational diabetes.
3. From a practical standpoint, avoiding liability for pregnancy discrimination involves ensuring that employees are not adversely treated due to pregnancy, making reasonable accommodation for pregnant employees, and extending the same benefits and treatment toward them as the company extends to other employees who have medical conditions. Pregnant employees do not need to be treated any better than other employees with medical conditions, but need to be treated at least as favorably.
4. If an employee claims that she cannot do certain duties due to being pregnant, the company has the right to require her to medically document such claims. Have the employee obtain a statement from her doctor showing clearly which duties of her job she can perform, which duties she cannot perform, and what accommodations might be necessary to enable the employee to continue working. Documentation requirements like this should be applied consistently and fairly to anyone who asserts a medical difficulty in doing their job functions.
5. Reasonable accommodation is something that the company can do, without undue hardship to the business, that allows the employee to work and manage any periods of leave.
6. Among other things, reasonable accommodation could include things such as redesigning job duties temporarily, furnishing health or safety aids, and extending a reasonable amount of maternity leave.
7. Regarding job duties for pregnant employees, it is important to act on the basis of sound medical information, rather than company officials' own ideas about what might be too risky for a pregnant woman to do. In *UAW, et al, v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196 (1991), a case involving a policy prohibiting women of child-bearing age from working in positions that would potentially expose them to lead in the battery manufacturing process, the Supreme Court ruled that the risk of harm to a pregnant employee or her fetus is not a legal basis for denying a job to a woman and commented: "If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best. Moreover, the incremental cost of employing members of one sex cannot justify a discriminatory refusal to hire members of that gender." Thus, acting on the basis of medical information, obtaining informed consent from the pregnant employee for her performance of potentially risky job duties, and maintaining a safe workplace would generally be the best way to proceed.
8. Concerning the length of maternity leave, there is no hard-and-fast rule in the statute or in regulations. However, based upon EEOC guidance and court cases, it would appear that at a minimum, a covered employer can be expected to allow at least two weeks of unpaid or paid leave for pregnant employees. Paid leave is not required unless it is promised in a written policy or agreement, and unless others who miss work for medical reasons are allowed to use available paid leave for medical absences. The best practice is usually to allow pregnant employees to apply their available paid leave as long as it lasts.
9. The larger the company is, the longer the time is that the EEOC or a court might consider reasonable in terms of duration of leave. Employers at the lower end of coverage, i.e., between 15 and 25 employees or so, can usually get away with two weeks or so, but larger companies might be expected to increase the time somewhat. In such situations, a neutral absence control policy can help. A basic sample of such a policy appears at the following link: http://www.twc.state.tx.us/news/efte/neutral_absence_control_policy.html.
10. Another thing to keep in mind is the issue of notice. In this case, that would be notice of her intent to return to work. Some companies, but not all, have policies requiring

employees on extended leaves of absence to check in at stated intervals regarding their return-to-work status. If a company has such a policy, and the employee has not adhered to it, then the company would likely want to see what the policy says about employees who fail to keep in touch as the policy requires.

11. Pregnancy leave can be related to other forms of medical leave, such as FMLA (for employers with 50 or more employees) and disability leave. Generally speaking, if two or more leave-related laws apply to a particular employee, the company should determine which law affords the greatest degree of protection for the employee and apply that result. Concerning the way that various medical leave-related laws fit together, see the following topic in this book: http://www.twc.state.tx.us/news/efte/medical_leave_laws.html.
12. Benefit continuation during maternity leave should be handled the same as it is for anyone else who goes on leave for other reasons.
13. If the company eventually arrives at the point where it can no longer readily accommodate the absence, and assuming that such action would not violate company policy or any individual employment agreement with the employee, it would be a good idea to advise the employee in writing that unless she is able to return to her duties by a stated deadline, the company will not be able to guarantee that it can continue to hold her job open and may have to replace her.
14. If the employee is ultimately laid off due to medical unavailability for work, and she files an unemployment claim, the company might consider responding to the claim with an explanation that the layoff was due to the claimant's medical unavailability for work, i.e., it was a medical work separation, and that the employer's account should be protected from chargeback of any benefits the claimant might receive. See the section headed "Medical Separations" in the following article in part IV of this book (online at the following link): http://www.twc.state.tx.us/news/efte/ui_law_qualification_issues.html.
15. In the event of a layoff for such a reason, try to end the work relationship on as positive a note as possible. Let the employee know that she is welcome to check back with the company once she is able to return to work, and that the company will be glad to consider her for any vacancy that might exist at the time. The company does not promise her a job thereby, but it sounds positive and will help dispel any notion that the company does not want her back.
16. Since any kind of discrimination claim can be a very serious matter, it could be well worth investing in an hour or two of an employment law attorney's time regarding the company's position in such matters, prior to taking any action with respect to a pregnant employee, just to help ensure that the company is not missing some kind of important issue.
17. The EEOC's official fact sheet on pregnancy discrimination law is at the following link: https://www.eeoc.gov/laws/types/pregnancy.cfm.
18. The main EEOC regulation dealing with pregnancy and maternity leave is here: https://www.gpo.gov/fdsys/pkg/CFR-2006-title29-vol4/xml/CFR-2006-title29-vol4-sec1604-10.xml.

THINGS EMPLOYERS WISH THEY HAD NEVER SAID

"Sticks and stones may break my bones, but words will never hurt me." Whoever came up with that old saying probably never talked with employment law attorneys and the employees who file lawsuits against their employers based in part on hurtful language at the workplace. The days when people can say whatever they want to without fear of recrimination are gone forever, if they ever really existed at all. Here is another old saying that one never seems to hear in court: *"To err is human; to forgive is divine."* Employers sometimes err, but should not count on employees being divinely forgiving. Court cases and newspaper articles dealing with employment discrimination are often replete with words that employers end up wishing they had never spoken. This article outlines some of the many things that, once uttered, cannot be unsaid and usually end up being thrown back in an employer's face in court. The various epithets and sayings are organized into the categories of discrimination they implicate, and all are examples of epithets, offhand remarks, or conversational snippets that have appeared in real court cases. One way to think of them is as "never-says", for they are things that an employer that wishes to stay out of court should never say either to or in the presence of an employee.

Racial Discrimination Never-Says

- Racially-oriented jokes (laughter is cheap; lawsuits are expensive)
- Singling out racial minorities for obscene gestures or words
- Criticizing only racial minorities
- Telling minority employees that the only reason they're not fired is because the law won't let them be fired
- Well-known racial and ethnic slurs
- Antiquated terms relating to race or color
- Terms based on assumptions about a person's ethnic background
- "You people"; "your people"
- "wrong side of the tracks"
- Do not ask: "Do you prefer being called 'black', 'African-American', or what?"; "… 'brown', 'Hispanic', 'Latino', 'Mexican-American'…?" - this shows far too much preoccupation with ethnicity; the employer should stick to worrying about whether someone can do the job; just call employees "employees" and refer to them by their names.

EEOC guidance on racial discrimination: http://www.eeoc.gov/laws/types/race_color.cfm

National Origin Never-Says

- National origin-related jokes
- Ethnic slurs
- Referring to people in terms of their assumed nationalities
- Making fun of accents
- Constantly bringing up shortcomings of people's supposed countries of ancestry

EEOC guidance on national origin discrimination: http://www.eeoc.gov/laws/types/nationalorigin.cfml

Age Discrimination Never-Says

- Jokes that depend upon making fun of older people
- "You can't teach an old dog new tricks."
- "over the hill", "past his prime", "part of the old guard", "she's seen better days", "golden-ager", and cruder slurs typically associated with age-related put-downs
- Referring to older employees as "Prunella" or "Methusaleh" or other names associated with old age
- "Over-qualified" (some at EEOC consider that to be code for age discrimination if there is a disparate impact on those who are 40 or older)
- "We need new blood around here."
- "We need fresh faces around here."
- Frequently asking when someone is finally going to retire
- Subtler - even this can be misconstrued: asking someone if they're going to be comfortable working under someone younger than they are (too much focus on age – find another way to get an idea on that)
- Winner of the prize for "Why Agency-Speak Needs Good Filtering": In describing the justification for outsourcing certain IT functions to a well-known third-party provider of IT services, the U.S. Department of Agriculture stated that "its goal was to incorporate 'younger highly qualified professionals [who] will have a modern professionally managed information infrastructure at their disposal.'" To illustrate its thinking further, the department applied "the metaphor of highly-engineered cars that need very little service and minimal service centers to support, versus older cars that are not as precise and need full-service gas stations." The outcome in this age discrimination case was not good for the employer. *Riley v. Vilsack*, 665 F.Supp.2d 994 (W.D. Wis. 2009).
- Another good illustration of how not to explain things: "… On August 13, 2009, [school official] presented a PowerPoint presentation on '21st Century Learning' to his staff. (Pl.'s Br. at Ex. 25.) In the presentation, [school official] used slides depicting people of various ages using a variety of technologies. (*Id.*) He also asked participants

to participate in a 'CITE Survey,' which began by categorizing people into age ranges such as 'younger than 30' or '52 or older.' (*Id.*) One slide explained the distinction between 'digital natives,' which was defined as those who are born at a time when a particular technology exists, and 'digital immigrants,' who are born before a particular technology is invented. (*Id.*) That slide further explained that '[d]igital immigrants are said to have a "thick accent" when operating in the digital world in distinctly pre-digital ways, when, for instance, one might "dial" someone on the telephone to ask if his e-mail was received.' (*Id.*) A subsequent slide appears to demonstrate that brain function while using technology is higher in those who are 'digital natives.' (*Id.*)" The court was unimpressed. *Marlow v. Chesterfield County School Bd.*, 749 F.Supp.2d 417, 426 (E.D. Virginia, Richmond Division, 2010).

EEOC guidance on age discrimination: http://www.eeoc.gov/laws/types/age.cfm
Links to good articles on the value of recruiting older workers: http://www.aarp.org/research/work/employment/workers_fifty_plus.html
http://www.conference-board.org/knowledge/matureworkforce.cfm

Disability Discrimination Never-Says

- Disability-related jokes
- Making fun of various disabilities
- Disability-related slurs
- Frequently calling attention to someone's limitations
- "Now he'll probably go and file a workers' comp claim!"

EEOC guidance on disability discrimination: http://www.eeoc.gov/laws/types/disability.cfm
DOL Guide to hiring people with disabilities: http://www.dol.gov/dol/topic/disability/hiring.htm
EEOC guide for small businesses: http://www.eeoc.gov/facts/accommodation.html
DOL Disability Nondiscrimination Law Advisor: http://www.dol.gov/elaws/odep.htm
Job Accommodation Network: http://janweb.icdi.wvu.edu/
JAN training videos and modules: https://askjan.org/training/library.htm

Religious Discrimination Never-Says

- Religion-based jokes
- "You're not going to Heaven."
- "There's only one way to get into Heaven."
- "Atheists are going to hell."
- "That's a Jew/Muslim/Buddhist/atheist for you!"

EEOC guidance on religion-based discrimination: http://www.eeoc.gov/laws/types/religion.cfm

Gender Discrimination Never-Says

- Jokes that depend upon making fun of one gender or another
- Always calling attention to male/female worker ratios, or differences between genders (isn't there something related to the actual work that people can talk about?)
- Unsolicited remarks about a person's appearance, even if they seem like compliments
- Words relating to female stereotypes: the "b" word, "honey", "darling", "cute li'l thang"
- Derogatory language directed at one gender or another, even if a specific person is not targeted
- Try to avoid the term "ladies" - many people nowadays consider it either fawningly patronizing or even disrespectful, depending upon the context, and especially when uttered by a male employee.
- Don't pronounce job titles with "-person" in them sarcastically or comically on a regular basis; better solution: find and use generic, gender-neutral job titles, such as director, manager, board chair, driver, operator, designer, server, waitstaff, and so on.
- Instead of lame comments about women not being able to "man" a booth at a conference or similar event, a gender-neutral term might be better: "So-and-so will staff the booth for us that morning."
- If there are people in the office who are unusually attractive, do not call attention to their appearance or to what their appearance can supposedly do for the company.
- Avoid jokes or speculation about marital status, marital relations, body parts, and mechanical or drug-related body part enhancers.
- "She's pregnant? Well, great – now she'll be off for who knows how long!"
- To someone who has just experienced possible sexual harassment: "Don't worry about him – that's just the way he is!"
- Unkind comments about LGBT individuals

EEOC guidance on gender-based discrimination: http://www.eeoc.gov/laws/types/sex.cfm

Genetic Information Discrimination Never-Says

Issues arising under the Genetic Information Non-discrimination Act of 2009 will be very difficult to separate from issues arising under disability discrimination and medical information privacy laws such as HIPAA. Gossip and its malevolent effects will also contribute to claims and lawsuits under GINA. There have been no major published court decisions yet in this area of the law, but the following are examples of statements that will likely show up eventually in cases arising under GINA:

- "I heard that diabetes runs in her family. We'd better really watch her attendance."
- "His doctor is [so-and-so]. Since her specialty is [xyz genetic disorder], I'll bet that's what he has."
- "She told me that her mother and grandmother both had heart disease. Isn't there some way we can exclude her heart condition from our insurance plan?"

EEOC genetic information discrimination guidance: http://www.eeoc.gov/laws/types/genetic.cfm

The foregoing are just some examples of what the EEOC, judges, and juries sometimes consider in order to find that a hostile work environment exists in a company that has been accused of illegal discrimination , or that enough evidence exists to allow a lawsuit to proceed. Sometimes good manners and common sense help avoid remarks like that, while training or fear of lawsuits might wield more influence at times. Whatever it takes, though, employers should be very careful to keep from ever uttering such things, because even though others might seem to smile or nod in agreement, or at least remain quiet, such words hang on the air like the scent of a skunk, and if a discrimination claim or lawsuit is ever filed, it is almost inevitable that the one who said them, as well as the company that employs him or her, will have to eat those words.

WORKPLACE INVESTIGATIONS - BASIC ISSUES FOR EMPLOYERS

Sooner or later, every employer will face the need to investigate one or more of its employees. More and more employers are recognizing what an important tool a workplace investigation can be in discovering problems and preventing their reoccurence. This paper is a brief survey of the most important legal issues for employers to know about before undertaking any investigation of employees.

How Does the Need for an Investigation Arise?

Many different problems can lead an employer to start an investigation, and not every investigation necessarily fits the popular profile of interrogations, witnesses under harsh lights, and long, drawn-out detective work. Here are some common reasons why companies investigate employees or situations:

- attitude problems
- substance abuse
- discrimination complaints
- harassment complaints
- threats against others
- vandalism and other sabotage
- violations of work rules
- safety problems
- workplace theft

Naturally, each type of problem demands its own methods of investigation. However, certain common threads run through each type of investigation situation. The investigator must be knowledgeable about state and federal employment laws; must uphold the privacy rights of employees and others; must conduct a thorough investigation, but without letting it drag on too long; must be objective; and must keep his or her mind on the ultimate goal of any investigation, i.e., discovering the underlying reasons for the problem so that management can take corrective action. In essence, investigations are just a tool for management to use in analyzing the reasons for problems or gathering data to make management decisions.

Federal and State Laws Requiring Investigations

Many laws in the area of employee relations effectively require employers to undertake investigations in order to meet their obligations under the laws. The general duty of any employer who either knows or should know about a discrimination, harassment, threat, or safety problem faced by an employee is to take prompt and effective remedial action to put an end to the problem. In order to know what action to take, or to find out whether action is even necessary, the employer has to investigate the situation and ascertain the facts. Employers that fail to investigate such situations usually lose any claims or lawsuits brought by the employee in response to the problem.

Some of the more important laws and legal situations that require investigations by employers are:

- **job discrimination laws** – Civil Rights Act of 1964 (Title VII), the ADA, the ADEA, and their state equivalent, the Texas Commission on Human Rights Act
- **health and safety laws** – OSHA – employers must investigate problems and prevent future similar problems; prevention of workplace violence – employers have a duty to investigate threats and prevent acts of violence in the workplace to the extent possible
- **drug-free workplace laws** – Drug-Free Workplace Act of 1988; DOT drug testing regulations
- **background and credit checks** – in order to minimize liability for negligent hiring or negligent retention, employers must sometimes investigate employees' backgrounds – Fair Credit Reporting Act requirements apply

Privacy Issues in Workplace Investigations

There are important privacy interests at stake in the workplace. Employers have fairly wide latitude in this area, but must be aware of important limitations that apply in various situations. In general, employees have the right to keep private facts about themselves and their families confidential, the right to not be accused wrongly, and the right to enjoy some degree of "personal space." Following is a discussion of some of the more significant ways in which these privacy interests come up in investigations.

Personnel Files

In general, whatever is in an employee's personnel file should be accessed only by those who have a job-related need to know the information. The following general principles apply:

- All information relating to an employee's personal characteristics or family matters is private and confidential.
- Information relating to an employee should be released only on a need-to-know basis, or if a law requires the release of the information.
- All information requests concerning employees should go through a central information release person or office.

In order to reduce the chance of confidential information getting out to people who do not need to know it, most employment law attorneys recommend keeping different types of personnel information is different types of files, i.e.,

segregating the information. Some of the types of separate files an employer should consider are:

- general personnel file – job application, offer letter, performance evaluations, letters of commendation, and so on;
- medical file (including workers' compensation and FMLA documentation) – this is the only type of record that absolutely must be kept in a separate file apart from the regular personnel files - that is because the Americans with Disabilities Act requires that any medical records pertaining to employees be kept in separate confidential medical files;
- I-9 records - keep these in a separate I-9 file because it will make it easier to defend against a national origin or citizenship discrimination claim if you can show that such information is available only to those with a need to know (in other words, that those who might have made an adverse job decision were not aware of the person's national origin or citizenship status) - also, if your I-9 records are ever audited, it would be better if the auditor only saw I-9 records, instead of all kinds of other records mixed in that might give rise to reports to other governmental agencies;
- safety records - for the same reason you would want an USCIS auditor to see only I-9 records in an I-9 audit, you want an OSHA auditor to see only OSHA-related records in an OSHA audit - this safety record file might also contain documentation relating to an employee's participation or involvement in an OSHA claim or investigation - limiting access to such documentation would make it easier to keep the information from influencing possible adverse decisions against the employee that in turn could result in retaliation claims under OSHA;
- grievance and investigation records - maintain a separate file for these records because they often contain embarrassing, confidential, or extremely private information about employees that could give rise to a defamation or invasion of privacy lawsuit if such facts were known and discussed by others within the company - also, making it known that investigation records will not be divulged may make it easier to persuade reluctant witnesses to give frank and honest answers in an investigation.

The human resources department can develop a security access procedure for these various files. The company can keep an overview by cross-referencing in one file the relevant documents in another file. If a person who has access to one file wants to see another document in a separate file, he or she would have to have clearance under the file access procedure in order to do that.

Searches at Work

In general, employees have a reasonable expectation of privacy in certain things or areas where they work, unless they have been given reasonable notice that no such expectation exists and that they may expect such areas to be viewed, inspected, or monitored in some way. For instance, employees who have never been told that their briefcases or purses might be subject to inspection would have a legitimate expectation of privacy in those things. A similar expectation would exist if the employee is allowed to have a work desk with a lockable drawer, or a personal locker in an employee break area – if the employee has never been told such areas might be subject to search, he or she would have a reasonable expectation that such areas would be private and not subject to search by the employer.

The key for an employer that wishes to have the flexibility to search a particular thing or area of the premises is to dispel any reasonable expectation of privacy on the part of employees by letting the employees know that certain things and certain areas will be subject to search at any time at the discretion of company management, with or without the presence of the affected employees. A good search policy will make all areas of the facility subject to search, as well as anything the employee brings onto the premises, including all work areas, equipment, furniture used by the employees, lockers, containers of any type brought by the employee onto the premises, and even personal vehicles left parked on company parking lots. A sample policy on searches may be found in "The A to Z of Personnel Policies" (part of this same book).

Drug Testing

Drug tests are, of course, a form of investigation. At least in the private sector, Texas employers have the benefit of operating in a state in which drug testing is largely left up to an employer to do for itself. Employers may do drug testing under a wide variety of circumstances such as:

- pre-employment testing
- for-cause testing (this also includes "reasonable suspicion" testing)
- post-accident testing
- random testing

With any type of drug testing, however, the employer must keep the results absolutely confidential, and the documentation should be kept in the same confidential medical file that is used for ADA purposes. There are many legal issues to keep in mind, and it is essential to have a clear written policy letting employees know about the types of testing that may be done and what will happen if a drug test turns out positive. More information on this subject, including a sample policy, is available in the book "The A to Z of Personnel Policies" (contained in this same binding).

Defamation

Defamation consists of communicating false information about a person to a third party, either intentionally (with

malice) or with reckless disregard for its falsity. A company can be liable to any of its employees about whom false information is released if it makes the information known itself or negligently allows the false information to be released. For that reason, employers must be extremely careful with the information that often results from investigations. This is why it is recommended to keep information relating to investigations in a separate investigations file. Under no circumstances should an employer allow an employee under investigation to be talked about in ways that could generate defamation liability for the company. Managers should be trained to never say or write anything about an employee that cannot be proven with reliable documentation or firsthand testimony from eyewitnesses.

Other Legal Issues Associated with Investigations

Retaliation Claims

Almost all laws relating to the workplace rights of employees include provisions prohibiting employers from retaliating in any way against employees who file claims or who assist in the filing or investigation of claims. Employers must take great care when investigating employees to ensure that the company does not take any unwarranted action against the employee that might appear to be retaliation for filing a complaint or claim. In addition, managers must be trained to know when to "back off" with an employee who is involved in a claim.

False Imprisonment

False imprisonment is a cause of action that can be brought against a company by an employee who feels that during part of an investigation, he or she was restrained or confined by the employer to the point where they felt "imprisoned." A company investigator must be very careful not to give the impression that the employee will be physically confined or restrained during an interview, for example. In a typical interview situation, the investigator will want to sit behind a desk or in a chair, facing the door that is the exit for the office. The employee being interviewed should sit with his or her back to the exit door and, if necessary, be reassured that they will not be kept from leaving. This arrangement also minimizes the risk to the investigator that the employee might become violent; if the employee feels that leaving is easy, he or she will probably do that rather than go out of their way to attack someone who is not in the exit path.

Intentional Infliction of Emotional Distress

This can be the basis for a lawsuit if the investigator conducts an interview in such a way that the employee feels unusually humiliated or threatened. Successful suits on the basis of intentional infliction of emotional distress are rare, but can be successful if the employer's action is seen as offensive to a reasonable person and would be viewed as outrageous by a reasonable society. There is generally no valid reason for an investigator or any other company official to shout at an employee, use slurs or other demeaning language, or cast the employee in a humiliating light, actions which have been the basis for successful lawsuits in this area of the law.

One sometimes hears about claims for "negligent infliction of emotional distress", but that is not a valid cause of action under Texas law. Nonetheless, employers must be careful to keep tense situations from escalating out of hand, since fine legal distinctions between "negligent" and "intentional" may be lost on juries in a close case.

Assault and Battery

Assault and/or battery can arise in an investigation if an employee charges that he or she either feared that an investigator was going to touch them in an offensive or harmful way (assault) or was actually touched in such a way (battery). This is why, for example, an employer may never physically force an employee to submit to a search. Rather, the employer should simply let the employee know that submitting to a search is required and that refusal to submit to the search can lead to immediate termination from employment (basically, this would be reminding the employee about the company's search

policy).

Malicious Prosecution

Employers sometimes find themselves the subject of a malicious prosecution lawsuit if they attempt to bite off more than they can chew regarding criminal prosecution of an employee. If an employee is reported to the police, described as some sort of criminal, and the employer prods the authorities into arresting and prosecuting the employee, but for some reason there turns out to be no basis for criminal charges, the employee may turn around and sue the employer for maliciously prosecuting him or her. If an employee is suspected of wrongdoing, and under the circumstances it would be appropriate to get law enforcement involved, it would be best to simply report to the law enforcement authorities whatever the problem is and make various information available to them. If such information happens to include the names of employees who may have material knowledge of a crime, those employees cannot file a valid complaint that they were maliciously prosecuted – it is not malicious prosecution to simply furnish factual information to the police and let the chips fall where they may.

Invasion of Privacy

The common-law tort of invasion of privacy consists of the disclosure of private facts about a person. There are two main elements to invasion of privacy:

- the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person; and
- the information is of no legitimate concern to the third parties to whom the information was released.

Thus, since investigations often reveal highly intimate or embarrassing facts about people, especially in the case of sexual harassment, the information must be kept completely confidential by the employer and all who are involved in the investigation.

Methodology for Investigations

A company has many different ways of conducting investigations. Sometimes, as noted above, a company might utilize searches or drug tests to investigate a suspected problem. It might also try monitoring of telephone calls or of an employee's use of the company's computer system or Internet access, or else video surveillance of certain areas of the workplace. Finally, use of more traditional means such as interviews by investigators and background checks by government agencies and private companies may be in order. Telephone, audio, and video monitoring issues and background checks are discussed in more detail in this conference notebook in the section dealing with employee privacy rights. The rest of this paper will focus on the use of company investigators in conducting workplace investigations.

Steps Common to Any Investigation

As noted at the start of this paper, companies must be prepared to conduct a prompt and thorough investigation anytime an employee alleges wrongdoing by the company or by another employee. Being able to show that a prompt and thorough investigation was done may make the difference between winning and losing before the EEOC or a court.

A company must:

- recognize when an investigation is in order;
- decide what the investigation should establish, such as whether a particular person experienced harassment or whether a set of computer files has been deleted;
- select appropriate investigators;
- identify potential witnesses and documents for review;
- plan the investigation (best to have a written plan);
- organize a list of questions to be asked of witnesses;
- establish security for files and records; and
- be prepared to modify and update the plan as needed based on new information that might come in as the investigation progresses.

Knowing When You Need an Investigation

One of the most important skills in managing a workforce is knowing when an investigation is in order. Here are some situations that generally call for investigations:

- an employee files a formal complaint or grievance
- an employee reports a questionable situation, but says he or she does not want to make any trouble
- an employee's morale, behavior, or performance mysteriously declines
- an employee is suspected of misconduct
- any violation of a rule

Goals of an Investigation

The main goal of any investigation is to provide a sound, factual basis for decisions by management. The investigation should also produce reliable documentation that can be used to support management actions. Finally, an investigation of employees should reveal whether any misconduct has occurred, identify (or exonerate) specific employees who are suspected or guilty of misconduct, and put a stop to further wrongful actions.

Who Makes the Best Investigator?

Choosing the right investigator or investigation team is critically important. The investigator has to be someone who is credible, respected, regarded as fair and impartial, and knowledgeable about company policies and employment law issues. In addition, they need to have good interviewing

skills, be well-organized and able to develop and follow a plan, and be able to communicate well with the various types of employees who will be interviewed. Finally, the company should consider how well the investigator will stand up in court if called upon to testify in a lawsuit, and whether the investigator can be safely trusted with all the confidential things that will come up during the process.

The best investigators are often from the human resources staff, but sometimes high-level managers may need to be brought in or associated with the investigation, if it appears that someone with more clout will get better cooperation from potential witnesses such as other management staff. In some situations, it may be necessary to bring in an outside investigator such as a consultant or attorney, if the situation requires the utmost in confidentiality. Finally, when technical issues are involved, such as the existence or deletion of computer files, experts in technical matters may need to take part.

Identify Witnesses and Documents

The company must move quickly to determine who knows what about which aspect of the situation under investigation. Keep in mind that waiting too long might mean that potential witnesses leave the company, become intimidated or otherwise influenced, forget important details, or go on vacation and are thus unavailable when needed. Knowing who the witnesses are is necessary for the scheduling of witnesses, and the order of interviews can make a big difference in the development of the facts. Always be ready to add to the witness list if other names come up during the investigation.

Equally important is identifying which documents will be needed. Memos, time cards, policies, personnel files, journals, and logs must be found and secured. Nothing is worse than discovering that certain documents are needed, then finding out that the documents have been shredded or otherwise purged as part of a routine procedure.

Organize a List of Questions

Any good investigator who is planning to interview witnesses will sit down beforehand and make a list of questions that must be answered for the type of investigation being done. Each situation demands different questions, since the elements of each problem are rarely the same. Generally, each witness will need to answer questions relating to what they saw, when they saw it, who else was there, why something happened (if known), what happened next, and so on. However, some witnesses will know a lot more than others, which is why the employer needs to be prepared to customize the questions asked of certain people. The investigator needs to have a talent for thinking of new questions on the spot to follow up on information as the witness gives it.

Interviewing Techniques

This step is, of course, what many people have in mind when they think of workplace investigations. Following is a list of things that successful investigators do in order to have the best chance of getting all the relevant information within a reasonable amount of time:

- start the interviews soon after the situation arises – delay can cause witnesses and documents to disappear
- hold individual interviews to uphold confidentiality and minimize peer pressure
- maintain objectivity
- take good notes, or record if appropriate (it is best to be up-front about the recording, even though Texas law does not require that)
- hold the interview in a private, quiet location
- never promise absolute confidentiality (because the company may have to release documents and names of witnesses due to legal requirements), but go ahead and tell witnesses that the company will do its utmost to protect employees' privacy unless forced by a court or agency order to do otherwise
- keep the interview on track
- do not interrupt witnesses while they are coming out with relevant information
- start out with general questions, then graduate to more closely-focused questions to pin witnesses down on the details
- repeat important questions, but with different wording, to see whether the witness sticks with the same answer
- avoid confrontational or accusatory questions
- pay attention to witnesses' body language
- use silence after a question as a technique to encourage reticent witnesses to start talking – people often feel a need to "fill in" periods of silence
- be ready with follow-up questions if needed

Putting It All Together

Since the main goals of an investigation are to produce a reliable set of facts for a decision and to reach a conclusion, the investigator will eventually have to tie all the various facts and documents together and show what it all means. Sometimes, the investigator only reports the facts to a higher manager, and other times, the investigator will be asked to go further and recommend what action to take. Whatever the mandate, however, the report should contain a description of the situation at issue, list the witnesses and documents used as evidence, summarize the information from each document and witness, make an assessment of the credibility of each piece of evidence and describe how it relates to the elements of the alleged problem, and make findings of fact on each element of

the alleged offense or violation. If a recommendation is needed, it should follow the findings of fact.

All in all, if the investigator has done his or her job right, the company should have a solid basis for taking action and defending itself against claims of inaction and unfair treatment. Done properly, investigations will either keep an employer out of court, or else enable the employer to worry a little bit less about the outcome.

WORKFORCE DIVERSITY ISSUES: THE ROLE OF CULTURAL DIFFERENCES IN WORKPLACE INVESTIGATIONS

Since the average workforce is much more diverse than twenty or thirty years ago, employers need to keep their employees' cultural differences in mind when planning interviews or investigations. The term "cultural differences" in its broadest sense includes differences based not only on the familiar protected categories mentioned in laws enforced by the EEOC, but also differences based upon income, regional origins, dress code and grooming standards, music preferences, and political affiliation. Even within some ethnic or racial groups, there are perceived differences between the members based upon how long an individual has been in this country, skin tone, language ability, and religion. Interviewing techniques that seem effective with longtime residents in the United States may not be effective at all with people who come from abroad and who are not used to American cultural norms. Although learned scholars still debate differences and similarities between groups of people, there are a few general principles to keep in mind that can help interviews go more smoothly with a diverse group of people:

1. Approach each interviewee with an open mind - do not form an opinion before meeting and talking with the individual, but rather let the interview shape your opinion.
2. Put yourself in the interviewee's place - imagine yourself as an employee being faced with your own questions.
3. Prepare yourself before interviewing each employee on your witness or party list. If you need more information about general cultural attributes of people from certain countries or religions, research the issue (using sources such as the public library or the Internet), reviewing at least two or three different sources for each different cultural type involved.
4. Try to find out as much as you can about a particular culture's stance toward things such as the amount of physical space between people who are talking with each other, the amount of eye contact that is appropriate, the significance of voice inflections when asking questions, and the significance, if any, of head movements and other body language during a conversation.
5. Be sensitive to the role that gender can play in cultural dynamics. For instance, in some cultures, it may be inappropriate for a male interviewer to be alone in a room with a woman who is being interviewed. A general practice of always having an opposite-gender witness present would come in handy for such times. Another example might be that male employees from certain cultures might react very adversely, or may "clam up" altogether, if forced to answer pointed questions from a female interviewer. Whether it's right or wrong to have such an attitude in our country is beside the point if the goal of getting full and accurate information is not being achieved.
6. Remember that one can be easily deceived by generalities and stereotypes. Just as there are significant differences between the longtime citizens of your own neighborhood, town, county, and state, and between the members of your church, there are equally significant differences between the people of other countries and religions. Refer back to point 1 above.

Regardless of cultural differences, there are some constants:

- Every person appreciates being treated with respect.
- Even those who come from cultures noted for self-sacrifice and community thinking have a sense of self-value and appreciate being treated as individuals.
- Every person appreciates feeling as if their opinion matters to you.
- Everyone appreciates an opportunity to explain themselves, so be sure to allow enough time to let people "get things off their chests."
- Every person from every culture understands the basic concept of fairness: that people should be treated consistently according to known rules or standards, based upon things that were within their power to control.
- Every employee comes to an interview with a certain amount of trepidation and uncertainty and will appreciate whatever you can do to reassure them that they will at least be treated fairly.

Remember, while it is important to know your employees and to have basic familiarity with their backgrounds and cultures, you will mislead only yourself if you believe that you have them all figured out based upon cultural generalities. Keeping an open mind and treating people fairly based upon what they do or do not do are the keys to bridging whatever cultural gaps exist.

DRUG TESTING IN THE WORKPLACE

Under Texas and federal laws, there is almost no limitation at all on the right of private employers to adopt drug and alcohol testing policies for their workers.

Government employers are not so free, due mainly to court decisions holding that testing employees without showing some kind of compelling justification violates government employees' rights to be safe from unreasonable searches and seizures. Drug testing is not for everyone. A company should do it only after careful consideration of many factors, including applicable statutes and regulations, contract or insurance requirements, and combatting some perceived problem with substance abuse among the workers. Drug testing, for example, may be mandated for some types of employees, as is the case with workers subject to U.S. Department of Transportation mandatory testing guidelines. Some federal contracts and grants may require employers to adopt drug-free workplace policies and possibly even to provide for drug-testing of employees. Other employers may be under no legal obligation to do testing, but feel it is needed due to reports that some employees may be unsafe due to being under the influence of drugs or alcohol. Regardless of the reason for testing, it is essential to carefully draft the policy and consider the various legal issues.

What is a good, basic drug testing policy?

Most policies start out by emphasizing in positive terms the need for safety in the workplace and adherence to job requirements and work quality, and go on to cite goals such as improving safety and productivity. The policy should address certain questions:

- What will be considered a violation? (necessary)
- Which employees will be covered? (necessary)
- What disciplinary measures will result from violations? (necessary)
- Will the company allow rehabilitation? (optional - not required by any Texas or federal law)

For an example of such a policy, see the drug testing policy section of "The A to Z of Personnel Policies".

Like any policy, a drug and alcohol policy should be given in writing to all employees. Employees should sign a written acknowledgment that they have received a copy of the policy. Employers usually make signing such a policy a condition of being hired. While it is common for such a policy to be part of an overall policy manual, it is probably best to have each employee sign a separate form consenting specifically to the search and testing policy.

What if an employee refuses to sign the policy?

It would be legal to fire the employee for refusing to sign an acknowledgment of the policy, but that should not be done until and unless the employee has been warned, preferably in writing and witnessed by others, that discharge can result from refusal to sign. An alternative to such a hard-line approach would be to hold a mandatory staff meeting, publish an agenda for the meeting showing as one of the items "distribution of new drug-testing policy", have all employees sign an attendance roster or else face discipline for an unexcused absence, discuss and distribute the policy in front of witnesses, have employees sign an acknowledgment of receipt, have a witness sign "employee refused to sign" on the acknowledgment form if an employee refuses to sign, and note in the minutes of the meeting that the policy was distributed to everyone in attendance. In such a case, an employee would look pretty ridiculous trying to claim that they were not given a copy of the policy or that they were unaware of what the policy required.

Can a company test some, but not all, employees?

It is legal to test some, but not all, employees, but an employer must be careful. The policy should cover all employees in specific job categories. For example, the company could make all workers who operate machinery or vehicles subject to drug testing, but not require testing of clerical staff. Some employers test only those employees whose jobs are inherently risky. Some companies would not even do drug testing were it not for certain laws, such as the DOT drug testing regulations for long-haul truck drivers, oil and gas pipeline workers, and so on. Some contracts specify that workers coming into a client's facility will be subject to drug testing. If that happens, the contractor does not also have to test its other employees who do not go onto that client's premises. The main thing is to decide who will be covered, and then to enforce the policy in an even-handed way.

What about discipline or rehabilitation for employees who test positive?

Most companies notify employees that testing positive for drugs or alcohol will result in immediate termination. Some companies allow a chance for rehabilitation and a return to work under probationary conditions, but this type of second chance is not required under Texas or federal law. If a worker is allowed to return to work after a positive test result, it is generally under a "last chance" agreement providing for monthly random tests, a year's probation, and immediate termination for any subsequent positive test result.

How about searches?

Many companies incorporate a search policy into their drug testing policies. After all, a drug test is a type of search. For an example of such a provision, see the sample drug-testing policy in the section of the book titled "The A to Z of Personnel Policies".

What if an employee refuses to cooperate?

An employer should never physically force an employee to submit to a search, due to the risk of civil and criminal complaints involving assault, battery, false imprisonment, invasion of privacy, and intentional infliction of emotional distress. However, employers may provide in the policy that employees who refuse to submit to a reasonable search under the policy, or who refuse to undergo a drug test, will be subject to immediate termination. In case of such refusal, termination should not occur until the employee has been reminded of the policy and of the risk of termination for non-compliance.

Under what circumstances should testing take place?

A typical policy will provide maximum flexibility for the employer. A company is allowed to do both random and "for cause" testing. Both circumstances should be spelled out to let employees know under what circumstances they can be called upon to submit to a test. For example, a "random" test might involve periodically testing all covered employees twice a year at intervals specified by the company. The company might send two employees each week for testing, but any given employee would only be sent twice in a year. "For cause" circumstances might include such things as reasonable suspicion by a supervisor that an employee may be in violation of the policy, reports from any witnesses, bizarre, unsafe, or threatening behavior on the employee's part, or involvement in a work-related accident ("involvement" means either being hurt or causing or contributing to the accident). Other things could be included as well; the term "for cause" is up to the employer to define. Terms used in the policy should be either readily understandable, i.e., with plain and unmistakable meanings, or else should be carefully defined. It is extremely important that the policy be understood by everyone who might be affected by it: company officials, lower-level supervisors, employees, the employer's insurance company, and government agencies, including courts, who might have to decide cases arising out of a drug test.

Pre-employment Drug Testing

Pre-employment drug testing is something that some employers choose to do for applicants. It is not regarded under the ADA as a medical examination, so it may be done at any point of the selection process, but due to cost issues, most companies restrict such testing to the final candidates for a position. Regarding the issue of who pays for the test, most companies assume that burden. Texas and federal law do not have specific provisions one way or the other, but if requiring an applicant to pay for a pre-employment drug test would have the effect of discouraging minority applicants, or else effectively result in less than minimum wage for the employee's first paycheck, EEOC and/or the U.S. Department of Labor may have concerns under EEO or minimum wage laws. It would be best to let doubtful cases be reviewed by employment law counsel prior to such testing. Even though drug tests themselves are not covered by the ADA, the results from such tests are considered medical records and should be kept in a separate, confidential medical file just as other types of medical records must be maintained under the ADA.

Regarding workers' compensation laws

Former Section 411.091 of the Texas Workers' Compensation Act (repealed in 2005) required any employer that is covered under a workers' compensation policy and that has 15 or more employees to have a drug-free workplace policy and to distribute the policy to all employees. Although the law did not require such companies to provide for drug testing, TWCC rules 169.1 and 169.2 state that if drug testing is done, the policy should be given in writing to all employees and should specify what penalties may be imposed in case of positive drug test results. While the statutory basis for those two rules may be in doubt, the intent behind the rules remains a good practice, i.e., any important policy should be in writing and should be specific as to requirements and penalties.

Clarity is essential

It should be very clear what is prohibited under the policy. While "use, possession, sale, or transfer" may be easy to understand, the concept of how the drug or alcohol test will reveal a violation is not so straightforward. It is very important to define exactly what will be considered a violation in this regard. Some employers are concerned only if the test shows drug or alcohol levels above a certain "cutoff" point. Other employers take a more hard-line or "zero tolerance" approach, stating that the policy is violated if a test detects any amount of prohibited substances in an employee's system. Whatever the employer regards as important, it should be clearly spelled out.

Find a good drug-testing lab prior to enforcing the policy

No company should begin drug testing until it has found and engaged a reliable drug-testing lab that will be willing to cooperate with the employer in the event that a lawsuit or claim arises from the test. No lab should be used unless it agrees in writing to routinely provide the company with copies of the test results, showing which tests were performed,

what substances were found, and in what amounts (either specific concentrations or an indication of what the cut-off levels for a positive result were). It should also furnish a copy of the complete chain of custody of the urine, hair, or blood sample showing who handled the sample at various times in the testing process. Employers that fail to present those types of documentation in response to an unemployment claim will lose the UI claim.

What type of testing should be done?

Initial tests or screens vary, but in order to have the best chance of protecting the company against an unemployment claim, the employer should always have the lab confirm the initial positive result with a confirmation test using the GC/MS method (gas chromatography/mass spectrometry). The GC/MS test is more expensive than the initial screen, but TWC expects to see the results of both tests before it will disqualify a claimant from UI benefits.

What about confidentiality?

Test results should be considered absolutely confidential. Negligent release of test results could result in legal action over issues such as invasion of privacy, intentional infliction of emotional distress, and defamation. Due to the federal law (ADA), it is necessary to maintain such records in a separate, confidential medical file. As a practical matter, the HIPAA privacy rule can make it difficult for employers to obtain specific drug test results from the testing lab. For that reason and others, employers should have employees sign a properly-worded consent form allowing the testing lab to release such results to the employer, and allowing both the testing lab and the employer to release the results to TWC and to any other agency or court dealing with a claim or lawsuit arising from the test. For a sample of such a form, see the "Drug and/or Alcohol Testing Consent Form" in the section of this book titled "The A to Z of Personnel Policies".

Does it violate other confidentiality laws to release the test results to TWC?

No. Many employers misunderstand the laws in this regard. Even highly-regulated and otherwise restrictive DOT testing procedures allow employers to release the results to courts, government agencies, or arbitrators dealing with claims arising from the drug test, and drug testing labs are required to release the results to employers upon request in such situations (see DOT regulation 49 C.F.R. 40.323). There is simply no substitute for the specific drug test results in an unemployment claim. Employers with lingering doubts on this issue should call the employer commissioner's office at TWC at 1-800-832-9394.

What special concerns are there in DOT drug testing cases?

U.S. Department of Transportation rules provide for drug testing via urinalysis of safety-sensitive employees in a variety of circumstances and for relieving such employees of duty in the event of a verified positive result or a test refusal. The DOT rules provide detailed procedural safeguards to ensure valid testing, valid results, and confidentiality. The rules are not meant to be a substitute for a good drug and alcohol policy, nor are they a limit on what employers are allowed to do in order to discourage and respond to drug and alcohol use on the job. With regard to how the DOT rules interact with a TWC unemployment claim, TWC precedent case 1051204 (MC 485.46, Appeals Policy and Precedent Manual) holds that proof of compliance with DOT standards regarding MRO review can serve as proof of confirmed drug test results (see requirements 3, 4, and 5 below).

Finally, what kind of documentation is needed in a TWC unemployment claim?

A TWC precedent case, Appeal No. 97-003744-10-040997, sets out some fairly clear guidelines regarding the kind of documentation an employer needs to respond to an unemployment claim involving an ex-employee whose termination resulted from failing a drug test. To establish that a claimant's positive drug test result constitutes misconduct, an employer must present:

1. a policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant;
2. evidence to establish that the claimant has consented to drug testing under the policy;
3. documentation to establish that the chain of custody of the claimant's sample was maintained;
4. documentation from a drug testing laboratory to establish than an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
5. documentation of the test expressed in terms of a positive result above a stated test threshold.

Evidence of these five elements is what TWC states is needed to overcome a claimant's sworn denial of drug use. That is why it is so important to have each employee sign a consent form allowing complete disclosure of all test documentation by both the testing lab and the employer for the purpose of responding to claims and lawsuits.

Summing up

All in all, common sense will help more than anything else. If a company has a clear written policy, ensures that all employees know about it, conducts tests according to the policy, and insists on the testing lab furnishing the appropriate documentation, it will be in a favorable position in any unemployment case or lawsuit arising from the test.

SEARCHES AT WORK - LEGAL ISSUES TO CONSIDER

Like it or not, most employers sooner or later have to think about whether they need to conduct searches of their employees and their work areas. The problems include cash and inventory shortages, disappearances of company or employee property, and contraband items such as drugs, alcohol, and dangerous weapons. It is not an easy area for employers, who have to worry about the legality of searches, the usefulness of such measures, and their effect on employee morale, and for that reason a company should not be in a hurry to start searching its workers. There are a number of legal issues to consider first!

To begin with, governmental employers have to worry about federal and state constitutional prohibitions against "unreasonable searches and seizures". Private employers face a variety of private causes of action such as invasion of privacy, defamation, and infliction of emotional distress. Even if a suit is unsuccessful, the "winning" employer may be out a large amount of time and money spent defending the suit.

Common sense would tell any employer to watch out for avoidable troubles such as actions that would entitle an employee to raise claims of assault or battery, false imprisonment, intentional infliction of emotional distress, and so on. For that reason, it is extremely unwise to physically force an employee to submit to a search or to hold the employee until police can be consulted. An employee should not be touched without consent. By the same token, no one should call the employee to be searched defamatory names such as "thief", "drug user", or worse.

The employer should draw up a simple policy informing employees that the employer reserves the right to conduct searches to monitor compliance with rules concerning security of company and individual property, drugs and alcohol, and possession of other contraband items. The policy should enable searches of the employees, their work areas, lockers, vehicles if driven or parked on company property, and other personal items. It should reassure employees that in requesting a search, the employer is not accusing anyone of theft or some other crime.

As noted above, an employer should never force an employee to submit to a search. However, the employer may make submission to reasonable searches a condition of continued employment. The policy should make clear that refusal, after fair warning, to submit to a search or test can lead to immediate discharge. Some employers specify that such refusal will be considered a voluntary quit. Administrative agencies and courts have analyzed such cases both ways. The policy should be given in writing to and acknowledged by all employees. For new hires, employers have the right to make signing such a form a condition of employment. If the search policy is contained within a larger policy handbook, it is best to have a separate form consenting specifically to that condition. Finally, when a search is conducted, it should be done in a manner protecting the employee's privacy and as mindful as possible of the employee's personal feelings.

An interesting case in this area was *K-Mart Corp. v. Trotti,* 677 S.W.2d 632 (Tex. App. - Houston [1st Dist.] 1984, writ refused n.r.e.). The employer was sued after searching a locker used by an employee. The employee used her own lock on the locker, and the employer did not require her to give it the combination. The court ruled that the worker had a reasonable expectation of privacy which the employer had violated and that $100,000 in exemplary (punitive) damages was not excessive under the circumstances. Most observers believe the employer would not have lost the case had it had a clear policy informing its workers that the lockers were subject to search at any time and that if private locks were used, a key or the combination must be given to the supervisor.

If an employer ends up with an unemployment claim involving a search, it should be prepared to submit a copy of its policy on searches, a copy of the claimant's

acknowledgment of the policy, copies of any warnings given, and testimony from any eyewitnesses to the final incident causing the discharge.

The employer should also be prepared to address any questions of why the search was requested, the reasonableness of the search, and whether the policy was applied consistently.

To sum up, a good policy on searches should incorporate the following points:

- the policy is for the purpose of monitoring compliance with work and safety rules
- all employees are subject to the policy
- if a search is requested, it is not an accusation of theft or other wrongdoing, but merely part of an investigation
- a search may include the employees, their work areas, lockers, vehicles if driven or parked on company property or used on company business, and any other personal items; again, remember that an employee should never be touched without his or her consent!
- all of the above areas are subject to search at any time; if the company allows an employee to have a locker or other storage area, the company will either furnish the lock and keep a copy of the key or combination, or else allow the employee to furnish a personal lock, but the employee must give the company a copy of the key or combination
- refusal to submit to a search may lead to immediate termination, or a lesser penalty, at the employer's option; however, prior to any termination, a clear and documentable or witnessed final warning should be given to help the employer in case an unemployment claim or lawsuit is filed.

If an employer incorporates those points into any search policy it may develop and conducts searches in a careful and considerate manner, such a policy would most likely put the employer in a good position to defend itself against any claims of unreasonable searches, invasion of privacy, or infliction of emotional distress. Employers may wish to consult a private practice labor law attorney for help in drafting and implementing such a policy (a sample policy appears in the back of this book in the section called "The A to Z of Personnel Policies").

AN EMPLOYEE'S RIGHT TO REPRESENTATION DURING AN INVESTIGATORY INTERVIEW

The question of whether the National Labor Relations Act requires a non-unionized employer to grant an employee's request to have a representative present during a meeting or investigatory interview from which disciplinary action might result has resulted in some interesting cases in the recent past. Employers around the nation had cause to worry after the D.C. Circuit Court of Appeals ruled in a landmark case in November, 2001 that the NLRA indeed gives employees such a right. In *Epilepsy Foundation of N.E. Ohio v. National Labor Relations Board*, 268 F.3d 1095 (D.C. Cir. 2001), the court held that the NLRB's decision in July, 2000 to extend the 1975 ruling of the U.S. Supreme Court in *NLRB v. J. Weingarten* (420 U.S. 251) to non-union workplaces was reasonable. The *Weingarten* holding was that a union employee has the right to request that a representative be present during an investigatory interview that might result in disciplinary action. In extending that holding to the non-union workplace, the NLRB observed that "… the right was grounded in the language of Section 7 of the Act, specifically the right to engage in 'concerted activities for the purpose of mutual aid or protection.' This rationale is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'" (*Epilepsy Foundation*, 331 NLRB 676, 678, July 10, 2000). The D.C. Circuit Court of Appeals affirmed that part of the Board's ruling, but reversed the part of the ruling that applied the rule retroactively to the Epilepsy Foundation, since the employer had acted in good faith reliance on the NLRB rule at the time of the incidents, which was that *Weingarten* rights extend only to union employees.

As the appeals court pointed out, neither the NLRB ruling nor the appeals court ruling went so far as to require certain things that might otherwise be an onerous burden on the disciplinary or investigation process:

- The employer is not required to inform an employee of his or her *Weingarten* rights or tell an employee about the right to representation.
- The ruling does not give the employee the right to delay a meeting if the representative of choice is unavailable at the time the employer wants to hold the meeting. If the employee asks for a specific representative who is unavailable at the time of the meeting, the employer can tell the employee to choose another representative.
- The ruling does not discuss the right of the employee's representative to speak during the meeting or ask questions. Presumably, a reasonable amount of consultation between the employee and the representative would be allowed. However, if the representative is disruptive or otherwise interferes with the meeting, the employer would presumably have the right to ask the employee to select a different representative.
- Finally, as the court of appeals correctly noted, the employer can forego a meeting altogether and simply act on the basis of other evidence in a matter. However, that alternative will not often be satisfactory, since the employer usually wants to know exactly what happened so that appropriate action can be taken against the appropriate party.
- The employer should document its efforts to comply with the employee's right to request representation during such a meeting.

In 2002, the U.S. Supreme Court declined review of the appeals court's decision, meaning that it found no compelling reason to disagree with it. Fortunately, the NLRB reconsidered its *Epilepsy Foundation* holding in the case of *IBM Corporation*, 341 NLRB No. 148 (June 9, 2004), ruling that its prior holding in *E. I. DuPont & Co.*, 289 NLRB 627 (1988), to the effect that the *Weingarten* rule does not apply in a non-union setting, was the proper interpretation of the NLRA. Thus, employers have received a bit of breathing room on this issue, even though the NLRB declined in 2007 to apply the *IBM* rule retroactively in cases arising before the *IBM* decision was issued (see *Wal-Mart Stores, Inc.*, 351 N.L.R.B. 130 (2007)). However, employers in Texas may still wish to consult an employment law attorney of their choice on this important legal issue to ensure that their disciplinary processes comply with various state and federal laws.

HIPAA PRIVACY RULE - WHAT EMPLOYERS NEED TO KNOW

One of the most important aspects of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) is its privacy protection. The law gave the U.S. Department of Health and Human Services the responsibility of adopting rules to help patients and other health care consumers keep as much of their personal information private as possible. The HIPAA privacy rule applies to "covered entities", and even though employers are generally not covered entities, they are definitely affected by the rules applying to entities that are covered. The HIPAA privacy rule Web site from HHS (http://www.hhs.gov/ocr/privacy/) has much guidance on the rule, including a very lengthy Q & A section that attempts to cover the privacy rule from the standpoint of covered entities, employers, health care consumers, health care providers, and other interested parties.

This article presents basic information about the HIPAA privacy rule in question and answer format and is specifically focused on the most important things that employers need to know about how the privacy rule will affect them.

What is the primary purpose of the HIPAA privacy rule?

The rule protects from unauthorized disclosure any personally-identifiable health information (protected health information, or PHI) that pertains to a consumer of health care services.

What is considered "personally-identifiable health information"?

Health information is considered to be personally identifiable if it relates to a specifically identifiable individual; it generally includes the following, whether in electronic, paper, or oral format:

1) Health care claims or health care encounter information, such as documentation of doctor's visits and notes made by physicians and other provider staff;
2) Health care payment and remittance advice;
3) Coordination of health care benefits;
4) Health care claim status;
5) Enrollment and disenrollment in a health plan;
6) Eligibility for a health plan;
7) Health plan premium payments;
8) Referral certifications and authorization;
9) First report of injury;
10) Health claims attachments.
11) Health care electronic funds transfers (EFT) and remittance advice; and
12) (other transactions prescribed in future regulations).

What is a covered entity?

The privacy rule applies to health plans, health care clearinghouses, and health care providers. It applies to employers only to the extent that they somehow operate in one or more of those capacities. The same standards apply to covered entities in both the public and private sectors.

How might an employer be a covered entity?

Normally, an employer will only deal with covered entities, not actually be one. However, if an employer has any kind of health clinic operations available to employees, or provides a self-insured health plan for employees, or acts as the intermediary between its employees and health care providers, it will find itself handling the kind of PHI that is protected by the HIPAA privacy rule.

What must covered entities do to protect consumers of health care?

Covered entities must adopt written PHI privacy procedures; designate a privacy officer; require their business associates to sign agreements respecting the confidentiality of PHI; train all of their employees in privacy rule requirements; give patients written notice of the covered entities' privacy practices and access to their medical records; a chance to request modifications to the records; a chance to request restrictions on the use or disclosure of their information; a chance to request an accounting of any use to which the PHI has been put; and a chance to request alternative methods of communicating information. They must also establish a process for patients to use in filing complaints and for dealing with complaints. Finally, they must take any measures necessary to see that PHI is not used for making employment or benefits decisions, marketing, or fundraising.

What do the written privacy procedures include?

A covered entity's written privacy procedures must include safeguards for administration of PHI, physical security of such information, and electronic and other types of technical security. The procedures should include the designation of a privacy officer and an explanation of the complaint and resolution process.

When is patient authorization necessary?

Patient authorization is not necessary if a disclosure is made for purposes of treatment, securing payment, or in accordance with the operations of a health care provider. If PHI is to be disclosed for any other purpose, the patient's written authorization is mandatory.

When disclosing PHI, what must a covered entity do?

Whether the PHI must be authorized or does not need to be authorized, the covered entity must always release only as much information is necessary to address the need of the entity requesting the information (what the regulation refers to as the "minimum necessary" information to satisfy the inquiry).

What penalties apply to violations of privacy rule requirements?

There are civil penalties of $100 per violation, but the penalties can be "stacked" if there are multiple violations with respect to a single individual. The maximum civil penalties are $25,000 per year, per person, per standard. Thus, if two standards were violated with respect to one person, the potential penalties could mount to as much as $50,000. Criminal penalties (up to a $250,000 fine and ten years in prison) may be imposed for "knowingly and improperly" disclosing information or obtaining information under "false pretenses", with higher penalties reserved for violations designed for financial gain or "malicious harm". In addition, of course, state laws may impose additional penalties for the same offenses, and most states would also allow common-law suits for torts such as invasion of privacy and infliction of emotional distress, among other causes of action. In November, 2004, a federal district court sentenced a former employee of a Seattle, Washington cancer clinic to 16 months in prison under the criminal penalty provisions of HIPAA after he admitted he used a patient's birthdate and SSN information to fraudulently obtain four credit cards in the patient's name and charge over $9,000 in goods.

Are there any exceptions to the privacy rule?

It is possible to disclose PHI without authorization if there is a compelling need for disclosure, such as when the information is needed for public health situations, court and agency proceedings (such as workers' compensation claim proceedings - see below), agency requirements (such as OSHA 300 logs - see OSHA Standards Interpretation Letter, August 2, 2004, http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24898), law enforcement, emergencies, identification of deceased people, and national security-related situations (see 45 CFR § 164.512(a, e, and l)).

OSHA Logs and HIPAA

In an OSHA Standards Interpretation letter dated August 2, 2004, OSHA held that the HIPAA privacy rule does not require employers to remove names of injured employees from the OSHA 300 log. This is due to the exception under HIPAA for records that are required by law. Since the OSHA 300 log is a required record, employers have no choice but to include all necessary information on it, including the employees' name and injury information. See the OSHA letter at the following address:
www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24898.

Workers' Compensation and HIPAA

There is no problem with employers, workers' compensation insurance carriers, physicians, and other participants in the workers' compensation system sharing protected health information with each other in connection with workers' compensation claims and appeals. HIPAA specifically allows three exemptions for workers' compensation-related matters:

- if the disclosure is "[a]s authorized and to the extent necessary to comply with laws relating to workers' compensation or similar programs established by law that provide benefits for work-related injuries or illness without regard to fault." 45 C.F.R. §164.512(l).
- if the disclosure is required by state or other law, in which case the disclosure is limited to whatever the law requires. 45 C.F.R. §164.512(a).
- if the disclosure is for the purpose of obtaining payment for any health care provided to an injured or ill employee. 45 C.F.R. §164.502(a)(1)(ii).

Thus, the employee's written authorization is not necessary for the disclosure if one of those exceptions applies, and the employee also would not be able to require the covered entity to withhold the information under 45 CFR §164.522(a). The bottom line is that if any health-related information is being exchanged in conjunction with a workers' compensation claim or appeal, the HIPAA privacy rule will not stand in the way. For a useful brochure on this subject from the Texas Department of Insurance's Workers' Compensation Division, go to http://www.tdi.texas.gov/wc/news/advisories/ad2003-05.html on TDI's Division of Workers' Compensation website.

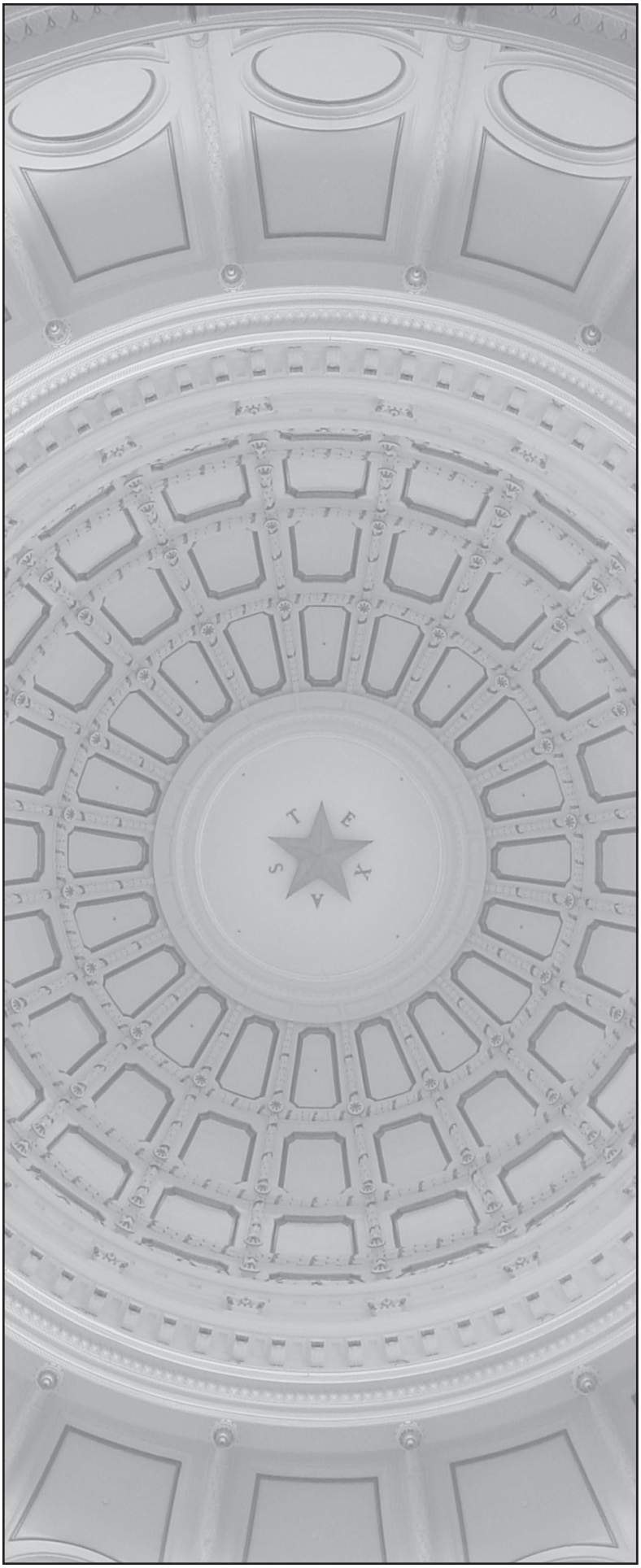
What about state laws?

The HIPAA privacy rule establishes a national minimum standard. If a state law provides greater privacy protections, the state law must be observed. As it happens, the equivalent Texas state law (Texas Health and Safety Code, Chapter 181 - online at http://www.capitol.state.

tx.us/statutes/he/he0018100toc.html), applies to more types of entities, requires consent for treatment, and otherwise provides similar protections. Since the Texas law defines "covered entity" as anyone who has any role at all in the production, gathering, storing, processing, or transmittal of PHI, as well as anyone who comes into possession of such information, some have argued that any employer who finds out or stores information relating to the medical condition of employees is covered under the law. However, the same state law provides that employers are not covered entities except with respect to reidentification of protected health information and use of PHI for marketing purposes (Texas Health & Safety Code, Section 181.051(3)). Nevertheless, Texas employers and their employees should be careful in how they deal with medical privacy issues in their workplaces. The regulations adopted by the Texas Department of Insurance for medical information privacy provide some guidance (28 T.A.C. Part 1, Chapter 22, Subchapter B). The exceptions for covered entities are found in TDI rule 28 T.A.C. § 22.57. However, since there have not been many court decisions issued yet under that 2001 law, employers should seek the guidance of qualified legal counsel if they have an unusual medical information privacy issue.

Under Texas Labor Code §§ 402.082 - 402.092, information relating to workers' compensation claims is confidential and may be released only under very restricted circumstances, and unauthorized disclosure of such information may result in criminal penalties, as provided in § 402.091. There is an exception in § 402.092(b)(4) for disclosures to government agencies for legal compliance purposes, including responses to unemployment claims.

The general wisdom applies here: when in doubt, keep the information as private and confidential as possible, and ask for the affected employee's written authorization to release it (to obtain a HIPAA-compliant waiver from employees, engage private counsel experienced in HIPAA issues - this is no area for a non-specialist).



WORK

separation

ISSUES

OUTLINE OF EMPLOYMENT LAW ISSUES - PART III

Work Separations - General

- No advance notice of termination or resignation is required.
- If advance notice of resignation is given, it can be accepted, rejected, or modified by the employer.
- If a notice period is rejected, the employer does not have to pay for the time not worked by the employee, since the duty to pay ends on the date the work separation becomes effective.
- In general, an employer does not have to explain why it is letting an employee go - an employer can say as little or as much as it deems appropriate - an exception is in the situation of an employee who is discharged as the result of a background check covered under the Fair Credit Reporting Act (i.e., a background check performed by an outside, for-profit firm) - in that case, the employer must explain to the employee that the discharge is the result of the unfavorable report, give the employee a copy of the report, and furnish contact information for the firm that issued the report.
- In most cases, it would not be a good idea to tell other employees why a coworker was let go. If curious people keep prying, the best response is to inform them that the company respects people's privacy and does not discuss personnel matters, and that they will need to ask the former employee directly if they feel they need more information.
- Texas law does not require written notice of termination or layoff, but a simple, clear, and unambiguous written notice of work separation can help prevent employees from later claiming that they are owed additional pay beyond the work separation date, since they did not know they had been laid off or discharged, and they allegedly continued to "work from home", call on customers, or engage in e-mail correspondence with various parties as part of their supposed duties.
- Depending upon the circumstances, the following may need to be done at or near the time of work separation:
  - The employer needs to make a final wage payment within six calendar days for a layoff or discharge, or by the next regularly scheduled payday for a resignation.
  - If the employee had health insurance, the employer should give notice under state or federal COBRA laws.
  - In case of a mass layoff, the employer should give a WARN notice to affected employees and the state
  - Normally, except in the event of a mass layoff, no notice to the state of Texas is required for any kind of work separation, but if the employee was subject to a wage garnishment order for child support or alimony, the employer must notify the New Hire division of the Attorney General's office within seven days of the work separation.
  - For employees who are under child support orders, the employer must notify the Attorney General's office (https://portal.cs.oag.state.tx.us/wps/portal/EmployerHome) within seven calendar days of the effective date of work separation, and in case of certain lump-sum payments of severance pay, bonuses, commissions, accrued leave, or similar post-termination payments, any child support or alimony amounts must be taken out of such payments.

Termination Checklist

- Was there a specific incident close in time to the discharge?
- Can the employer show that the employee violated a known policy or law?
- Does the employer have documentation and witnesses to support its reasons for termination?
- Did the employee progress all the way through the disciplinary system?
- Was the employee confronted with the problem and given a chance to explain?
- Does the reason for termination have anything to do with any of the circumstances described in the topic "Wrongful Discharge" in Part IV of this book?
- Discrimination issues:
  - Does the employee belong to a protected minority (depending upon the city or state(s) in which a company operates, that list could include race, color, gender, pregnancy, sexual orientation, gender identity, age, national origin, disability, citizenship, and/or veteran status)?
  - Was the treatment given to the employee different from that given to non-minorities?
  - Was the treatment given to the employee different from that given to other workers in general?
- Was the employee involved in a protected activity?
  - ... involvement in a claim over wages, workers' compensation, or discrimination?
  - ... jury or military duty?
  - ... voting? (For a listing of state laws regarding paid or unpaid time off for voting, see the NFIB Web site at http://www.nfib.com/tabid/56/Default.aspx?cmsid=31407&v=1.)
  - ... refusal to commit an illegal act?
  - ... inquiring about the legality of an instruction from the employer?
  - ... "whistleblowing"?
- Does the reason for termination have anything to do

with any of the circumstances described in the topic "Wrongful Discharge" in Part IV of this book?

- In the case of a simple layoff, is the company using neutral, business-related criteria, not related to any minority characteristics, to evaluate the affected department and select those who will be laid off?
- Depending upon the answers to these questions, the employer may need to seek legal advice prior to taking any adverse job action against the affected employee.

Exit Interviews / Notice of Discharge

- "Pink slip" or work separation notice - optional in most states - not required in Texas (however, giving at least a simple work separation notice can help prevent ex-employees from filing wage claims based upon "work" they allegedly did after your company thought they were gone - see comment [6] under "Work Separations - General" and comment [3] below for details).
- Most states, including Texas, do not require an employer to give an explanation of the reason or reasons for discharge, and an employee is not required to give an explanation for a resignation - if given, make the explanation brief and to the point - the "pink slip" is not the time to make an example of someone or to "rub it in" - in general, the shorter the explanation is, the better.
- In Texas, an employer does not have to give a departing employee a termination notice or letter, or a letter of recommendation, based on a 1914 Texas Supreme Court ruling in the case of *St. Louis Southwestern Railway Co. of Texas v. Griffin*, 171 S.W. 703 (Tex.1914). That holding ruled that a 1907 statute (article 5196, § 3, V.T.C.S.) requiring an employer to give an employee a termination letter within ten days of a former employee's request violated Article I, section 8 of the Texas Constitution. The Court held that the constitutional right to speak includes the right to not speak about a former employee. The Court's decision was discussed in detail in Attorney General Opinion No. JM-623, January 20, 1987 (accessible online at https://www.oag.state.tx.us/opinions/opinions/47mattox/op/1987/htm/jm0623.htm).
- Under Section 52.031(d) of the Texas Labor Code, a truthful written notice of discharge cannot be the basis for a defamation lawsuit - as noted above, an employer should write down only the bare minimum needed.
- Above all, avoid inflammatory language or anything you cannot document - certain terms sound inherently defamatory, such as "thief", "stealing", or "drug abuse" - use non-inflammatory descriptive terms that can be documented, such as "failure to properly account for items entrusted to his care", or "violated drug-free workplace policy by testing positive for [whatever]".
- The same goes for any oral explanations of the reasons for discharge - remember, an employee may be tape-recording the conversation - it is usually best to let one specific person in the organization carry out all terminations in order to minimize the risk that individual hard feelings might inadvertently result in statements that end up sounding defamatory in court.
- Supply a space for the employee's statement - an employee will often give an honest statement that can help the employer defend against an employment claim.

Final Pay / Severance Benefits

- Texas law has specific deadlines for final pay, as well as limitations on what may be deducted from pay:
  - In the case of an involuntary work separation (discharge, termination, layoff, "mutual agreement", and resignation in lieu of discharge), the employer has six calendar days from the effective date of discharge to give the employee the final paycheck; if the sixth day falls on a day on which the employer is normally closed for business, the employer may wait until the next regular workday to give the employee the final check.
  - If the work separation is voluntary, i.e., the employee initiates the work separation, and continued work would have been available had the employee not chosen to give notice of resigning, or had the employee not abandoned the job, the deadline for the final paycheck falls on the next regularly scheduled payday following the date of last work; "voluntary work separation" includes resignation, retirement, walking off the job, and job abandonment.
  - "Final pay" includes all components of the pay - however, if a commission or bonus policy or plan provides for payment on a specific date or at a specific interval, the plan or policy will determine when such payments must be made - such plans or policies should always be in writing for the company's own protection.
- Severance/wages in lieu of notice - the employer should decide whether to pay such post-termination pay in installments or in a lump sum. Texas allows either method. Under the Texas Payday Law, severance pay is not owed unless it is promised in a written policy. Be sure to understand the difference:
  - Most employers designate any post-employment wages paid to ex-employees as severance pay.
  - For purposes of unemployment compensation, however, it is important to know that such payments may not be severance at all, but rather, wages in lieu of notice.
  - Sections 207.049(1) and (2) of the Texas Unemployment Compensation Act state that a claimant will be disqualified from receiving unemployment benefits for any benefit period in which he is receiving wages in lieu of notice or severance pay.
  - The courts have generally defined severance

pay to be a payment the employer has obligated itself to make, either verbally or in writing, which is based upon a set formula, such as length of prior service. For example, an employer may have a company policy that a terminating employee is entitled to one month's wages for every year of service. Section 207.049(2) defines "severance pay" as "dismissal or separation income paid on termination of employment in addition to the employee's usual earnings from the employer at the time of termination." The term does not include any payment made to settle a claim or lawsuit, to obtain a release of liability under the Civil Rights Act of 1991, or in connection with a previously negotiated contract. Thus, severance pay that is unilaterally offered (for example, in a policy or in a job offer letter) would generally be disqualifying, while a negotiated severance payment would likely not affect benefit eligibility. Individual facts and circumstances make a difference, and each case is decided on its own facts. TWC does not issue advisory opinions before a claim is filed, and only the claim investigator can make an official ruling in an individual case.

- Wages in lieu of notice are additional wages that the employer is not obligated to pay. They are paid only because the employer has chosen to give the employee no notice of termination. The amount of wages is not necessarily based on longevity or length of service. For example, an employer may call an employee in for dismissal and offer him X number of weeks of wages to assist him during the time he is seeking new employment. No obligation + no notice = wages in lieu of notice.
- Anytime an employer is paying severance pay or wages in lieu of notice, that information should be provided to the Texas Workforce Commission local office on any response to an employee's claim for benefits. Keep in mind that either form of additional pay will not stop receipt of unemployment benefits, but payments will be delayed until the until the payment's period of coverage has expired. This can result in substantial savings to an employer because many people will have found another job by the time they are eligible for benefits.
- Keep in mind that if an employer has a policy or practice of making severance payments that require a continuing plan of administration, it will likely be obligated, under the federal law known as ERISA, to treat such benefits as a "welfare benefit" and to report them along with other forms of ERISA benefits in the IRS form for ERISA, Form 5500. ERISA is a very complicated statute that affects employment taxes, benefits, and employment policies and agreements. For more information, contact a qualified ERISA attorney.
- Finally, remember in the case of child or spousal support orders to make the proper deduction from severance pay or wages in lieu of notice - for more information, see the topic "Severance Pay" in the article "The Texas Payday Law – Basic Issues".
- Other types of post-termination payments that are neither severance pay nor wages in lieu of notice:
  - an incentive paid to obtain a release or waiver of liability from the departing employee with regard to the Civil Rights Act of 1991, or to settle a claim or lawsuit that has already been filed, or in connection with a written contract that was negotiated between the employer and employee prior to the date of the work separation - a payment like that will not affect unemployment benefits.
  - liquidated damages - this kind of payment would also not affect unemployment benefits. TWC has held (in a non-precedent case) that an amount promised as liquidated damages in an employment agreement ("If such-and-such happens and you are terminated prior to _____, XYZ Company will pay you $____ in satisfaction of any remaining obligations it may have toward you.") is an enforceable part of the wage agreement under the Texas Payday Law.
- A slightly different definition of "severance pay" is found in the Texas Payday Law, where it is defined in Rule 821.25(b) as "payment by an employer to an employee beyond the employee's wages on termination of employment, based on the employee's prior service. Severance pay does not include payments for liquidated damages, payments in exchange for a release of claims, or payments made because of a lack of notice of separation." Severance pay that meets that definition is an enforceable part of the wage agreement under Section 61.001(7)(B) of the Texas Labor Code.
- 5. Both wages in lieu of notice and severance pay are treated as taxable wages for unemployment tax purposes - see TWC's Tax Department Law Manual Section 4.2.2.10 ("Dismissal Payment") online at http://www.twc.state.tx.us/tax-law-manual-chapter-4-taxes-1#4.2.2.10.

COBRA

- Health insurance benefit continuation rights apply if the employer has twenty or more employees (be careful not to promise COBRA rights that do not exist, since the company could be forced to extend such continuation coverage anyway if the conditions for equitable estoppel are met – see the discussion of the *Thomas v. Miller* case in "Other Types of Employment-Related Litigation" in the outline of employment law issues in part IV of this book).
- It does not apply if the employee was terminated for "gross misconduct", but the burden of proving that is on the employer - for a good case listing many examples of what courts consider gross misconduct under COBRA,

see *Boudreaux v. Rice Palace, Inc.*, 491 F.Supp.2d 625 (W.D.La. 2007).

- In most cases, COBRA provides for continuation of health plan coverage for up to 18 months following the work separation.
- COBRA rights accrue once a "qualifying event" occurs - basically, a qualifying event is any change in the employment relationship that results in loss of health plan benefits.
- In the case of an employee with a spouse (see your state's definition of "spouse"), it is essential that an employer notify both the employee and the employee's spouse of the employee's COBRA rights.
- The official DOL help line for COBRA questions is at 1-866-444-3272.
- Texas "COBRA" law - the Small Employer Health Insurance Availability Act requires health benefit continuation rights for employees (and their beneficiaries) of company health plans if the company has two to 50 employees; the state law is very similar to the federal law, but with a shorter benefit continuation period (up to nine months following the qualifying event if the employee was not covered by the federal COBRA law); if the employee had federal COBRA coverage as well, six months of continued coverage under Texas law are available, beginning after the federal COBRA period expires; more information is available from the Texas Department of Insurance at http://www.tdi.state.tx.us/pubs/consumer/cb040.html.

Release and Waiver Agreements

- Do not try to include prohibitions against unemployment, FLSA, EEOC, and NLRA claims. Texas law flatly prohibits any agreement not to file an unemployment claim, and any such agreement is void and unenforceable. The right to minimum wage and overtime pay may not be waived (*Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945)). EEOC takes the position that attempting to have an employee promise not to file an administrative claim regarding employment discrimination is potential evidence of intent to discriminate. The NLRB has signaled a similar view regarding employee rights under the NLRA.
- Incentive money, i.e., money paid to secure an employee's agreement not to file claims or lawsuits, is not regarded as severance pay for unemployment claim purposes and will not affect unemployment benefits.
- The enforceability of such an agreement will be dependent upon the extent to which the terms are expressed in plain language. Complicated wording and arcane terminology will generally make the agreement less enforceable.
- Just like arbitration agreements, release agreements must meet certain standards as to readibility, clarity, and equitable (fair) treatment.
- The agreement should make it as clear as possible that in return for accepting whatever incentive is offered and signing the agreement, the employee gives up the right to pursue various claims in court.
- Include language in conspicuous lettering advising the employee of his or her right to seek legal advice before signing the agreement, and allow a reasonable time (most companies allow at least seven days) for signing. For special rules regarding releases signed by employees age 40 or older, see "Early Retirement - Voluntary Leave Incentives - Age Discrimination Issues" in this outline.
- Preparing a valid release that has a high likelihood of standing up in court really requires the assistance of an experienced employment law attorney. In light of all the laws favoring employee rights, and of public policy against anything that limits a person's access to the court system, it is simply inadvisable to attempt to prepare a release agreement without such help.

Special Problems - Work Separations

- Layoffs - there is no general duty to rehire employees who have been laid off.
- WARN Act (federal law) - covers employers with 100 or more employees if the company has a:
  - shutdown of an employment site - 50 or more full-time employees;
  - mass layoff of 50-499 full-time employees if that constitutes at least 33% of the workforce at a site;
  - mass layoff involving 500 or more full-time employees for at least 30 days; or a
  - 50% or more reduction in hours for 50 or more full-time employees for each month of a six-month or longer period.
- Temporary employees from a staffing firm do not count toward the above thresholds under WARN (see 20 C.F.R. § 639.3(e)).
- Under WARN, the employer must give at least 60 days' advance notice of layoff, or else must make a payment of wages in lieu of notice corresponding to the notice not given.
- TWC is the state reporting agency for mass layoffs and plant closings in Texas - more information is at http://www.twc.state.tx.us/svcs/jtpa/dislocat.html.

Early Retirement/Voluntary Leave Incentives/Age Discrimination Issues

- It must be a voluntary program, with employees not targeted for layoff or otherwise threatened, such as a threat to abolish or rescind vested benefits.
- Make sure the offer is not specifically aimed at older workers - do not condition it upon age, but rather upon tenure or other theoretically neutral criteria.
- Any potential reduction in force should be based upon

skill level, prior evaluations, willingness to accept new assignments or training, and other neutral, non-age-related criteria (i.e., try not to use seniority as a criterion that would give an older worker a higher chance of being laid off).

- Any employees accepting such an incentive should sign releases explaining their rights under federal law.Give at least 21 days for employees to have a chance to consult their attorneys or other advisors (45 days in the case of group reductions in force).
- Employers must give employees 7 days to rescind their acceptance of an early retirement incentive.
- Never give the appearance of trying to push someone toward retirement - try not to bring the subject up, but be ready to respond in a purely informational manner if an employee asks about it. Caution is advised - a "suggestion of retirement would not alone give rise to an inference of discrimination." *Kaniff v. Allstate Insurance Co.*, 121 F.3d 258, 263 (7th Cir. 1997); *Greenberg v. Union Camp Corp.*, 48 F.3d 22 (1st Cir. 1995). However, frequent inquiries or suggestions about retirement plans can let a jury reasonably find that the employer was biased against older workers (see *Greenberg* at 28 - 29).
- In the event of an ADEA age discrimination claim, "to establish a prima facie case of age discrimination under the ADEA through the indirect method, the plaintiff must prove that (1) he is a member of a protected class; (2) his performance met the company's legitimate expectations; (3) despite his performance, he was subject to an adverse employment action; and (4) the company treated similarly situated employees under 40 more favorably." *Martino v. MCI Communications Services, Inc.*, 574 F.3d 447, 453 (7th Cir. 2007). "Choosing to terminate someone on the basis of old age is impermissible; choosing to let someone go because they have an obsolete skill set, on the other hand, is completely kosher." *Martino* at 454.
- Avoid the "age discrimination never-says" (see "Things Employers Wish They Had Never Said" in part II of this book).

EASY MISTAKES THAT ARE EASY TO AVOID

It is obvious to any employer who has dealt with unemployment claims that such claims are hard to defend against, mainly due to the fact that the law itself is meant to help ex-employees, not employers. Strange, then, that some employers make mistakes before or after claims are filed that make the claims even harder to win. Presented here are the most frequent avoidable mistakes.

Prior to Claim

Terminating an employee in the heat of the moment
Failing to discuss the problem with the employee prior to termination
Terminating an employee without reasonable warning
Ignoring company procedures or prior warnings
Taking no action when employees complain

Post-claim

Missing a claim response or appeal deadline
Assuming that if TWC does not recontact the company, the claim has been dismissed or denied
Changing the explanation for the work separation
Failing to prove the case against the claimant
Failing to present firsthand testimony from eyewitnesses

Prior to the Claim - Mistakes made before a claim is filed

Terminating an employee in the heat of the moment

Despite the employment at will doctrine in Texas, an otherwise legal discharge will not necessarily be without a price. A discharged employee can always file an unemployment claim. In that case, it will be up to the employer to prove that the discharge resulted from a specific act of misconduct connected with the work and that the claimant either knew or should have known he could lose his job for such a reason. The mistake usually happens when the employer, acting in the heat of the moment, fires the employee without considering whether the employee has received the number of warnings that the policy manual says that employees can expect or whether the employer will be able to prove the misconduct in question.

Failing to discuss the problem with the employee prior to termination

Although no law requires employers to let employees know why they are being terminated (in the vast, vast majority of situations), it can be a mistake to fire someone without discussing the problem leading to termination and without giving the employee a chance to explain his or her side of the story. That having been said, there are some trouble situations where it is best just to say whatever it takes to get the employee out of the workplace without causing a scene or without giving a lawsuit-prone employee additional fuel for a lawsuit; if in doubt, consult your attorney. Still, TWC claim examiners and hearing officers generally look with favor upon employers who confront the soon-to-be-former employee with the problem and let the employee try to explain. For one thing, that avoids the related problem of giving a false reason for termination (almost always fatal to a case). For another, there is always the possibility that the employee will point out something that will make the employer realize that discharge might not be appropriate. Finally, it gives the appearance of fairness, which is important from a perception standpoint. (Remember, the TWC people processing the UI claims are themselves employees, not employers, and they generally have a well-developed idea of what they consider fair and right. Good, bad, or indifferent, that is the reality, so it should be taken into account.)

Terminating an employee without reasonable warning

There is no set number of prior warnings that must be given before an employee can be fired. However, there are two very important considerations here. First, since the test is whether a "reasonable employee" could have expected to be fired for the reason in question, the employer has to show that either the employee did something that was so bad, he had to have known he would be fired without prior warning, or that the employee had somehow been placed on prior notice that he could lose his job for such a reason. "Prior notice" would come from a policy expressly warning of discharge or from a (preferably written) warning to the effect that a certain action or lack of action would result in dismissal.

Ignoring company procedures or prior warnings

Here is another reason employers should ignore the temptation to take advantage of the right under the employment at will rule to change policies and procedures at will. Doing so can lead directly to losses in UI claims. Remember, an employer must show that the claimant either know or should have known that her job was on the line for the reason in question. That will be impossible to show, for example, if the employer fires the employee without giving the employee the benefit of progressing through whatever progressive disciplinary process the company usually follows. The problem also shows up if an employee gets a written warning stating that it is the "first written warning", and the list of further steps on the form shows a "second written warning" or "final warning", but

the employee is fired for a subsequent offense without getting the (apparently promised) intermediate or final warning. The point is that the employer should try its best to do what it says it will do. If employees have been led to believe that certain steps will occur prior to termination, follow those steps, or else be prepared to lose the UI claim.

Taking no action when employees complain

Of course, not all complaints are valid, and some employees are chronic complainers. That having been said, nothing stirs the sympathy of TWC claim examiners and hearing officers like the story of a claimant with a halfway legitimate grievance, whose employer either took no effective action to address the grievance or retaliated somehow against the claimant. Complaints usually do not come out of thin air. Listen, investigate, act, and document your actions. Employers that seem responsive to employee concerns not only face UI claims with more confidence, but also generally have fewer worries about employee turnover and unions coming in.

Post-Claim - Mistakes made after a claim is filed

Missing a claim response or appeal deadline

A late claim response means that the employer waives any rights it has in the claim, including the right to protest chargebacks to its tax account. Filing a late appeal means that the TWC must dismiss the appeal without considering the underlying merits of the case.

In both cases, missing deadlines means that no matter how good the employer's case is, the employer will be out of luck if the claimant ends up drawing benefits. There is no alternative to filing claim responses and appeals on time.

Do whatever it takes to meet the deadlines. In an emergency, put the words "We protest." [or] "We appeal.", followed by "More information will follow later.", on a piece of paper, and then fax or hand-deliver it to any TWC office; such a response or appeal will be sufficient if filed by the end of the fourteenth day after the date the claim notice or ruling was mailed. The fourteen-day deadline is for calendar days, not working days. You can also mail the response or appeal, but it must be U.S.-postmarked by the fourteenth calendar day. If you mail it too late to get the timely postmark, bring a reliable witness with you who can later help you testify that you placed it in the U.S. mails at the time you did. If you get from this discussion that meeting these deadlines is important, you are correct.

Assuming that if no response from TWC comes, the claim has been dismissed or denied

UI claims do not simply go away by themselves. Even if a claim is disallowed by reason of insufficient wage credits, the last employing unit will get a ruling to that effect warning that a future valid claim might be filed. If you have responded to a claim or filed an appeal, yet receive nothing from TWC in a couple of weeks, something is probably wrong. Follow up! Call your local TWC office or the employer commissioner's office (1-800-832-9394) and ask about the claim or appeal status. If you lack confidence in whatever you hear from the first person you contact, do not hesitate to ask to speak with another person. Be sure to record the facts of the call: the name of the person you contact, the office where they work, the number you called, the date and time of the call, and what you were told. If you are told that no response was received from your company or that "nothing is in the system", offer to send another copy, and in the accompanying note, mention that you had sent the same thing earlier.

Changing the explanation for the work separation

Sometimes an employer will give one explanation for the claimant's work separation at the time of responding to the claim notice, but give another explanation when the claim examiner calls, when writing an appeal letter, or when testifying at an appeal hearing. It is almost a 100% certainty that the inconsistency in explanations will be noticed by TWC personnel, and the probability is almost as high that the TWC people will be suspicious of the change in the story. Many TWC people, quite frankly, take a changed work separation explanation as a sign that the employer is not credible and is just looking for the right words to get the claimant disqualified. This is why it is critically important to study the facts behind the work separation carefully and get it right the first time. Remember, if the deadline is near and the employer needs more time, it can file a quick timely response notifying the claim examiner that the employer wishes to be an interested party and will file more information as soon as possible.

Failing to prove the case against the claimant

Remember, in a discharge case, the burden of proving misconduct is on the employer. The employer must show that the separation resulted from a specific act of misconduct connected with the work that happened close in time to the discharge and that the claimant either knew or should have known she could lose her job for such a reason. Whatever the allegation against the claimant is, it must be proven with documentation and testimony from people with direct, personal knowledge of the circumstances. Generally, the evidence needed will be a copy of whatever rule or policy the claimant violated, proof that the claimant knew about the policy, copies of prior warnings (if applicable), and firsthand testimony from witnesses who saw the misconduct occur. The exact form of documentation will vary from case to case. For example, if the claimant was terminated for attendance violations, a copy of the attendance records will be needed.

Failing to present firsthand testimony from eyewitnesses

Most people have heard the adage "an accused has the right to face his accusers". That happens to be a fundamental principle of the American system of justice, which is in turn derived from the English legal system. This principle applies to UI claims as well. A claimant who is accused of something by the employer has the right to face the ones making the accusations. That is why firsthand testimony from witnesses with direct, personal knowledge of the situation leading to discharge is given the greatest evidentiary weight in a case. Such testimony outweighs anything else, including notarized affidavits. The only exception is in the area of drug testing, where the results of a GC/MS confirmation test indicating the presence of prohibited substances in the system of the claimant can help overcome the sworn firsthand denial of drug use by the claimant. While it is true that employers sometimes win with secondhand testimony that is only based on reports from others, that is the case only when the claimant fails to participate in the hearing at all. If the claimant denies the misconduct alleged, and the employer is unable to present firsthand testimony to prove its allegations, the employer will lose. For this reason, employers should make every effort to determine who the best witnesses are and ensure that they are available to testify at a hearing.

Unemployment claims can be difficult to win. Some are unwinnable. Many cases, however, can be won, and it would be a shame to lose a winnable case unnecessarily. Keeping the above pitfalls in mind can reduce the chance of losing a case that can be won. Common sense and following TWC instructions will go a long way. In problem cases, do not hesitate to consult an attorney experienced in employment law matters, and always remember that your federal UI taxes already pay for several attorneys in the employer Commissioner's office at TWC - a major part of their job is helping employers deal with UI claims and appeals from an employer's standpoint. The number for that office is 1-800-832-9394.

UNINSURABLE DRIVERS: POLICY AND WORK SEPARATION ISSUES

Note: This information is meant to make it easier to defend your company against unwarranted unemployment claims from drivers who have been discharged for driving-related problems. As always, in close or questionable situations, it is best to consult a human resources professional or employment law attorney before taking any action against an employee, filing a claim response, or participating in an appeal hearing.

Many employers have drivers on staff. Unemployment claims involving drivers who have been fired for uninsurability present special problems for employers. Keeping a few guidelines in mind can give an employer a much better chance of defending against such a claim:

- proper questions on the job application concerning driving record and background;
- clear policy on insurability as a condition of continued employment as a driver;
- prompt reporting of accidents and violations to the insurance carrier;
- cooperation with insurance carrier regarding records and insurability determinations;
- furnishing appropriate evidence to TWC in case of an unemployment claim; and
- using the driver's license laws to be aware of a driver's record and to properly protest an unemployment claim.

Job Application Questions Relating to Driving Record and Background

Employers are allowed to ask for any information necessary to checking an applicant's driving record, driving experience, and background. That would include the driver's license number. However, remember that many professional drivers are licensed in more than one state. Ask applicants to list all driver's licenses they hold and to give the numbers and expiration dates of all licenses. You will need those numbers to check the driving records in those other states. Have the applicants give written consent for you to get their motor vehicle records, and be ready to follow any particular requirements of other states in that regard. An alternative is to have the applicants get certified copies of their motor vehicle records for you; it is certainly your right to make that a condition of processing their applications for employment.

It is permissible to require Texas employees with driving duties in Texas to have valid Texas driver's licenses. A new driver from another state must obtain a valid Texas driver's license within 90 days of moving to the state (Section 521.029(a), Transportation Code - https://statutes.capitol.texas.gov/Docs/TN/htm/TN.521.htm#521.029).

A company should also ask the applicants to list any accidents or motor vehicle law violations they have had within a specified period of time in the past. If an applicant's information differs from what the official motor vehicle records indicate, ask the applicant to explain. If there are any questionable accidents or tickets listed on the motor vehicle records, be sure to ask for specifics.

Concerning background checks, be careful. The federal law known as the Fair Credit Reporting Act (FCRA) contains strict requirements for certain types of background checks. If an employer plans to use any kind of outside for-profit agency to investigate an applicant's or employee's background, the employer must first obtain that person's written authorization for the check and disclose to that person a summary of the person's rights under the FCRA. (Such a summary may be obtained from any agency that might do such a check and should be furnished as part of the service you pay the agency to perform.) If the applicant refuses to give you such written authorization, you have the right to disqualify them from further consideration. If employment is denied or terminated as the result of such a check, that fact must be disclosed to the applicant, along with an explanation of the problem leading to the denial or termination of employment and the name, address, and phone number of the company that conducted the investigation.

It is certainly permissible to ask about criminal history on the job application. Do not ask only about prior "convictions". In Texas, a common form of sentencing is deferred adjudication. If the person being sentenced satisfies the terms of probation specified by the court, no final conviction is entered on the individual's record, and they may legally claim never to have been convicted of that particular offense. However, they may not claim never to have pled guilty or no contest to the offense, since pleading guilty or no contest is one of the conditions for deferred adjudication in the first place. It is just a matter of asking the question in the right way. One way of asking a question about prior criminal background would be as follows: "During the past (x) years, have you been convicted of, or have you pled guilty or no contest to, any of the following charges: a felony of any kind, driving while intoxicated, driving under the influence of a prohibited, controlled, intoxicating, or illegal substance, or (fill in the blank)." This is not to say that the mere existence of criminal problems in the past should be a bar to employment under all circumstances. To be fair and to avoid possible discrimination charges, be sure to inquire

only about criminal offenses or driving-related offenses that are relevant to the job in question.

In general, the job application should make it clear to applicants that supplying wrong or incomplete information can result in them not being hired, or if the problem is discovered after hire, can result in their discharge from employment.

Clear Policy on Uninsurability

The company's policies applying to employees with driving duties should address the following points:

- all drivers must maintain a clean driving record;
- all drivers must be insurable at any time they are performing driving duties;
- all drivers must have a valid driver's license at any time they are performing driving duties;
- any driver with a suspended or revoked driver's license may be taken off driving duties;
- any driver who becomes uninsurable (as determined by the employer's insurance carrier) agrees to be reassigned to other duties, or may be terminated from employment at the company's option;
- drivers who are reassigned due to uninsurability, lack of a clean driving record, or lack of a valid driver's license agree that they will accept whatever alternative assignments the company may give them and that they understand that a reduction in pay may result from the reassignment;
- any employee performing driving duties agrees to report any accidents in which they are involved as a driver or any violations of any motor vehicle laws for which they are cited by a law enforcement authority; such report to the company shall be made immediately or as soon as possible following the event;
- failure to promptly report accidents or motor vehicle law violations will result in disciplinary action, up to and possibly including discharge; and
- any driver involved in an accident or cited by a law enforcement official for violating a motor vehicle law must turn over any documentation relating to such incident as soon as possible to the employer, and must cooperate with the employer in verifying the information with other parties involved and with law enforcement authorities.
- In developing such policies, employers should consult their insurance carriers, since each shares the common interest of keeping only good drivers on the roads.

Prompt Reporting of Problems to the Insurance Carrier

It is essential to provide your insurance carrier with up-to-date information relating to your drivers. This is so that you can ask the insurance company to make a prompt determination as to whether a particular driver will remain insurable under the policy. You do not want to end up losing an unemployment claim just because the problem causing uninsurability happened too far in the past. That happens in cases where the insurance carrier makes insurability or continued coverage determinations only once every 12, 18, or 24 months. Such intervals are far too large to be of use to employers who might have to deal with unemployment claims from drivers who are suddenly declared uninsurable or otherwise excluded from coverage long after driving problems occurred. The employer should do its best to let no more than a month pass between the incident and the discharge, if discharge becomes necessary. If the TWC claim examiner or hearing officer seems troubled by the interval between the final incident and the discharge, point out that you were simply trying to be fair to the employee by not taking unduly hasty action and that it takes time for an insurance company to make a determination.

Cooperation with Insurance Carrier

Going hand in hand with prompt reporting of accidents and violations is the issue of cooperating with the insurance company regarding records and insurability determinations. This is one of those "I'll scratch your back if you'll scratch mine" propositions. Furnish whatever documentation you have regarding insurability issues to your insurance carrier, and ask the carrier to do the same for you. You will need such documentation in case you have to fire a driver and the driver files an unemployment claim, and the insurance company needs the documentation to be able to make a prompt insurability determination.

Furnishing Appropriate Evidence to TWC in Case of an Unemployment Claim

General

In order to have a decent chance of winning an unemployment claim involving a claimant who has been discharged, an employer must show two main things: first, that the discharge occurred due to a specific act of misconduct connected with the work that happened close in time to the discharge, and second, that the claimant either knew or should have known that discharge could result from such a problem. The burden of proving misconduct is on the employer. That means that if you are dealing with an unemployment claim from a driver you terminated, you must show sufficient evidence to justify a disqualification.

Excessive Accidents

If the driver was terminated for excessive accidents, you will have to show that specific accidents occurred at specific times and that the claimant was at fault in whatever accidents contributed to the decision to discharge. That is especially the case with the final

accident. If the final accident was not the claimant's fault, you will probably lose the case, since disqualification is based upon a final incident of misconduct, and if the most recent misconduct was one or two accidents ago, those problems would be too remote to have been the "proximate" cause of dismissal, i.e., the precipitating factor in the discharge.

Excessive Motor Vehicle Law Violations

If the driver was terminated for excessive traffic violations or violations of other motor vehicle laws, you will need to prove that the violations occurred and that the claimant was at fault in the violations. You can show the claimant was at fault if you have some kind of evidence showing that the claimant paid a traffic ticket, was convicted and sentenced to some kind of fine or other penalty, or entered a guilty or no contest plea in order to receive probation, a suspended sentence, deferred adjudication, or some other form of alternative sentencing.

Failing to Promptly Report Problems

If the driver was discharged for failing to promptly report accidents or violations, you will need to show that the accidents or violations occurred and that the claimant failed to make a reasonable effort to promptly notify your company under whatever notification policy you have. You will also need to show how the claimant either knew or should have known he could be fired at that time and for that reason.

Loss of License to Drive

If a driver loses his job due to losing his license, the TWC ruling will depend upon whether the problems leading to loss of the license were within the claimant's power to control. If the claimant draws benefits, the employer should certainly ask for chargeback protection if it had no alternative but to lay the claimant off, i.e., was required by a state or federal law or regulation to discontinue the claimant's driving duties.

Supplying Wrong or Incomplete Information on the Job Application

If the driver was fired for falsifying the job application or for failing to supply all pertinent information, the employer will need to present a copy of the application and copies of any documentation showing how the claimant's original information was false or incomplete. Look back at the information above concerning "convictions". Do not fire a claimant and expect a favorable ruling from TWC if the problem was that the application asked only about "convictions" and the claimant failed to list a deferred adjudication sentence that was successfully completed. If that situation has happened to your company, you need to redesign your job application as noted above.

Uninsurability

If the driver was fired for uninsurability, you will need to prove that the incidents causing uninsurability happened close in time to the discharge and were the claimant's fault. Drivers are sometimes declared uninsurable for problems that happened before they went to work for the employer. While the employer may need to lay such drivers off, TWC will not disqualify them from unemployment benefits, since any possible misconduct on their part occurred prior to working with the employer and was thus not misconduct "connected with the work". However, this does not apply if the problems occurring prior to employment were not reported on the job application. In that case, that would fall under the "falsification of a job application" category (see above).

Using the Driver's License Laws to Get Needed Information

Due to the Texas Commercial Driver's License Act and similar laws in other states, it is fairly easy to be aware of a driver's record and to properly protest an unemployment claim involving serious license or driving record problems. Under those state laws, which in turn were mandated by a federal law, there is a nationwide database of driving records of people who have commercial driver's licenses. Those laws also require prompt reporting of any problems that might affect a driver's ability to hold or renew a commercial driver's license. Using the database, employers should have another way of getting information relating to the ability and qualifications of applicants and drivers. In Texas, the Texas Department of Public Safety can give information on how a company can obtain such records.

In addition to cooperating with law enforcement authorities and their insurance carriers, employers may also contact the employer Commissioner's office for assistance on this subject at 1-800-832-9394. As is usually the case, timely information can make all the difference.

TYPES OF WORK SEPARATIONS

Key to predicting how an unemployment claim or other type of employment action might turn out is the ability to understand the circumstances under which an employee leaves the company. The nature of the work separation determines to a large extent how a claim or lawsuit will be handled. The purpose of this brief article is to summarize the most important ways in which TWC analyzes work separations, but other laws will be mentioned where appropriate. Additional information on this topic can be found in the next section of this book, "Post-Employment Problems", in the articles dealing specifically with unemployment claims.

Voluntary or Involuntary?

The first thing to do is determine whether a work separation is voluntary or involuntary. This is important not only because TWC applies different standards to voluntary and involuntary work separations, but because many companies' benefit plans provide different outcomes depending upon the circumstances in which an employee leaves employment.

Voluntary Work Separations

A work separation is voluntary if initiated by the employee. An employee initiates the work separation if he or she basically sets the ball rolling toward a work separation. In a true voluntary work separation, the employee has more control than the employer over the fact and the timing of leaving the work. That can happen several different ways:

1) Resignation with advance notice - the employee gives the employer oral or written notice of leaving in advance.
2) Retirement - a special form of resignation with advance notice that involves satisfying some kind of condition for leaving the company with one form or another of continued benefits.
3) Resignation without advance notice, but with notice given at the time of the work separation - the employee does let the employer know somehow that he or she will not be returning to work.
4) Resignation without notice at all - this can include walking off the job, job abandonment, and failure to return to work after a period of leave.
5) "Constructive discharge" – for purposes of discrimination, wrongful discharge, anti-retaliation, and other laws, an employee may be considered to have been constructively discharged if working conditions were so intolerable that a reasonable employee would feel forced to resign. However, under the law of unemployment compensation, such a work separation is generally considered to be voluntary.
6) Failing to return following an unpaid suspension of three days or less - see "Unpaid Suspensions" in the article "Unemployment Insurance Law - Qualification Issues" for details.

As long as the employer did not pressure the employee into resigning, work separations that occur under those circumstances may be considered voluntary.

Focus: Job Abandonment

There is no official definition of job abandonment in the statute or the TWC regulations. It is mentioned in the following TWC precedent cases: Appeal No. 97-004610-10-042497, VL 135.05(6); Appeal No. 1197-CA-71, VL 450.02(2); Appeal No. MR 86-2479-10-020687, MC 90.00; and Appeal No. 764254-2, MC 135.05 (cross-listed at VL 135.05). The concept of job abandonment is generally defined by each company in its employee handbook. The basic idea is to set a limit for the number of days an employee can be completely out of contact with the company, beyond which the company will presume that the employee has decided not to return to work at all. Most companies define job abandonment as absence without notice for three or more days in a row. Such work separations are generally considered voluntary, although TWC may view certain job abandonment-caused work separations as involuntary, depending upon how the claimant and employer explain their respective positions and on what the facts show.

Involuntary Work Separations

A work separation is involuntary if initiated by the employer. An employer initiates a work separation by taking some kind of action that makes it clear to the employee that continued employment will not be an option past a certain date. In such a situation, the employer has more control than the employee over the fact and the timing of leaving the work. There are many ways in which a work separation can be involuntary:

1) Layoff, reduction in force, or downsizing - work separation due to economic inability to keep the employee on the payroll.
2) Temporary job comes to an end - work separation due to work no longer being available because the job is simply finished. This includes successful completion of PRN or on-call, as-needed assignments, if no further work is available the next workday.
3) Discharge or termination for misconduct or "cause" - work separation that the employer views as somehow being the claimant's fault.
4) Resignation in lieu of discharge - same as discharge, but the employer gives the employee the option of resigning as a face-saving option.

5) Forced retirement - may be akin to an economic layoff or a discharge for cause, but in this situation, the employee is allowed to qualify under a retirement plan.
6) "Mutual agreement" - in most cases, this form of work separation is viewed as involuntary, since it is usually initiated or encouraged by the employer.
7) Unpaid suspension of four days or longer - see "Unpaid Suspensions" in the article "Unemployment Insurance Law - Qualification Issues" for details.

Focus: PRN Status / On-Call, As-Needed Employees

Status as a PRN or on-call, as-needed employee would not have anything to do with unemployment claim eligibility, since on-call, as-needed employees are regarded as having been laid off, i.e., involuntarily separated from employment, upon the completion of each assignment if no further work is available the next workday. For unemployment claim purposes, a PRN employee's work separation date would be the last day of an assignment, if no further work was available on the next workday immediately following that day. Such a work separation could lead to a chargeback if the claimant draws unemployment benefits, and the company paid wages to the claimant during the base period of the unemployment claim (the chargeback decision depends upon the reason why the last period of work during the base period came to an end). It does not matter if a company leaves a PRN employee on the active payroll system for a particular length of time. What matters is that the employee stopped working for pay at some point. Under the law of unemployment compensation, that is the relevant work separation that the agency takes into account.

Effect of Voluntary or Involuntary Work Separations

The nature of a work separation may determine several important things following the decision to sever the employment relationship:

1) Voluntary work separation:
   a. Under the Texas Payday Law, an employee who leaves voluntarily must receive the final pay no later than the next regularly scheduled payday following the work separation.
   b. In an unemployment claim, the claimant who voluntarily left employment faces the burden of proving good cause connected with the work for leaving the job.
   c. In many companies, employees who leave voluntarily receive different benefits than those who are involuntarily separated, depending upon the terms of the company's benefit plan.

2) Involuntary work separation:
   a. Under the Texas Payday Law, an employee who leaves involuntarily must be given the final pay no later than six calendar days following the last day of work.
   b. In an unemployment claim, the employer that initiated the work separation has the burden of proving misconduct connected with the work as the reason for discharge.
   c. Post-termination benefits eligibility under company benefit plans is often affected by involuntary work separations. If the discharge was for "cause" or misconduct, such benefits are often reduced or denied. Under COBRA, an employee who was terminated for "gross misconduct" is ineligible for continuation coverage under the company's health plan.

Quit or Discharge - Close Cases

The question of whether a claimant quit or was fired is very important. It determines who has the burden of proof in the case. The burden of proof in an unemployment claim falls on the party that initiated the work separation. If a claimant quit, he has the burden of proving that he had good cause connected with the work to resign when he did. If the claimant was fired, the employer has the burden of proving 1) that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge and 2) that the claimant either knew or should have known she could be fired for such a reason.

Sometimes the circumstances are murky, and it is unclear exactly what happened. Here are some hints as to how TWC will rule:

1) Whoever first brought up the subject of a work separation might be held to be the one who initiated the separation.

2) "Mutual agreement" work separations are usually held to be discharges. See # 1.

3) A resignation under pressure is a form of discharge. If the employee had no effective choice but to leave when they did, it was an involuntary work separation, and the employer's chances in the case will depend upon its ability to prove misconduct.

4) If an employee expresses a vague desire to look for other work, and the employer tells the employee to go ahead and consider that day to be his final workday, that will usually not be considered a resignation, since no definite date has been given for the final day of work.

5) If the encounter starts out as a counseling session or a reprimand, and the employee gets discouraged and offers to quit, watch out. If you immediately "accept the resignation", it might be considered a discharge. It would be better to remind the employee that all you wanted to

do was talk about a problem, not let him go, and ask the employee whether resignation is really what he wants. If he then confirms that he wants to resign, ask him how much notice he is giving. If he gives two weeks' notice or less, and you accept the notice early within the two weeks, it will still be a quit, not a discharge. (An employer does not have to pay an employee for the portion of a notice period that is not worked, unless company policy promises such a payment.)

6) If you have an employee sign a prepared, fill-in-the-blank resignation form, that will look suspicious. The employee might claim that he was forced to sign it or else was tricked into signing it, which will only hurt your case. Have the employee fill out a resignation letter in his own words, preferably in his own handwriting, if you can persuade the employee to cooperate to that extent.

7) If an employee offers to resign, but you instead convince the employee to stay, and later change your mind and "accept the resignation", you have just discharged the employee! Persuading an employee to stay after they have tendered their resignation amounts to a rejection of the resignation, which means that the offer to resign expires, and the employee's acceptance of your pleas to stay amounts to a rescission of the resignation.

8) If an employee asks to be laid off, be careful - that can be a trap. Do not react like some employers have and fire the employee. Remember, if the employee resigns, they have the burden of proving good work-related cause to quit. It would probably be best to answer any layoff requests with a response to the effect that the request is denied and a reminder that the employee is still needed, thus placing the ball back in the employee's court. If the employee persists, follow that up with a statement to the effect that if the employee no longer wishes to work there, they need to submit a resignation request in writing, and remind them that in the meantime, they still have a job to do. Do not prepare a resignation letter for the employee to sign -- have the employee prepare their own statement of resignation, and then respond to that statement in writing, attaching a copy of the employee's resignation notice to the response. Be sure that any exit paperwork reflects that the employee resigned.

9) If you are merely counseling an employee about a matter of concern, and the employee starts badgering you with questions and comments like "Are you telling me I'm fired?", "So you're firing me for this?", or "I can't believe you're firing me for this!", watch out. Things like that are often seen in situations where the employee is trying to maneuver the employer into a premature discharge in the hopes that an unemployment claim might turn out favorably for the claimant. The best response is something like this: "No, I am telling you that you need to start paying attention to instructions and following the rules." Make it clear to the employee that you are focused on improving their performance or on getting them to comply with policies. Once again, place the ball back in their court, effectively letting them know, without saying it out loud, that if they want out of the company, they will have to take the initiative themselves.

Two-Week Notice Rule

The amount of notice can be important in a TWC case. The rule followed by the Commission recognizes that two weeks' notice is standard in most industries. If the employee gives notice of intent to resign by a definite date two weeks or less in the future and you accept the notice early at your convenience, it will be regarded as a resignation, not a discharge. If more than two weeks' notice is given, but you wait until two weeks or less before the effective date of resignation to accept the notice early, then you would have a good chance of having TWC regard the work separation as a resignation, although not all claim examiners and hearing officers agree. Also, if the employee gives more than two weeks' notice, and you accept it more than two weeks in advance, but you pay wages in lieu of notice for the rest of the notice period, then the situation will still be judged a quit, not a discharge. However, if more than two weeks' notice is given, and you accept the notice more than two weeks in advance without paying wages in lieu of notice (payment for a notice period not worked is not required unless such a payment is promised in writing), the situation is likely to be considered a discharge, with the burden of proof falling squarely on you to prove misconduct connected with the work if you feel that the claimant should be disqualified from UI benefits. Much would depend upon the individual facts in the case.

The same rule works in reverse when an employer gives advance notice of a layoff or termination. If the notice is two weeks or less, and the employee accepts the notice by leaving within the two-week period, the work separation will still be considered involuntary, and the employer will have to prove misconduct if the claimant is to be disqualified from unemployment benefits. However, if the notice is longer than two weeks, and the employee leaves ahead of the final two-week period, the work separation would presumably be voluntary in nature, and the employee would have the burden of proving good cause connected with the work for resigning. For more details on how TWC applies the two-week notice rule, see section 125.25 in both the Misconduct and the Voluntary Leaving chapters of the agency's Appeals Policy and Precedent Manual.

Ambiguous Notice

Sometimes employees give murky resignation notices (open-ended, or giving employers multiple options). If the company has the luxury of needing the employee to actually stay, it can try the following to minimize the risk of a "layoff at the employer's convenience" ruling:

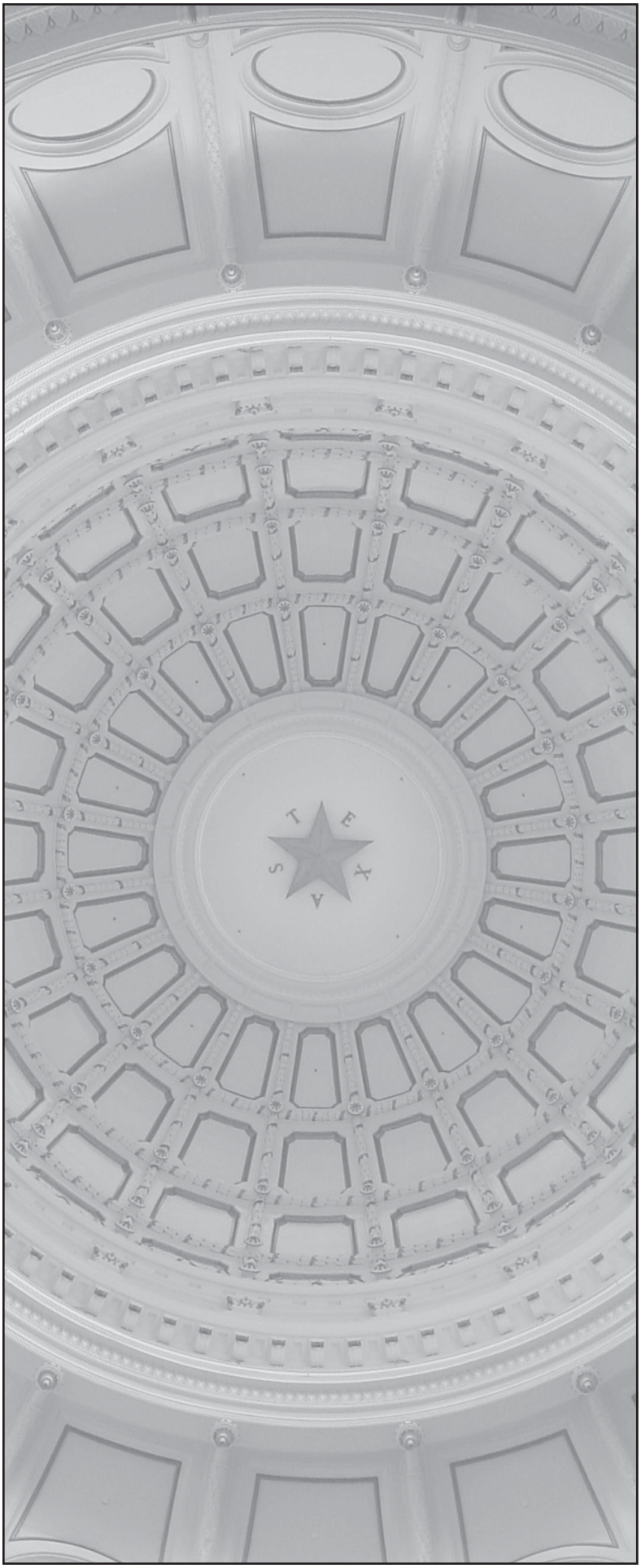
1) respond with a memo rejecting the resignation notice - let the employee know that it is not convenient for the company that the employee resign at that time, so the employer really needs for the employee to stay, with no change in the employment agreement.
2) completely ignore it - if they resubmit the same letter, admonish them that it does not look like a resignation letter, since there is no definite date given for the last day of work, and ask the employee to take it back and not submit it again until they actually want to stop working.

All of this would be aimed at getting a real resignation letter with a definite date of resignation two weeks or less in the future. Adopt a policy informing employees that no open-ended notices of resignation will be accepted - any notice of resignation must contain a definite date of last work. The policy should remind employees to use caution in submitting a letter of resignation, because once the employer takes action on it, it may be too late to rescind the notice.

Resignation Without Notice

It can be difficult for a company to protect itself in a resignation case and "prove" that an employee quit, if the employee refuses to give a written notice of resignation, or else leaves under circumstances that make it unlikely that the employee will cooperate and give the company a letter of resignation after the fact. In many such cases, the ex-employee later alleges the company fired them. The most common situation involves a resigning employee quitting without notice, informing only a coworker of that fact, and leaving the employer with no resignation letter to prove it was a resignation. Invariably, the sudden resignation causes one or more coworkers to have to work extra hours. To document that the employee resigned, have the coworker write a memo to the employer explaining the call or contact with the ex-employee and why the coworker worked the extra time: "Dear [Boss], This is just to let you know that the reason I [came into work] [came to work earlier than usual] [worked past my usual end time] today was because _____ called me and said she was quitting and that I needed to cover for her. I worked from ____ to ____, a total of __ hours. I didn't want you to think that I was trying to work outside my schedule. Just let me know if you need me to continue covering for _____." Such a memo serves two purposes: 1) it explains why the coworker worked outside the schedule; and 2) more importantly, it increases the credibility of the assertion that the employee quit, in case the employee disputes that fact in an unemployment claim. Ideally, the coworker would be available later to give firsthand testimony confirming what he or she wrote in the memo. Of course, such a memo will not cover every possible resignation-without-notice situation, but it is an example of how an employer can think outside the box to give itself a little more protection in resignation cases.

In close cases, most administrative agencies such as TWC decide that the work separation was involuntary. Employers should be prepared with both documentation and witnesses to prove their cases either way in the event of a dispute over the nature of the work separation.



POST-

employment

ISSUES

OUTLINE OF EMPLOYMENT LAW ISSUES - PART IV

Unemployment Compensation

Basics

- All 50 states have unemployment insurance statutes that must meet federal guidelines; consequently, UI systems around the country share many characteristics.
- Generally, anyone who is no longer performing personal services for compensation may file a UI claim and try to draw benefits, but must meet various requirements:

(1) Monetary eligibility - minimum level of earnings during the "base period"; the base period is defined by each state, but is generally a year-long period of time lagging behind the time that the initial UI claim is filed.

(2) Continuing eligibility requirements:
- the claimant must be medically able to work in some field for which he or she is qualified;
- the claimant must be available and actively searching for full-time work;
- the claimant must be authorized to work in the United States (there is thus no citizenship requirement; basically, anyone who can satisfy the I-9 requirements can meet this eligibility condition); and
- the claimant must file weekly claims on time.

(3) "Qualification" - the claimant must be out of work through no fault of his or her own.

- With regard to disqualification, the burden of proof is on the party who initiates the work separation: if the claimant quit, the claimant must prove good cause connected with the work for quitting; if the claimant was fired or laid off, the employer must prove that the work separation resulted from misconduct connected with the work on the claimant's part.
- Primary disqualification categories:
  - voluntary quit for personal reasons;
  - discharge for misconduct connected with the work;
  - refusal of suitable work without good cause;
  - work stoppage resulting from participation in a la bor dispute; and
  - receipt of wages in lieu of notice, workers' compensation, or retirement pension.

Claim Filing Process

- A claimant must list his or her last employment on the initial claim form.
- The filing of the initial claim generates a claim notice to the last employer, which then has an opportunity to protest payment and/or chargeback of benefits by mail, fax, phone, or over the Internet.
- The response deadline for the employer is short, only two weeks in Texas; on or before the last day, the employer must file a timely written response to the notice of initial claim in order to become a party of interest with appeal rights.
- The employer should be as specific as possible in the claim protest and furnish adequate facts about the work separation.
- Employers have a qualified privilege to respond truthfully to a claim notice, ruling, or appeal in an unemployment case - that means that the employer may not be successfully sued for defamation based on information supplied to a state employment security agency regarding an unemployment claim (see § 301.074 of the Texas Labor Code).
- The claim examiner will usually contact the employer by phone for more details - it is best to let the claim examiner speak with firsthand witnesses (those witnesses who have direct, personal knowledge of the situation).
- The claim examiner will issue a written decision on whether the claimant is qualified for benefits based upon his work separation the initial determination will also have a chargeback ruling if the employer is a base period employer and filed a timely written response to the claim notice.

Appeal Process

- Either party may appeal in writing to the appeal authority, which will then mail a notice of hearing to both parties.
- Most appeal hearings are held by telephone; in special circumstances, such as when a hearing-impaired party or witness is involved, the hearing can be in person.
- The appeal hearing officer puts witnesses under oath and gathers written and oral evidence from both parties prior to issuing a written decision.
- There is a further appeal available - the three-member Commission, whose members are appointed by the governor to represent claimants, employers, and the public, makes the final decision.
- The appeals board reviews the entire record in the case and issues a written decision.
- After the final appeal decision is issued, a party may either:
- file a motion for rehearing within a specified period, if the state law has such an appeal step - generally, a motion for rehearing, in order to be granted, must offer specific new evidence, present a compelling reason for why the new evidence could not have been presented earlier, and give a specific explanation of how the new evidence is so important that it could change the outcome of the case; or
- file a further appeal to a court, again within a specified

period following the issuance of the appeals board decision.
- If a motion for rehearing is filed and the appeals board denies it, the party may file a court appeal thereafter.

Wrongful Discharge

The basic rule in Texas is the "employment at will" doctrine: absent an express agreement to the contrary, either party in an employment relationship may end the relationship or change the terms and conditions of employment at any time for any reason, or even for no particular reason at all, with or without notice.

There are several exceptions, both statutory and court-made:
- Statutory exceptions:
  - federal employment discrimination statutes: a discharge may not be based upon a person's race, color, religion, gender (including pregnancy, sexual orientation, and gender identity), age, national origin, disability, or citizenship
  - Texas discrimination statutes: a discharge may not be based upon a person's race, color, religion, gender (including pregnancy), age, national origin, or disability
  - many other states add veteran status, sexual orientation, and gender identity to the list
  - protected activity (something the law entitles an employee to do without fear of retaliation)
  - bringing suspected wrongdoing to the attention of competent government authorities (state and federal whistleblowing statutes)
  - filing various types of claims (OSHA, federal wage and hour, workers' compensation, employment discrimination, etc.)
  - military duty
  - jury duty
  - voting
  - engaging in union activity
- Common law exceptions (i.e., exceptions found in court decisions):
  - Public policy: it is illegal to discharge an employee for refusing to commit a criminal act.
  - Contractual - if a discharge would violate an express employment agreement, it would be a wrongful discharge; this includes collective bargaining agreements.
  - In *Goodyear Tire & Rubber Co. v. Portillo*, 879 S.W.2d 47 (Tex. 1994), the Texas Supreme Court ruled against a company that had failed to enforce its anti-nepotism policy for 17 years and then suddenly fired an employee who was known all that time to have violated the policy.
  - Remedies for wrongful discharge can include reinstatement, back and future pay, promotion, punitive damages, and an injunction against future illegal conduct. In addition to compensating the employee, the employer can also be made to pay attorney's fees, expert witness fees, and court costs.

Other Types of Employment-Related Litigation

- *Arbitration* - should have a separate agreement, instead of being in the middle of a policy handbook; an employer's unilateral right to terminate the obligation to arbitrate renders the agreement illusory; to be non-illusory, the agreement must limit an employer's power to terminate the arbitration obligation by limiting termination only to prospective claims, applying it equally to claims from both the employer and the employee, and requiring advance notice to the employee before such termination is effective; *see In re Halliburton Co.*, 80 S.W. 3d 566 (Tex. 2002) and *Nelson v. Watch House International, L.L.C.*, 815 F.3d 190 (5th Cir. 2016).
- *Breach of contract* - see "fraud" below - an employer should never put anything into an agreement that it does not fully intend to carry out; depending upon individual state laws, this goes for both oral and written promises; the basics of this cause of action are found in *Greater Fort Worth & Tarrant County Community Action Agency v. Mims*, 627 S.W.2d 149, 151 (Tex. 1982). Even a unilateral, "illusory" promise can become enforceable by performance. In *Vanegas v. American Energy Services*, 302 S.W.3d 299 (Tex. 2009), the Texas Supreme Court considered a promise made by a company that it would pay five percent of the proceeds of a sale or merger to any employees remaining with the company until the time of a sale or merger. Several employees sued after the company refused to fulfill that promise. Brushing aside the company's argument that the promise was illusory because the employees were employed at will and could be terminated at any time, the Court held that the employees' acts of remaining with the company constituted specific performance that made the unilateral contract binding on the company.
- *Constructive discharge* - an employee who resigns may satisfy the adverse employment element of a discrimination claim by proving that he or she was constructively discharged. *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000). To prove constructive discharge, a plaintiff must prove that "working conditions were so intolerable that a reasonable employee would feel compelled to resign." *Id.* In establishing whether such a resignation was reasonable, "[t]he following factors are relevant: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off, whether accepted or not." *Id.;*

Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 297 (5th Cir.1994). By the time of *Hunt v. Rapides Healthcare System*, LLC, 277 F.3d 757, 771-772 (5th Cir. 2001), the Fifth Circuit had removed "reassignment to a younger supervisor" from the list of relevant factors (see also *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 481 (5th Cir. 2008)). "Aggravating factors used to support constructive discharge include hostile working conditions or the employer's invidious intent to create or perpetuate the intolerable conditions compelling the resignation." (*Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 342 (5th Cir. 2005)).

- *Defamation* - verbal or written publication of false information about a person with intent to harm the person's reputation or with reckless disregard for the consequences of the falsehood.
  - This includes the so-called "doctrine of compelled self-publication", when an ex-employee who is given what amounts to a defamatory reason for discharge is forced, by virtue of needing to tell the truth, to repeat the defamation to prospective new employers (see, for example, *Chasewood Construction Co. v. Rico Construction Co.*, 696 S.W.2d 439 (Tex. App.-San Antonio 1985, *writ ref'd n.r.e.*); for an alternative view, see *Doe v. Smith Kline Beecham Corp.*, 855 S.W.2d 248 (Tex. App.-Austin 1993), *modified*, 903 S.W.2d 347 (Tex. 1995).). For this reason, the employer must be very sure of its facts before telling an employee that he or she is being discharged for a particular reason, and even if the employee is given a frank explanation of the reason, the explanation should be as matter-of-fact and non-inflammatory as possible.
- *Estoppel* - "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Community Health Servs.*, 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984).
  - *Equitable estoppel* - elements: conduct or language amounting to a misrepresentation of material fact by a party that must have been aware of the true facts; that party must have had an intention that the representation be acted on, or the other party must have reasonably believed that the former's conduct was so intended; the party asserting estoppel must have been unaware of the true facts; and the party asserting estoppel must have justifiably relied on the representation to its detriment.
  - *Promissory estoppel* - elements: promise or offer of some kind; detrimental reliance on that promise; the reliance was reasonable under the circumstances; the employer should have known the offeree would rely on the promise; and some measure of damages other than mere disappointment.
  - *Arbaugh v. Y & H Corporation, dba Moonlight Café*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) is technically not an estoppel case, but it served as a basis for the *Minard* and *Thomas* cases cited below. The U.S. Supreme Court ruled in *Arbaugh* that the employee numerosity requirement under Title VII of the Civil Rights Act of 1964 is not jurisdictional, and that the employer raised too late the objection that it had fewer than 15 employees. The 15-employee limit is simply one of the substantive elements of proof that must be pleaded and proven.
  - *Minard v. ITC Deltacom Communications, Inc.*, 447 F.3d 352 (5th Cir. 2006) - equitable estoppel applies to the 50-employee numerical threshold under FMLA. If a company leads an employee to believe they will be covered under the FMLA, and the conditions for equitable estoppel are satisfied, then it will not matter that an employer has fewer than 50 employees (in this case, the employer had 50 or more employees, but not 50 or more within a 75-mile radius of the claimant's work location). Following the *Minard* ruling, the 5th Circuit held that a typographical error in an FMLA-related letter to an employee did not extend the employee's FMLA entitlement, since there was no showing of harm to the employee (see *Durose v. Grand Casino of Mississippi, Inc.*, 251 Fed.Appx. 886 (5th Cir. 2007)).
  - *Thomas v. Miller, et al*, 489 F.3d 293 (6th Cir. 2007) - 20-employee threshold in COBRA cases is non-jurisdictional and subject to equitable estoppel, if the elements of that cause of action are shown.
  - Lesson: know what laws apply to your company and its situations, and be careful what the company promises, because the rules of estoppel may require the company to deliver exactly what it promised.
- *Fraud* - commonly tied together with a breach of contract claim; *see The American Tobacco Co., Inc. v. Grinnell*, 951 S.W. 2d 420 (Tex. 1997).
- *Intentional infliction of emotional distress* - elements: (1) the employer acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the employer's actions caused the plaintiff emotional distress; and (4) the emotional distress that the plaintiff suffered was severe (*City of Midland v. O'Bryant*, 18 S.W.3d 209 (Tex. 2000)). Some states (not Texas) even recognize the tort of "negligent infliction of emotional distress" - Texas law recognizes only the tort of intentional infliction of emotional distress, which requires proof of some kind of "extreme and outrageous" conduct on the employer's part. Illustrative cases: *MacArthur v. Univ. of Texas Health Center - Tyler, et al*, 45 F.3d 890 (5th Cir. 1995); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999).
- *Interference with an employment relationship* - this commonly occurs when an outside party puts pressure on an employer to take some kind of adverse job action against an employee. An employer in such a situation should never act without the counsel of an attorney; such an action can be brought against both third parties and individual employees of an employer, depending upon the individual state's laws. A good discussion of this cause of

action is found in *Marathon Oil Co. v. Sterner*, 745 S.W.2d 420 (Tex. App.-Houston [14th Dist.] 1988), *aff'd in part, rev'd in part*, 767 S.W.2d 686 (Tex. 1989).

- *Invasion of privacy* - this is a real risk for companies that try to implement monitoring and surveillance procedures without first seeking the advice of an employment law attorney; see *K-Mart v. Trotti*, 677 S.W.2d 632, 636 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.).
- *Malicious prosecution* - employees and ex-employees whose employers improperly cause criminal charges to be filed against them may have a cause of action for "malicious prosecution"; see *Browning-Ferris Indus. v. Lieck*, 881 S.W.2d 288 (Tex.1994). No liability exists if the employer does not knowingly furnish false information; see *Espinosa v. Aaron's Rents, Inc.*, 484 S.W.3d 533 (Tex. App. Houston [1st Dist.] 2016). The key to avoiding liability under this cause of action is to simply make a good-faith, factual report of alleged wrongdoing to law enforcement, furnish relevant information, and let the chips fall where they may.

UNEMPLOYMENT INSURANCE LAW - COVERAGE ISSUES

A. General Background

All 50 states, including Texas, have unemployment compensation or unemployment insurance statutes that must meet federal guidelines; consequently, unemployment insurance (UI) systems around the country share many characteristics. Generally, anyone who is no longer performing personal services for compensation may file a UI claim and try to draw benefits, but must meet various requirements, including monetary eligibility, continuing eligibility, and qualification requirements. These requirements for Texas claimants are found in the Texas Unemployment Compensation Act (TUCA - Texas Labor Code Sections 201.001 et seq.).

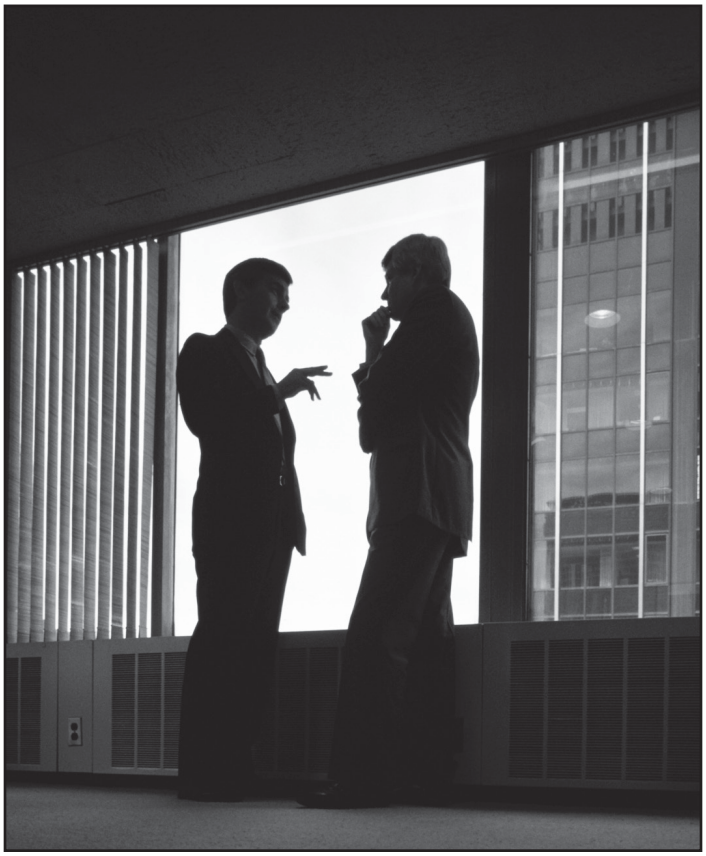
B. Definition of an Employer

There is a difference under the TUCA between "employing unit" and "employer", as shown by the following definitions from the statute:

Sec. 201.011. General Definitions.

In this subtitle:

(11) "Employing unit" means a person who, after January 1, 1936, has employed an individual to perform services for the person in this state.



Sec. 201.021. General Definition of Employer.

(a) In this subtitle, "employer" means an employing unit that:
  (1) paid wages of $1,500 or more during a calendar quarter in the current or preceding calendar year; or
  (2) employed at least one individual in employment for a portion of at least one day during 20 or more different calendar weeks of the current or preceding calendar year.

(b) The definition provided by this section does not apply to an employing unit covered by Section 201.023 or to farm and ranch labor covered by Section 201.028.

(c) An individual who performs a service in this state for an employing unit that maintains two or more separate establishments in this state is employed by a single employing unit for purposes of this subtitle.

1. Last Employing Unit

When an unemployed worker files a UI claim, the claimant must name the individual or business for whom they last performed work for "remuneration" or pay. The source of that last work is known as the "last employing unit", or LEU. The LEU may or may not be an employer that is liable for unemployment taxes or reimbursements to TWC. The conditions for employer liability are set forth in Section 201.021 shown above. Failure to name the correct LEU may cause TWC to disallow the claim, in which case the claimant is instructed to file a corrected, backdated initial claim naming the correct last employing unit, and a new Notice of Application for Unemployment Insurance is sent to that particular LEU.

2. Temporary or Contingent Employers

Temporary staffing firms are quite numerous in Texas and supply tens of thousands of temporary employees to client firms that need to cover short-term staffing shortfalls. The TUCA contains the following definition relating to temporary or contingent staffing:

Sec. 201.011. General Definitions.

In this subtitle:

(20) "Temporary employee" means an individual employed by a temporary help firm for the purpose of being assigned to work for the clients of a temporary help firm.

(21) "Temporary help firm" means 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 work loads, special assignments and projects, and other similar work situations.

Sec. 201.029. Temporary Help Firm.

For purposes of this subtitle, a temporary help firm is the employer of an individual employed by the firm as a temporary employee.

Sec. 201.030. Professional Employer Organization.

For the purposes of this subtitle, "professional employer organization" has the meaning assigned by Section 91.001 (Chapter 91 of the Texas Labor Code).

Chapter 91 of the Texas Labor Code, which regulates the professional employer organization (PEO) industry, supplies further definitions that are useful for understanding temporary and other contingent staffing firms as employers:

Sec. 91.001. Definitions.

In this chapter:
(14) "Professional employer services" means the services provided through co-employment relationships in which all or a majority of the employees providing services to a client or to a division or work unit of a client are covered employees. The term does not include:
(A) temporary help;
(B) an independent contractor; ...

(16) "Temporary help" means an arrangement by which an organization hires its own employees and assigns them to a company to support or supplement the company'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.

Special rules apply when temporary employees of staffing firms become unemployed and file UI claims. Section 207.045 sets forth the conditions under which an employee of a temporary staffing firm or a PEO may be disqualified under the voluntary leaving provision:

Sec. 207.045. Voluntarily Leaving Work.

(a) An individual is disqualified for benefits if the individual left the individual's last work voluntarily without good cause connected with the individual's work.
(b – g)
(h) 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.
(i) A covered employee of a professional employer organization is considered to have left the covered employee's last work without good cause if the professional employer organization demonstrates that:
(1) at the time the employee's assignment to a client concluded, the professional employer organization, or the client acting on the professional employer organization's behalf, gave written notice and written instructions to the covered employee to contact the professional employer organization for a new assignment; and
(2) the covered employee did not contact the professional employer organization regarding reassignment or continued employment; provided that the covered employee may show that good cause existed for the assigned employee's failure to contact the professional employer organization.

3. Not-for-Profit Entities

Sometimes one hears a misconception that non-profit entities are not liable under the unemployment compensation system. Although the law leaves extremely small non-profits out of the picture (those with fewer than four employees), most non-profit institutions will be liable employers under the TUCA:

Sec. 201.023. Tax-Exempt Non-profit Organization.

In this subtitle, "employer" also means an employing unit that:
(1) is a non-profit organization under Section 501(c)(3), Internal Revenue Code of 1986 (26 U.S.C. Section 501(c)(3));
(2) is exempt from income tax under Section 501(a), Internal Revenue Code of 1986 (26 U.S.C. Section 501(a)); and
(3) (employed at least four individuals in employment for a portion of at least one day during 20 or more different calendar weeks during the current year or during the preceding calendar year.

4. Public Employers

Public or governmental employers are liable under the TUCA. Although most public employers do not pay a quarterly state unemployment tax, all governmental subdivisions must have an employer account with TWC and report the wages of all of their employees on a quarterly basis. The TUCA contains the following definition of such employers:

Sec. 201.026 State; Political Subdivision.

In this subtitle, "employer" also means a state, a political subdivision of a state, or an instrumentality of a state or political subdivision of a state that is wholly owned by one or more states or political subdivisions of one or more states.

Public employers fall into two main groups, depending upon how they pay the costs of unemployment claims for their workers. The first group is "reimbursing governmental employers", consisting of those public entities that have elected reimbursing status with TWC. A reimbursing employer pays no state unemployment tax, but simply reimburses TWC dollar for dollar for its share of any UI benefits paid out to its former employees. The second group is "taxed group account". That designation means that the governmental employer is part of a larger group of similar employers that pool their wage credits and their chargebacks, and pay a group UI tax rate that is based upon the shared claim history of the group.

Regardless of whether a governmental employer elects reimbursing status or is part of a taxed group account, the chargeback protection provisions that apply to private sector taxed employers do not apply.* That means that if benefits are paid out to former employees, the governmental employer will end up either reimbursing TWC for its share of the benefits or paying a group tax rate that is influenced by the benefit payments.

* Effective with initial claims filed on or after September 6, 2015, a reimbursing employer can be protected from reimbursement liability if the work separation occurred under certain disqualifying circumstances (a discharge for misconduct connected with the work, or a resignation without good cause connected with the work)).

C. Definition of an Employee

1. General

The TUCA contains no direct definition of "employee". The term is indirectly defined in the definition of "employment":

Sec. 201.041. General Definition of Employment.

In this subtitle, "employment" means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.

From this definition, an "employee" is anyone who performs services under the direction and control of an employer.

2. Temporary Employees

The TUCA did not contain a definition for temporary employees until September 1, 1993, at which time the following formal definition was added to the law:

Sec. 201.011. General Definitions.

In this subtitle:

(20) "Temporary employee" means an individual employed by a temporary help firm for the purpose of being assigned to work for the clients of a temporary help firm.

(21) "Temporary help firm" means 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 work loads, special assignments and projects, and other similar work situations.

Sec. 201.029. Temporary Help Firm.

For purposes of this subtitle, a temporary help firm is the employer of an individual employed by the firm as a temporary employee.

3. Independent Contractors

Just as with the term "employee", the term "independent contractor" is not expressly defined in the Act. However, it is indirectly defined in the following provision:

Sec. 201.041. General Definition of Employment.

In this subtitle, "employment" means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.

Hence, independent contractors would be those individuals whose services are performed free from direction or control of an employer. This term is widely misunderstood, however, and one must be familiar with the various tests used to determine

whether a worker is an employee or an independent contractor. TWC uses a combination of the common-law "direction and control" test and the "twenty-factor" test traditionally used by the IRS. TWC's criteria have been formally published by the agency's Tax Department in its Form C-8, available by free download from the Tax Department section of the TWC Web site at "http://www.twc.state.tx.us".

In a nutshell, independent contractors are not independent just because they are called that by the employer, or because they call themselves that, or because they have signed an "independent contractor agreement". Independent contractor status does not depend upon what a piece of paper says about the situation, but rather upon the underlying nature of the work relationship. A good way to think about the concept is this: independent contractors are independent business entities who are in a position to make a profit or loss based upon how they operate their own standalone business enterprises. For much more detail on this subject, see the article "Independent Contractors / Contract Labor" in Part I of this book.

4. Seasonal Workers

In general, the TUCA makes no distinction between employees in general and employees who work on a seasonal basis. The fact that an employee may have only seasonal employment has no bearing on his or her ability to file a UI claim following the loss of such employment. It may have a bearing on monetary eligibility, though, if the work season is short and not much other work is done during the year; that subject is covered in more detail later in this paper.

Seasonal workers who perform services for agricultural employers are mentioned in a specific provision of the TUCA:

Sec. 201.047. Farm and Ranch Labor as Employment.

(a) Farm and ranch labor is employment for the purposes of this subtitle if the labor:
  (1) is performed by a seasonal worker employed on a truck farm, orchard, or vineyard;
  (2) is performed by a migrant worker;
  (3) is performed by a seasonal worker who:
    (A) is working for a farmer, ranch operator, or labor agent who employs a migrant worker; and
    (B) is doing the same work at the same time and location as the migrant worker; ...

The main thrust of that provision is to ensure that seasonal workers on farms or ranches have the possibility of filing UI claims following the end of the season for which they are hired.

5. Labor Disputes

Section 207.048 of the TUCA basically disqualifies from unemployment benefits any claimant who is unemployed as the result of a work stoppage that stems from a labor dispute. The effect of this section is to prevent striking workers from collecting UI benefits during the work stoppage that resulted from a labor dispute in which they might be involved, either directly or indirectly. Precedent cases adopted by the Commission make it clear that such workers are not even considered separated from employment - the work relationship is still in existence during the pendency of the labor dispute. The work relationship comes to an end only if the employer or the employee takes an unequivocal action to sever the employment relationship, such as the employee formally resigns from employment, the employer lays the striking workers off, the employer refuses an unconditional offer by the striking employee to return to work, or some other similar action occurs.

6. School Employees

The TUCA prevents school district employees from collecting UI benefits based upon their school wages during any period in which work is not available between academic terms or semesters, or during a school break, if there is "reasonable assurance" that the employee will be able to return to such employment in the following academic term or semester, or following the end of the break. Hence, school employees may not collect UI benefits based upon their school district wages during holiday breaks, or over the spring or summer breaks, or during other breaks in the school year, as long as there is reasonable assurance that the employee will return to the school's employment following the break.

7. Foreign Worker Eligibility

Generally speaking, individuals who are not legally employable in the United States may not draw UI benefits, even if they meet all the other eligibility and qualification requirements. For one thing, it is illegal to employ such workers. However, even though wages from illegal employment must still be reported to TWC, such wages may not be used to establish eligibility for an unemployment claim (see below). One of the continuing eligibility requirements for every claimant is that they be authorized to work in the United States. A person who is not so authorized is not "available" for full-time work, as required under the statute. The TUCA provides in pertinent part the following regarding wages paid to foreign workers:

Sec. 207.043. Aliens.

(a) Benefits are not payable based on services

performed by an alien unless the alien:

(1) is an individual who was lawfully admitted for permanent residence at the time the services were performed;

(2) was lawfully present for purposes of performing the services; or

(3) was permanently residing in the United States under color of law at the time the services were performed, including being lawfully present in the United States as a result of the application of Section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. Section 1182(d)(5)).

8. Athletes

In a provision similar to that covering school employees between semesters, professional athletes may not file for UI benefits between sports seasons if there is a reasonable assurance that they will return to the team in the next sports season:

Sec. 207.042. Athletes.

Benefits are not payable to an individual based on services, substantially all of which consist of participating in a sport or athletic event or training or preparing to participate in a sport or athletic event for a week that begins during the period between two successive sport seasons or similar periods if:

(1) the individual performed the services in the first of the seasons or periods; and

(2) (2) there is a reasonable assurance that the individual will perform the services in the later of the seasons or periods.

9. Part-Time and Full-Time Employees

The TUCA does not distinguish between part-time and full-time employees in terms of coverage under wage reporting and claim-filing laws. Employers must report the wages of all employees, both part-time and full-time, to TWC. Likewise, there is nothing special about part-time status that prevents an individual who was last employed on a part-time basis from filing an unemployment claim. However, if an employee loses her part-time position with a company and files an unemployment claim, she will be ruled ineligible for UI benefits if she is available only for part-time employment. One of the basic eligibility criteria is that claimants must be available and actively searching for full-time employment, and another provision of the law disqualifies a claimant who refuses an offer of suitable full-time work without good cause (see the following article, "Unemployment Insurance Law - Eligibility Issues"). Claimants who have been through the system before sometimes tailor their statements to the agency in order to fit those criteria - they will say they are available for full-time work, even though they might rather work only on a part-time basis. Even if a former part-time employee manages to convince a claim investigator that they are available for full-time work, their UI benefits will be based upon the relatively low wage levels they earned in the part-time job. UI benefit levels are not very high in any event (as of October 1, 2019, a maximum of $521 per week even for the highest earners; the minimum is $69 per week), and benefit levels for former part-timers would be lower still, so most people do not have a great incentive to keep drawing benefits after a few weeks unless they genuinely cannot find suitable new work despite their best efforts to do so.

UNEMPLOYMENT INSURANCE LAW - ELIGIBILITY ISSUES

A. General Background

The unemployment compensation or unemployment insurance statutes enacted by all 50 states must meet federal guidelines; for that reason, unemployment insurance (UI) systems around the country are very similar. Generally, anyone who is no longer performing personal services for compensation may file a UI claim and try to draw benefits, but must meet various requirements, including monetary eligibility, continuing eligibility, and qualification requirements. These requirements for Texas claimants are found in the Texas Unemployment Compensation Act (TUCA - Texas Labor Code Sections 201.001 et seq.).

This paper focuses on the eligibility requirements that claimants must meet in order to draw unemployment benefits for which they are otherwise qualified based upon the reasons for their work separations.

B. Monetary Eligibility Based on Wages

To be monetarily eligible to file a UI claim, a claimant must have on record with the Texas Workforce Commission (TWC) a minimum level of earnings during the "base period" established by the claim; the base period is defined by each state, but is generally a year-long period of time lagging behind the time that the initial UI claim is filed.

In Texas, the base period is defined as the "first four of the last five completed calendar quarters" prior to the date the initial claim is filed. An easier way to think of it is to take the calendar quarter in which the initial claim is filed (the "quarter in progress"), as well as the quarter immediately preceding that (the "lag quarter"), and disregard those quarters. One goes back in time four calendar quarters from that time, i.e., the base period is the year-long period preceding the lag quarter, as shown below:

Base Period Quarter 1	Base Period Quarter 2	Base Period Quarter 3	Base Period Quarter 4	Lag Quarter	Quarter In Progress When Claim Is Filed
✓	✓	✓	✓	X	X

A claimant who has been working for an employer that has been properly reporting its employees' wages will have "wage credits" on file with the Texas Workforce Commission. The wage credits are basically wages from employment, reported by the employer in its quarterly reports to TWC. The definitions found in the TUCA that pertain to wages are:

Sec. 201.081. General Definition of Wages.
In this subtitle, "wages" means all remuneration for personal services, including:
(1) the cash value of remuneration paid in a medium other than cash; and
(2) a gratuity received by an employee in the course of employment to the extent that the gratuity is considered wages in the computation of taxes under the Federal Unemployment Tax Act (26 U.S.C. Section 3301 et seq.).

Sec. 201.082. Exceptions to Wages.
In this subtitle, "wages" does not include:
(1) that part of the remuneration paid by an employer to an individual for employment during a calendar year that exceeds remuneration to the individual, excluding remuneration under another subdivision of this section, by the employer, of $9,000;
(2) a payment, including an amount the employer pays for insurance or an annuity or pays into a fund for the payment of insurance or an annuity, that is made to or for an employee or the employee's dependent under a plan the employer established for employees generally, or a class of employees, including or excluding the employee's dependents, for:
    (A) retirement;
    (B) sickness or accident disability;
    (C) medical or hospitalization expenses in connection with sickness or accident disability; or
    (D) (expenses related to death;
(3) a payment made to an individual employee for retirement, including an amount an employer pays for insurance or an annuity or pays into a fund for the payment of insurance or an annuity;
(4) a payment for sickness or accident disability, or medical or hospitalization expenses for sickness or accident disability, an employer makes to or for an individual employee after the expiration of six calendar months after the last calendar month the employee worked for the employer;

The minimum level of earnings for monetary eligibility to file a UI claim is found in Section 207.021(a)(5-6) of the TUCA. Those provisions boil down to this: a claimant must have wage credits in at least two calendar quarters in the base period, and the total base period wages must be at least 37 times the weekly benefit amount for the claimant. The weekly benefit amount is determined by taking the wage amount from the calendar quarter in the base period in which earnings were highest, and dividing that number by 25. In addition, if the claimant had a prior UI claim, he or she must have earned wages from employment equaling at least six times the weekly benefit amount following the prior initial claim.

A claimant who does not meet the minimum monetary eligibility requirements will have his or her UI claim disallowed. This sometimes happens if a person has not been working long enough to earn wages in at least two calendar quarters, in which case the claimant can then simply wait for another calendar quarter to file. In other cases, a claim is disallowed due to insufficient base period wages when the claimant really had been working enough time, but the wages were perhaps allocated to a wrong Social Security number or else the employer failed to report the wages at all. The latter problem usually occurs if the employer considered the claimant to have been an independent contractor; that problem is discussed in more detail in the article titled "Unemployment Insurance Law - Coverage Issues."

C. Continuing Eligibility Requirements

Claimants must meet several continuing eligibility requirements to draw benefits if they are otherwise qualified:

1) must have filed a claim under TWC rules, properly registered for work at an employment office, and must report to the office whenever required must be authorized to work in the United States;
2) must be medically able to work;
3) must be available for full-time work;
4) must have been totally or partially unemployed for a waiting period of at least seven consecutive days;
5) must participate in reemployment services if the claimant has been determined to be likely to exhaust his or her regular benefits and to need those services to obtain new employment.

A claimant who at any point fails to meet one or more of those requirements will be held ineligible to receive benefits as long as the failure exists, even if otherwise qualified to receive benefits.

1. Work Registration and Reporting Requirements

The underlying rationale of the UI system is to pay benefits to those who are temporarily unemployed through no fault of their own. Part of being unemployed through no fault of one's own is trying one's best to become reemployed. For that reason, claimants must register for work with the state's job matching system, a giant database of job openings and information on those who are looking for work. There are many different programs available to help claimants find new work, some of which require the claimant to report to a career development or Workforce Solutions center for classes, instructions, orientation, and so on. If a claimant is told to report for such an event or meeting, but fails to attend, she will be ineligible for benefits until she finally does come in. A determination to that effect is issued by TWC, and the claimant has the right to file an appeal and show good cause for not attending, such as having to attend a job interview with a prospective new employer.

2. Authorized to Work in the United States

The point of the UI system is to get unemployed people back to work. They can work legally only if they are authorized to work in the United States, i.e., can satisfy the same I-9 requirements that apply to anyone seeking employment in this country. One of the things that claimants must do when registering for work (see requirement number 1 above) is to affirm, subject to verification by TWC, that they are authorized to work in this country. A claimant who cannot do that cannot draw UI benefits. Keep in mind that non-citizens may be authorized to work in the United States if they have proper work authorization documentation from the USCIS, so this is not a requirement that claimants be United States citizens.

3. Medical Ability to Work

The UI program is not meant to be a substitute for workers' compensation or Medicare / Medicaid programs. UI benefits are not for those who are so incapacitated by medical problems that they cannot work at all. One of the most important things for a claimant to show is medical ability to work.

Some employers think that just because a medical layoff was necessary for one of its workers, the ex-worker cannot file a UI claim due to medical inability to work. That is not how the medical ability to work requirement is designed. What it means in plain English is that the claimant must show that he is medically able to work in some field for which he is qualified by experience or training.

Many TWC precedent cases that illustrate this concept are found in the "Able and Available" section of the Appeals Policy and Precedent Manual, downloadable at http://www.texasworkforce.org/ui/appl/aa.pdf.

4. Availability for Full-Time Work

With only very narrow exceptions, claimants must be actively searching for full-time work in fields for which they are qualified by experience or training in order to be eligible for UI benefits. It is not enough to search for part-time work. Likewise, the work search must be reasonable under the claimant's circumstances, i.e., active enough to make it likely that the claimant will find a job within a reasonable amount of time. If a claimant fails to make a sufficient number of job contacts, there is a risk of being held unavailable for work and thus ineligible. A claimant may also be ineligible if he

or she has unreasonable demands as to work schedules, job locations, pay, or benefits. In general, whatever the claimant has received in the past with similar jobs and similar employers, he or she should be willing to accept with a prospective new employer.

These principles are illustrated in the "Able and Available" section of TWC's Appeals Policy and Precedent Manual; employers may download that section at http://www.texasworkforce.org/ui/appl/aa.pdf.

5. Total or Partial Unemployment - "Waiting Week"

Two principles are at work here -- a claimant must be "unemployed" in order to be eligible for benefits, and cannot receive benefits for the first week of unemployment (the "waiting week") until he or she has received at least two weeks' worth of unemployment benefits and has either returned to full-time work or has exhausted his or her unemployment benefits except for the waiting week payment. "Unemployed" may be either totally unemployed or partially unemployed, according to the following definitions:

Sec. 201.091. Total and Partial Unemployment.

(a) An individual is totally unemployed in a benefit period during which the individual does not perform services for wages in excess of the greater of:
  (1) $5; or
  (2) 25 percent of the benefit amount.

(b) An individual is partially unemployed in a benefit period of less than full-time work if the individual's wages payable for that benefit period are less than the sum of:
  (1) the benefit amount the individual would be entitled to receive if the individual was totally unemployed; and
  (2) the greater of:
    (A) $5; or
    (B) 25 percent of the benefit amount.

(c) For purposes of this subtitle, an individual is considered unemployed if the individual is:
  (1) totally unemployed as defined by Subsection (a); or
  (2) partially unemployed as defined by Subsection (b).

(d) Notwithstanding Subsection (b), an individual is not partially unemployed for purposes of this subtitle for a benefit period in which the individual's working hours are reduced by the individual's employer as a result of misconduct connected with the work on the part of the individual. Such limitation will be effective for a maximum of four weeks from the effective date of such a reduction in hours.

(e) For purposes of this subtitle, an individual is not considered unemployed and is not eligible to receive benefits for any benefit period during which the individual works the individual's customary full-time hours, regardless of the amount of wages the individual earns during the benefit period.

The two most important definitions above are these: ***totally unemployed*** means someone who is earning 25% or less of the weekly benefit amount to which their base period earnings qualify them, and ***partially unemployed*** means someone who is earning more than 25%, but less than 125%, of their weekly benefit amount. In plain terms, a totally unemployed person is someone who is no longer working for pay, and a partially unemployed person is someone whose pay, due to a reduction in work time, is below 125% of the weekly benefit amount to which he or she would be entitled if totally unemployed.

A partially-unemployed claimant can file valid weekly claims and draw benefits as long as they report their work and earnings and do not earn 125% or more of their weekly benefit amount. The earnings act as an offset against the benefits. As an example, if an employee whose prior earnings entitle her to a weekly benefit amount of $240 per week experiences a drop in earnings due to a reduction in hours through no fault of her own (not as a disciplinary measure and not at the employee's own request), and the earnings fall below 125% of $240 per week, or $300, the employee can file a valid partial unemployment claim and draw the difference between the lower weekly earnings and $300 per week. A paycheck of $280 would thus result in payment of $20 in UI benefits. The reason that the law provides for partial UI benefits is to encourage employees whose hours are reduced to stay with the job and work the available hours, thus promoting employment, rather than quitting altogether and going on total unemployment; those who stay with the job and collect partial UI benefits end up with 125% of their weekly benefit amount, instead of only 100%.

The requirement for the "waiting week" is found in the following section of the Texas Unemployment Compensation Act:

Sec. 207.021. Benefit Eligibility Conditions

(a) Except as provided by Chapter 215, an unemployed individual is eligible to receive benefits for a benefit period if the individual:
  (1 - 6) …
  (7) has been totally or partially unemployed for a waiting period of at least seven consecutive days; and
  (8) …

(b) A week may not be counted as a waiting period week for the purposes of this section:
  1) unless the individual has registered for work at an employment office in accordance with

Subsection (a)(1);
2) unless it is after the filing of an initial claim;
3) unless the individual reports at an office of the commission and certifies that the individual has met the waiting period requirements;
4) if benefits have been paid or are payable with respect to the week;
5) if the individual does not meet the eligibility requirements of Subsections (a)(3) and (a)(4); and
6) if the individual has been disqualified for benefits for the seven-day period under Section 207.044, 207.045, 207.047, or 207.048.

(c) Notwithstanding any other provision of this section, an individual is eligible to receive benefits on the individual's waiting period claim in accordance with this subtitle if the individual has been paid benefits in the individual's current benefit year equal to or exceeding two times the individual's benefit amount and:
(1) has returned to full-time employment after being totally or partially unemployed for at least seven consecutive days; or
(2) has exhausted the individual's regular benefits for the current benefit year, other than benefits applicable to the waiting period.*

* Note: Subsection (c) above is the provision that applies to initial claims filed on or after September 6, 2015. For claims with earlier filing dates, the previous law would apply (the waiting week was paid as soon as three weeks' worth of benefits had been paid).

6. Participation in Reemployment Services

Claimants who are deemed to be difficult to reemploy may be required to participate in special programs designed to increase the chances of finding new work. The statute provides the following:

Sec. 207.021. Benefit Eligibility Conditions

(a) Except as provided by Chapter 215, an unemployed individual is eligible to receive benefits for a benefit period if the individual:
(1 - 7) …
(8) participates in reemployment services, such as a job search assistance service, if the individual has been determined, according to a profiling system established by the commission, to be likely to exhaust eligibility for regular benefits and to need those services to obtain new employment, unless:
(A) the individual has completed participation in such a service; or
(B) there is reasonable cause, as determined by the commission, for the individual's failure to participate in those services.

D. Other Eligibility Issues

1. School or College Enrollment

In most cases, full-time attendance at a school, college, or university is incompatible with the requirement that a claimant be available for full-time work. The only ways around that requirement are for the claimant to show either that:
(a) the claimant is both looking for full-time work and willing to quit attending classes in order to accept suitable full-time work if offered; or
(b) the claimant's classes do not interfere with the normal hours of work for the kinds of jobs for which the claimant has experience or training, and that the claimant is actively searching for such positions.

Several precedent cases from TWC's Appeals Policy and Precedent Manual dealing with attendance at school, college, or university classes can be found in the "Able and Available" section of the Manual, downloadable at the following Web site: http://www.texasworkforce.org/ui/appl/aa.pdf.

2. Receipt of Pension or Other Funds

a. **Wages in lieu of notice or severance pay:** Under Sections 207.049(1) and (2) of the Act, a claimant is disqualified from UI benefits for the period covered by wages in lieu of notice, a non-obligatory post-termination payment that is given to make up for the lack of advance notice of layoff or termination, or severance pay given under an employer policy. This disqualification does not apply to other types of post-termination payments, such as incentives to resign, retire, sign a release or waiver agreement, or settle a claim or lawsuit, or to severance pay owed under a negotiated contract or agreement.
b. **Workers' compensation:** According to Section 207.049(2) of the Act, a claimant cannot draw workers' compensation and unemployment compensation at the same time, except in the rare case of permanent, partial disability. However, if a claimant has such a disability, there could be an issue of whether the claimant is ineligible for benefits based upon medical inability to work, and the employer is entitled to raise the issue.
c. **Pension or retirement benefits:** Under Section 207.050 of the Act, if the claimant is receiving a pension or retirement payment based in part upon wages earned during the base period of the claim, there is a dollar-for-dollar decrease in the UI benefits that would otherwise be payable. This offset does not apply in the case of Social Security benefits.
d. **Other wages:** If a claimant is receiving income from part-time employment on the side while filing for unemployment benefits, it is possible for the claimant to

draw what is known as "partial unemployment benefits" under Section 207.003 of the Act. In order to do so, the claimant must be "partially unemployed" through no fault of his or her own and be earning below a certain "cut-off" amount. The cut-off amount is equal to 125% of the weekly benefit amount to which the claimant would be entitled in the case of total unemployment. The partial unemployment benefit amount is calculated by multiplying the normal weekly benefit by 1.25 and then subtracting from that amount the weekly earnings from the claimant's employment on the side. That difference is what the claimant will receive in partial unemployment benefits. This goes hand-in-hand with the requirement that claimants report all work and earnings while filing claims for benefits. Failure to do so can render a claimant subject to a fraud ruling.

3. Refusal of Suitable Work

Section 207.047 of the Act disqualifies a claimant who, while in claim status, has refused a referral to, or an offer of, suitable work without good cause. A referral to suitable work can include the situation that occurs when TWC directs a claimant to return to his or her customary self-employment, if they have had their own business in the past. This proceeds directly from the work search and availability requirements that claimants must satisfy in order to be eligible for continued weekly UI benefits. In a nutshell, in all but the most unusual of cases, a claimant must be available and actively searching for full-time work while collecting UI benefits. Claimants are told that if they receive an offer of suitable work, they must accept it, unless there is some good reason not to do so, or else face disqualification. Such a disqualification is every bit as serious as a disqualification for quitting a job without good cause connected with the work or for being discharged for misconduct connected with the work.

Before TWC will assess a disqualification, the following criteria must be satisfied (as taken from TWC's Unemployment Insurance Manual):

1. A definite work offer or referral must have been made directly to the claimant, with an explanation covering the nature of the work, the wages, hours of work, job location, and other requirements. See Appeals Policy and Precedent Manual, SW 170.10.
2. The work must be suitable per the requirements of Section 207.047 and 207.008 of the Act.
3. The claimant must have refused the offer or referral or failed to report to the employer when so directed.

This provision makes it important for a prior employer to stay aware of its former employee's job-hunting activities after a UI claim is filed, if possible, and to promptly report any perceived refusal of suitable work on the claimant's part. There is nothing wrong with companies sharing information with each other concerning such activities.

The Appeals Policy and Precedent Manual of TWC has many precedent cases in this area of the law; employers can download a copy of that section of the Manual at http://www.texasworkforce.org/ui/appl/sw.pdf.

E. Conclusion

Aside from the well-known qualification issues relating to whether it was the claimant's fault that he or she became separated from the last work, there are many eligibility issues upon which the claimant's ability to draw UI benefits depends. It is definitely worth the employer's while to be aware of these various eligibility issues and to notify the Commission whenever the employer has knowledge that certain requirements are not being met by the claimant. After all, the bottom line is that UI benefits are supposed to be for those who are able to work and are out of work through no fault of their own, and if any of the foregoing requirements is not satisfied, the claimant cannot be considered entitled to such benefits.

UNEMPLOYMENT INSURANCE LAW - DEALING WITH CLAIM NOTICES

A. Introduction to Unemployment Claims

The unemployment compensation system is a claim-driven process. That means that when an employee leaves an employer for whatever reason, nothing happens until and unless the ex-employee files an initial claim for unemployment benefits with the Texas Workforce Commission (TWC). Each claim can involve various types of claim notices, rulings, and appeals. Although the different types of notices, rulings, and appeals have different rules to keep in mind, one common thread runs through the whole system: it is extremely important to pay attention to any documents involving a claim, since the time limits for responding and appealing are very short, and failing to respond or appeal on time can lead to loss of the right to appeal further.

B. Types of Claim Notices

There are several different ways an employer can be notified of a claim. In most cases, that will be by receiving some kind of claim notice in the mail from the Texas Workforce Commission (TWC). In rare cases, an employer's first notice will be verbal, i.e., a claim examiner will call for information about a former employee who has filed a claim, or it may be in the form of a tax rate notice showing an increased state unemployment tax rate due to chargebacks you never knew you had. In the latter two cases, something has gone wrong, and you should immediately call the employer Commissioner's office at 1-800-832-9394 or (512) 463-2826. In all cases, prompt action is necessary, since there is only a very short response period for any claim notice.

1. Notice of Application for Unemployment Benefits (Notice of Initial Claim)

This is the notice sent to the business or individual for whom the claimant last worked immediately before filing the initial claim. For private businesses, it is sent to the location where the claimant last performed work. Governmental employers may designate a special address to which all claim notices will be sent. This is an important notice, since the last employing unit has the right to protest payment of benefits to the claimant.

ACT IMMEDIATELY!
The initial claim notice carries a short response deadline: only 14 calendar days from the date the notice is mailed to submit a timely response. A timely response makes the employer a party of interest to the claim with full appeal rights. A late response has the opposite effect, meaning that if the initial determination is in the claimant's favor, the employer who protested late will not have the right to appeal the ruling. The response may be hand-delivered, faxed, or mailed to any TWC office, or called in by phone or filed via the Internet using the number or Internet address shown on the claim notice. If it is mailed, the U.S. postmark date will determine whether the protest is timely. If the response is faxed, the date and time of receipt of the fax by TWC determine the timeliness of the response. (For some narrow exceptions, see the section on "Timeliness of Appeals" below.)

<u>From TWC's Unemployment Insurance Division:</u>

The Texas Workforce Commission (TWC) offers employers two options to respond to unemployment benefit claim notices using the State Information Data Exchange System (SIDES). The U.S. Department of Labor (DOL) and the states developed SIDES Web Services and SIDES E-Response to offer employers and Third Party Administrators (TPAs) secure, electronic, and nationally standardized formats to respond to requests to claim notices, attach documentation when needed, and confirm the documents are received. Employers can use SIDES E-Response and SIDES Web Services at no cost.

SIDES E-Response: For employers that respond to a limited number of unemployment claims throughout the year, the SIDES E-Response web site provides a portal for electronically posting responses to information requests from state workforce agencies. SIDES E-Response is available in Texas and other participating states to any employer or TPA with Internet access. The web site is similar to the TWC Employer Response to Notice of Application. Employers may choose either response system. SIDES Web Services: For employers and TPAs that typically deal with large numbers of unemployment notice requests, SIDES Web Services provides a more automated data-sharing and file-tracking interface between employers' IT systems and the TWC network. SIDES Web Services offers integrated computer-to-computer interface. SIDES is especially helpful to employers with operations in multiple states.

To use SIDES E-Response or SIDES Web Services, contact the TWC employer claim response help line at (877) 832-5800 or e-mail InternetEmployerResponse@twc.state.tx.us.

2. Request for Work Separation Information (Notice of Additional Claim)

This is the notice sent to the business or individual for whom the

claimant last worked immediately before filing an additional claim. For private businesses, it is sent to the location where the claimant last performed work. Governmental employers may designate a special address to which all claim notices will be sent. This is an important notice, since the last employing unit has the right to protest payment of benefits to the claimant.

ACT IMMEDIATELY!

Just like the related initial claim notice, the request for work separation information carries a short response deadline: an employer has only 14 calendar days from the date the notice is mailed to file a timely written response. If the employer is a base period employer, filing a timely response makes the employer a party of interest to the claim and gives the employer full appeal rights. Filing a late response has the opposite effect, meaning that if the initial determination is in the claimant's favor, the employer who protested late will not have the right to appeal the ruling. Due to a quirk in the law, an employer who is not in the claimant's base period will not have appeal rights even if it files a timely protest to the additional claim notice. However, it should still protest timely anyway, since a disqualification of the claimant at this point may help the employer get chargeback protection if the claimant files a new initial claim in the future. The response may be hand-delivered or faxed to any TWC office or mailed. If it is mailed, the U.S. postmark date will determine whether the protest is timely. (Some narrow exceptions exist - see the section on "Timeliness of Appeals" below.)

3. Notice of Maximum Potential Chargeback

This is the notice sent to base period employers who are not the claimant's last employing unit on an initial claim. It notifies such employers that someone who used to work for them and who later went to work for someone else is now collecting unemployment benefits that may be charged back to the base period employers' tax accounts. Private taxed employers have the right to protest such chargebacks.

ACT IMMEDIATELY!

An employer will be charged back with its share of the benefits in question unless: 1) it files a timely written response to the claim notice within 30 calendar days from the date the notice was mailed from TWC, and 2) it shows that the claimant's last work separation prior to the initial claim date fits into one of the recognized chargeback protection categories. Those categories are:

(1) a discharge required by a federal or state statute or a municipal ordinance in Texas;
(2) a discharge for misconduct connected with the work;
(3) a resignation without good cause connected with the work, including a sale of the business by an owner;
(4) discharge or resignation resulting from refusal to treat a person with a communicable disease within the scope of the individual's employment, if the employer made available the facilities, equipment, training, and supplies necessary to take reasonable precautions to preclude infection;
(5) a work separation due to a medically verifiable condition on the part of the employee or the employee's minor child;
(6) a work separation resulting from a natural disaster declared by the governor or the President;
(7) a work separation resulting from any other natural disaster, fire, flood, or explosion;
(8) a resignation from partial employment to accept other employment that the employee reasonably believed would increase the employee's weekly wage;
(9) a work separation that was caused by the employer being called to active military service in any branch of the United States armed forces;
(10) a work separation that resulted from the the employee leaving the employee's workplace to protect the employee or a member of the employee's immediate family from violence related to a sexual assault, or to protect the employee from family violence or stalking as evidenced by documentation indicating such a problem, such as an active or recent protective order, a police record, a physician's statement or other type of medical documentation, or a record from a family violence or rape crisis center;
(11) a work separation that resulted from quitting to move with the employee's spouse, if the claimant is otherwise qualified because the spouse was a member of the U.S. armed forces whose permanent change of station lasted longer than 120 days, or whose tour of duty lasted longer than one year;
(12) a work separation that was caused by the employee's disability-related inability to perform the work, if the employee is a recipient of Social Security disability benefits;
(13) a resignation to care for the employee's terminally-ill spouse, if the illness was medically documented, and no other reasonable, alternative care was available;
(14) a layoff caused by the reinstatement of a military veteran with reemployment rights under USERRA; or
(15) a part-time employee's temporary work separation prior to the initial claim, if the employee continues to work the employee's normal hours at the time the initial claim is filed;
(16) a work separation resulting from the claimant quitting work that was unsuitable and that lasted less than four weeks;
(17) a work separation resulting from the claimant quitting to enter Commission-approved training; or
(18) a work separation caused by the employer entering into a shared work plan, if the shared work benefits are reimbursed by the federal government.

The response may be hand-delivered or faxed to any TWC

office or mailed. If it is mailed, the U.S. postmark date will determine whether the protest is timely. (There are some narrow exceptions - see the section on "Timeliness of Appeals" below.)

4. Wage Verification Notice (Not Initial Claim Last Employer) – (Notice of Maximum Potential Chargeback for Reimbursing Employers)

First, the good news: if your organization is a reimbursing employer, you never have to pay quarterly taxes on your employees, and you have no tax rate that will increase for three years if benefits are paid out to your former employees. Now the bad news: this form is your notification that a former employee who went to work somewhere else is now collecting unemployment benefits that will be charged back dollar-for-dollar to your account in the form of reimbursements. There is no right of protest, regardless of the reason the claimant left your employment (however, effective with initial claims filed on or after September 6, 2015, a reimbursing employer can be protected from reimbursement liability if the work separation occurred under certain disqualifying circumstances (a discharge for misconduct connected with the work, or a resignation without good cause connected with the work)). That is the only significant downside to reimbursing status, though. For the vast majority of reimbursing employers, the advantages far outweigh the disadvantages.

Employers should always check the wage and potential reimbursement amounts and call TWC if any errors seem to have been made.

5. Wage Verification Notice (Initial Claim Last Employer) – (Notice of Maximum Potential Chargeback for the Last Employing Unit)

This is a special notice sent to the last employing unit (LEU) named on an initial claim, but it is sent only if the LEU is also a base period employer. A non-base period LEU will not receive this form. It tells you that the claimant is now drawing benefits on your account; it includes a chart showing the calendar quarters and the wages involved in the base period and the maximum amount that can be charged to your account. The maximum is charged only if the claimant draws all of his or her maximum benefit amount.

If this is the first notice you have received that a claim was filed, **ACT IMMEDIATELY!** Call the employer Commissioner's office at TWC, ask for one of the legal staff, describe the problem, and follow whatever directions you are given. In most cases, that advice will be to fax or mail to TWC a written protest describing the problem and requesting an appealable ruling. That ruling will state that your late protest means that you have waived your appeal rights, but it will go on to state that you may appeal the ruling and request a hearing within 14 calendar days of the date the ruling was mailed. (See the section on "Timeliness of Appeals" below.)

6. Detailed Earnings Analysis (Continued Claim Verification / Analysis of Earnings by Benefit Period)

These are benefit audit forms sent to employers by the Benefit Payment Control Department of TWC. Both are meant to verify wages earned by claimants who reported working for an employer during one or more claim weeks. This is usually done on a random audit basis, but in some instances may be a prelude to a fraud investigation. These forms can cover a two-week or longer period. With both forms, employers are asked to break down the earnings on a weekly basis. Employers' cooperation with these audits is greatly appreciated, since it helps TWC cut down on claim fraud and may help the claimants' base period employers better control their chargebacks from a claim. If either of these forms is the first notice you have received that a former employee is claiming benefits, you should call either the local TWC office, the Workforce Solutions center in your area (see http://www.twc.state.tx.us/dirs/wdas/wdamap.html), or else the employer Commissioner's office at 1-800-832-9394 or (512) 463-2826 for information on what to do next.

7. None of the Above (Any Other Claim Notices)

If you get a call from a TWC office about a claimant filing a claim, but have not received a written claim notice, tell the person calling that you have not received the notice and ask him or her what date the notice was mailed. Then file a written protest immediately to have a chance of being a party of interest with appeal rights.

If your first notice that a claim was filed comes in the form of a tax rate notice showing chargebacks you never knew about, call the employer Commissioner's office immediately, describe the problem, and follow their suggestions on what to do next. The toll-free number is 1-800-832-9394; the regular number is (512) 463-2826. If you get some other kind of written notice that a claim was filed, it could be either a mistake or else some unusual circumstance. In either case, call the employer Commissioner's office just to make sure. The worst thing to do is just assume a mistake has been made and that it will all go away by itself. Do not hesitate to call for assistance!

C. Consistency in Claim Responses

It is absolutely essential that when drafting your response to a claim notice, you get the facts straight the first time. If you prepare a hasty response and include unsupported assertions, or make statements that you later have to change or retract altogether, your credibility will be damaged with the TWC claim examiner, appeal hearing officer, and the Commission. One of the very worst things an employer can do is state one

thing in the initial claim response, then change directions later at the appeal hearing. The hearing officer will be suspicious and will grill the company representatives with skeptical questions. More often than not, changing stories will harm an employer's case irreparably. If you are not sure what to put down in the initial response, give a timely response with as much specific information as possible and follow up with more details before the deadline.

D. What is a Base Period?

The base period is a year-long period of time that determines both the amount of UI benefits a claimant can potentially draw and which employers will be in line for potential chargebacks if benefits are paid. It lags behind the date the initial claim is filed. Officially, it is defined as the first four of the last five completed calendar quarters immediately preceding the initial claim. An easier way to think about it is to take the date the initial claim is filed and figure out into which calendar quarter the filing date falls. Disregard that quarter (the quarter in progress), and disregard the quarter immediately preceding that one (the lag quarter), and then go back in time four calendar quarters. That year-long period will be the base period, as shown in the following chart:

Base Period Quarter 1	Base Period Quarter 2	Base Period Quarter 3	Base Period Quarter 4	Lag Quarter	Quarter In Progress When Claim Is Filed
✓	✓	✓	✓	X	X

Any employer that paid the claimant wages during any of the quarters checked above will be potentially liable for chargebacks. The liability will be proportional to the amount of wages the employer paid in relation to other base period employers, i.e., if you paid half the claimant's wages during the base period and another company paid the other half, you will each have half of the chargeback liability. For more information on how the base period affects an employer's claim liability, see "How Do Unemployment Claims Affect an Employer?" in this section of the book.

E. Evidence Needed to Win a Case

Different situations require different types of evidence in order for the employer to win, but there are some types of evidence that will always be required no matter what happened to cause the claimant's work separation:

(1) Firsthand testimony from witnesses with direct, personal knowledge of the events leading to the claimant's work separation, i.e., "the ones who saw it happen". Documentation of policies, warnings, attendance, or any other subjects relating to the claimant's work separation.
(2) In a discharge case, evidence relating to a specific act of misconduct that happened close in time to the discharge, i.e., the event that precipitated the discharge. In a resignation case, evidence relating to whatever motivated the claimant to resign.

Beyond those general categories, there are specific things that are needed for each different type of case. Specific evidence needed to win a misconduct case is found in the "Misconduct" section, and that needed to win a resignation case is found in the "Voluntary Leaving" section.

F. Ineligibility for Benefits

Claimants must meet several continuing eligibility requirements to draw benefits if they are otherwise qualified:
(1) must have filed a claim under TWC rules, properly registered for work at an employment office, and must report to the office whenever required;
(2) must be medically able to work;
(3) must be available for full-time work;
(4) must have been totally or partially unemployed for a waiting period of at least seven consecutive days;
(5) must participate in reemployment services if the claimant has been determined to be likely to exhaust his or her regular benefits and to need those services to obtain new employment.

A claimant who at any point fails to meet one or more of those requirements will be held ineligible to receive benefits as long as the failure exists, even if otherwise qualified to receive benefits.

In addition, the claimant must meet the following monetary eligibility requirements in order to have a valid initial claim:

(1) must have wages on record during at least two calendar quarters in the base period;
(2) the total base period wages have to be at least 37 times the weekly benefit amount (WBA); and
(3) if the claimant has filed a prior benefit claim, he or she must have worked and earned at least six times the WBA since the prior initial claim was filed.

If you are dealing with an unemployment claim and feel that the claimant might be ineligible under any of the requirements noted above, you should mention that in your claim response, in your appeal letters, or in a fax or call to any TWC office.

G. Timeliness of Protests and Appeals

If you receive a claim notice and notice that your deadline to protest a claim is that day or the next day, respond immediately with as much specific information as you can. Remember, late responses deprive your company of its appeal rights.

TWC now allows claim responses to be filed over the telephone

or the Internet. If filing a claim response by phone, use the telephone number given in the claim notice, and be sure to advise the TWC staff that the purpose of the call is to protest the notice of claim. If a claim examiner (sometimes called a "claim adjudicator") calls for information about the claim, and the company has not yet filed a claim response, be sure to tell the TWC staff member that the company wishes to have the phone call serve as the company's initial claim response, and give as much information as possible. If filing the claim response via the Internet, use the Web address given in the claim notice and supply as much information as possible in the space provided. If necessary, send additional documentation in via mail or fax using the contact information in the claim notice.

As noted in previous sections, you must file timely responses to TWC notices in order to have any chance at all of participating in the claim determination process. The easiest way to do this is to pay attention to the mailing date and response deadline and ensure that you respond before the deadline passes.

Important: no matter what kind of notice or ruling you have, read the information below, which explains the most common things that can go wrong as far as filing a timely response is concerned.

Under the law, an employer who files a late protest gives up its right to protest chargeback of benefits and has no right to appeal an award of UI benefits to its former employee. The claimant might be disqualified based upon his own statements to TWC, but the employer should not count on that. An employer who files a late appeal from a ruling gives up the right to have the appeal considered, because TWC has no jurisdiction to rule upon a late appeal; the appeal would have to be dismissed. In addition, an employer that has filed late claim responses two or more times in the past can lose chargeback protection in future cases (for more information, see section II.A., "Initial Claim", of the article "Unemployment Insurance Law: The Claim and Appeal Process" later in this part of the book).

If you have received a claim notice or ruling close to the deadline and are worried that you might not be able to fully investigate and respond in time, you can file a quick response that will preserve your appeal rights by noting your disagreement and submitting a brief outline of the basic facts behind the work separation. That is all it takes to do a protest or appeal. You can file the response by hand-delivering it to any TWC office anywhere in the state, by faxing it to any such office, by using a courier or delivery service to deliver it to any TWC office, or by using ordinary mail. If you use ordinary mail, make sure you get it postmarked by the response deadline, and get proof of mailing (available at nominal cost at any U.S. post office). The U.S. postmark date is what TWC uses to determine the filing date of a mailed response. Online claim responses can be made at http://www.twc.state.tx.us/businesses/employer-response-notice-application-unemployment-benefits, and appeals can be filed at http://www.twc.state.tx.us/businesses/employer-benefits-services (see "Appeal Online"). After you file the timely response to preserve your appeal rights, then go ahead and do a more complete investigation and get the additional information to TWC as soon as possible.

The most common mistakes that lead to late protests and appeals are:

(1) thinking that a 14-day deadline means "business days" or that the period does not include holidays or weekends. "Day" means "calendar day". Take the mailing date shown on the notice and add 14 calendar days to it, depending on what kind of deadline is involved. Holidays and weekends do not extend the deadline. The only exception is when a response deadline falls on an official state holiday or a weekend, in which case the deadline is extended until the next business day.

(2) thinking that a complete investigation is necessary to file a response. A timely response is what is necessary, not a complete investigation. You can investigate fully once the response is filed and then offer additional information whenever it becomes available.

(3) assuming that someone else will do the appeal for the company. Make sure that the appeal is being handled; check up on the people you assign to do the task. This is especially true if you hire an outside consultant, attorney, or company to handle your appeals for you.

(4) not designating someone to check for and handle important mail in your absence. *If you want to have a rule that no one else can check your mail for time-sensitive items in your absence, you can do it, but it will not make a difference if it results in your filing a late protest or appeal. If you give such an explanation for a late protest or appeal, neither TWC nor the courts will be able to use it as justification for holding your response timely.* To protect your company against such an outcome, designate a trusted employee to check your mail for important items that have inflexible deadlines and to fire off a quick preliminary response that will preserve your appeal rights.

(5) thinking that a timely response is unnecessary just because the claimant has told you that he is no longer interested in filing for UI benefits. Claimants say things like that and then change their minds and file for benefits anyway. It could also happen another way: the claimant gets another job, loses it, and then reopens the earlier initial claim. If you have not filed a timely written protest, you are not a party of interest to the claim and cannot protest chargebacks to your account that might later result from

future job losses by that claimant.

(6) failing to promptly check the records once a claim notice comes in. Some employers file late protests and claim that they did not recognize the name of the claimant. That is not a valid excuse; people get married or otherwise change their names for various reasons. The social security number is always on the claim form. Any company can search its records and find that information. A company that is truly mystified by a name or social security number should first make sure it files a timely written protest (at the very least: "We protest - no such employee in our records."), then promptly call the local Workforce Solutions or state TWC office for help and document the call and what was said by which TWC or Workforce Solutions employee.

(7) assuming that TWC will overlook a late response if you explain that the company was relocating, was extremely busy at the time, or that the person responsible for handling the response mislaid or otherwise lost track of the document. In general, there is no "good cause" exception to the protest and appeal deadlines. The bottom line is that a company has to make it a top priority to file a timely protest or appeal.

The only exceptions to the deadlines occur when a response is late due to misinformation from a TWC employee, when TWC misaddresses the claim notice or ruling, or when USPS mishandles the delivery of the document to the employer. If you think that one of these exceptions might apply in your case, call the employer hotline at 1-800-832-9394 and talk with a member of the employer Commissioner's legal staff.

In the specific case of delayed receipt or non-receipt of the document, your chances for winning will greatly improve if you can show that you:

(1) routinely maintain a log of all incoming government correspondence;

(2) assign log duties to only one or two employees who can be witnesses on your behalf if necessary; and

(3) have instituted a document tracking system and have stuck to it.

If an non-receipt or delayed receipt issue ever comes up, submit a copy of the relevant log pages, testify about the document tracking system and how everyone is careful to follow it, and have the firsthand witnesses swear that they carefully watch for all such correspondence and either did not ever see it or that they were there when it arrived late and thereafter handled it promptly.

To reiterate, late responses and late appeals lose cases. If you call TWC and leave a message, or cannot get through, or get confusing or conflicting information that leaves you uncertain of what to do, do ***not*** do nothing. Do ***not*** let a response or appeal deadline pass. The claim notice or ruling clearly tells you that you must make a timely response or file a timely appeal. Do that. File the response or appeal anyway, within the stated time frame, and protect your rights. If you later decide not to contest the case further, you can always withdraw your appeal, without any penalty for having filed an earlier appeal.

The full text of Commission Rule 32 on timeliness appears in the Texas Administrative Code, Title 40, Part 20, Chapter 815, Subchapter B, Rule 815.32; see http://info.sos.state.tx.us/pub/plsql/readtac$ext.viewtac.

H. Special Timeliness Information Concerning Initial Claim Notices

(1) As noted before, do whatever you have to do to file a timely written response to this notice!

(2) Note the short response deadline - only 14 calendar days from the date the notice was mailed!

(3) "Calendar days" means that holidays and weekends count.

(4) If the address shown for your company is incorrect, or if you want subsequent rulings and hearing notices sent to a different address, note that fact and the address change in the space provided on the back of the form.

(5) If you are on the final day due to late receipt or mishandling of the notice in your office, immediately submit a written response with as much detail as possible. That will preserve your appeal rights.

(6) Notice that there is a fax number given on the front of the form for the local office where the claim is being handled. You can fax your response to the office if you wish and call to verify receipt.

I. Special Timeliness Information Concerning Notices of Maximum Potential Chargeback

(1) You have only 30 calendar days to file a timely written response.

(2) "Calendar days" means that holidays and weekends count.

(3) If the address shown on the form is no longer valid, note that fact and the new address in your claim response and also inform the Tax Department of the change in address. This kind of notice is always sent to the most recent tax address of record, so keep your address information current.

(4) **Special exception to the timeliness rules for this kind of notice:** if you and this claimant were involved in a previous claim in a prior benefit year and you won the decision, i.e., the claimant was disqualified from benefits and/or your tax account was protected from chargeback, you should be able to get automatic chargeback protection in the next benefit year, even if you file a late response to this type of claim notice. If this situation fits you, note

the prior favorable decision in your current late response and supply specifics so that the facts can be verified. If possible, include a copy of the prior decision with your new protest.

J. Examples of Claim Responses

In this section, you will find examples of claim responses that could apply in certain claim protest situations. These examples are very basic, intended to serve only as illustrations of the kinds of statements that might go into a response to an unemployment claim. They should not be regarded as the final wording for a protest; for that, it is always best to consult with your attorney, preferably an employment law attorney. The important thing to remember is that TWC is not looking for courtroom formality or immersion in legalities. Experience has shown that the best responses are usually the simplest and most direct ones. One implication of the agency's crushing caseload is that employers who can state their cases in a few well-chosen words or paragraphs are often the ones whose cases end up being understood the best by agency personnel. Make your protests and appeals stand out by being brief, to the point, and well-organized. The main thing to avoid is inconsistency: what you put in appeals should match what you put in the claim response and what you told agency personnel.

Remember, you can speak at no cost with a TWC attorney about protests or appeals by calling toll-free at 1-800-832-9394.

CAUTION: These examples are furnished here solely for purposes of illustration. They are not meant to be forms that can be copied directly and used. No sample form for legal purposes should ever be used without first consulting your own attorney. No one form can cover all possible situations. Each situation has its own specific facts and issues, and it is always best, before using a legal form, to discuss those issues with your attorney to minimize the risk of important considerations being missed. You can use these examples to take to your attorney (preferably an employment law attorney) and let him or her adapt one of them to suit your particular company and situation.

Sample Responses to Claim Notices

For an employer that does not intend to dispute the payment of benefits to a claimant, a neutral response could be something like the following:

> "We do not wish to contest the claimant's entitlement to benefits. However, we wish to remain a party of interest to the claim and would appreciate receiving copies of any determinations to which we are a party."

A neutral response like that should be used only if the employer has no problem with the claimant drawing unemployment benefits and does not plan on appealing a decision in the claimant's favor.

In any disputed case, the claim response will need to contain as much detail as possible regarding the reason why the employer believes that benefits should be denied. If the employer plans on disputing the payment of benefits to a former employee, it must take care to give enough information in its claim response to put TWC on notice of facts that would arguably justify disqualification from benefits. Failing to give a timely or adequate response to a claim can not only deprive the employer of the right to appeal an adverse ruling (if the response is late), but can also lead to imposition of a chargeback even if the employer later successfully appeals a ruling in favor of the claimant. The latter would happen if the employer is found to have filed late or inadequate claim responses at least twice in the past, and the current case arose after a third late or inadequate response led to an initial decision in favor of the claimant.

<u>Sample response for a disputed claim:</u>

> "We protest any payment of benefits to this ex-employee. We fired her for repeated tardiness [or] repeated failure to give proper notice of attendance problems [or] failure to follow instructions [or] having too many avoidable accidents [or] insubordination [or] possession of alcohol on company premises [or] taking vacation without permission [or] [supply your own description of the claimant's misconduct]."
>
> If the claimant quit: "We protest any payment of benefits to this ex-employee. He/ she quit to move out of state/out of town [or] to take another job [or] because we declined to give her a raise [or] because we asked him to take a small pay cut [or] because he disagreed with our new drug-testing policy [or] because we did not give her a promotion that she had hoped for, but which she had not been promised."

The above are only examples. If you want to supply more detail, go ahead, but avoid excessive wordiness. It is more important to make firsthand witnesses and documentation available to the claim investigator than it is to write a lengthy claim protest.

K. What to Do When the Claim Examiner Calls

At some point fairly soon after the claim notice is mailed, usually after the employer submits a written response, but sometimes before, the claim examiner will call the employer

in an effort to get some facts pinned down and recorded in the form of "statements of fact." The claim examiner will not actually "record" the conversation on an audiotape, but will enter the employer's statements into a computer record that becomes part of the permanent claim file in the case. The claimant is also asked to make a statement of facts for the record. In many cases, two or more such contacts will occur for both the claimant and employer. The most important thing for the employer to remember is that the claim examiner is trying to assemble enough facts to make a decision. The employer should come across as calm, organized, and in command of the facts. As noted above, it is essential to have a consistent explanation for what happened.

If the employer is concerned about the claimant filing other types of claims and lawsuits, it may be advised by its employment law attorney to not furnish any information to the claim examiner, or at the very least to be careful about what it says. At a bare minimum, if the employer decides to fight the UI claim, but expects other employment-related claims and lawsuits, it should strive for the utmost in consistency when explaining the facts behind the claimant's work separation to various agencies and to a court. The employer should not let fear of a defamation lawsuit keep it from reporting the facts behind the work separation; § 301.074 of the Texas Labor Code provides that any information supplied by an employer in connection with an unemployment claim or appeal may not be used as the basis for a defamation lawsuit. In addition, § 213.007 of the Labor Code states that an unemployment claim ruling has no collateral estoppel effect, i.e., the ruling made by TWC or a court in an unemployment claim has no preclusive or evidentiary weight in any other kind of legal action. If the employer decides not to furnish any information, the claimant might be qualified for benefits based upon a lack of disqualifying information. Such a "non-response" would not by itself lead to any penalties from the TWC, as long as the company does not later file an appeal, win the appeal, and cause the claimant to have an overpayment, which would generate liability for having made an "inadequate" claim response.

In the usual case, however, the company wants to defend against the UI claim by having the claimant disqualified and/or its account protected from chargebacks. Thus, when the claim examiner calls, the company will want to cooperate as fully as possible. The employer should try to furnish whatever witnesses have firsthand knowledge of the circumstances behind the claimant's work separation. Their statements will carry the greatest weight, and assuming they are believable, the employer will generally win its case if the work separation was the claimant's fault.

In addition, it is important to submit copies of relevant documentation to the claim examiner. If the examiner asks about something that the company did not submit along with its claim response, the employer should offer to fax a copy of the document to the claim examiner at that time. Anything the claim examiner asks about is likely to be important to the outcome of the case, so furnish documents readily. The types of documents that are often important in a disqualification determination include, but are not limited to:

(1) job applications;
(2) consent/acknowledgement forms;
(3) background check results;
(4) policies and warnings;
(5) time sheets/attendance records;
(6) memos, logs, and journals;
(7) e-mails and letters from customers or vendors;
(8) copies of traffic citations or court records;
(9) drug/alcohol test results;
(10) medical documentation or leave request forms;
(11) performance evaluations; and
(12) exit interview records.

Even audio- and videotapes can be relevant evidence in a case. If such evidence exists and relates to the events leading up to the work separation, submit copies and keep the originals. Be ready to furnish copies of that and the other documentation to the claimant if so requested at any point by the claim examiner. For an appeal hearing, send a copy of such evidence to both the claimant and the hearing officer. Make sure that the tapes are in a format that can be easily played or displayed by commonly-available equipment. If computer evidence is essential to your case, try to furnish printouts and to make your technical expert available to answer any questions about its authenticity that the claim examiner may ask.

Of course, not every case will involve each type of the above evidence. However, almost every case will involve two or more of the above. Whatever you submit to TWC will be available to the claimant, and the reverse holds true as well - you will have the right to obtain copies of any evidence the claimant submits and of any statements of fact the claimant may make in the case. Rest assured that the evidence you provide is not subject to release to anyone outside of the agency, the sole exception being the very unlikely event that the UI claim eventually ends up in court.

Try not to argue with the claim examiner. Instead, discuss your opinions with federal and state lawmakers, because they are the only ones who can change the actual laws. When dealing with TWC, just furnish the facts and let the chips fall where they may. If you followed your own policies and treated the employee fairly, chances are the claim examiner will conclude that the claimant should have known that the final incident would lead to discharge, and will in turn disqualify the claimant.

UNEMPLOYMENT INSURANCE LAW - QUALIFICATION ISSUES

I. Basic Qualification Issues

A threshold requirement that every claimant must meet before drawing unemployment benefits is to show that they are out of work through no fault of their own. This fundamental requirement is also known as the "work separation" issue. The qualification issue depends upon why the claimant came to be separated from the last work he or she held prior to filing the initial claim. That last work separation could have been from regular employment, from independent contractor work, or even from casual work for a private individual. What TWC asks is whether it was the claimant's fault that that last work came to an end when it did. As such, the emphasis is always on the cause or incident that precipitated the work separation. In a discharge case, that will be the final incident, the incident but for which the work separation would not have occurred at the time it did. In a voluntary leaving case, the focus will be on the final problem that caused the claimant to decide that leaving would be better than staying.

In work separation determinations, the burden of proof is on the party who initiates the work separation: If the claimant quit, the claimant must prove good cause connected with the work for quitting; if the claimant was fired or laid off, the employer must prove that the work separation resulted from misconduct connected with the work on the claimant's part, if the claimant is to be disqualified from UI benefits.

The primary disqualification categories include:

- discharge for misconduct connected with the work
- voluntary quit for personal reasons
- refusal of suitable work without good cause
- work stoppage resulting from participation in a labor dispute
- receipt of wages in lieu of notice, workers' compensation, or retirement pension

In situations involving the first three disqualification categories, the disqualification remains in effect until the claimant returns to work for at least six weeks and/or earns at least six times his or her weekly benefit amount. The disqualification for striking workers lasts during the pendency of the labor dispute, but ends if the claimant makes an unconditional offer to return to work and the offer is refused, or if some other event occurs that effectively severs the employment relationship. In the final category, the disqualification for wages in lieu of notice remains in effect during the period covered by such wages. The disqualification for receipt of workers' compensation benefits lasts as long as the claimant is receiving such benefits. Finally, the disqualification for pension benefits applies only to pensions based in part on wages received during the base period, and the disqualification is really a dollar-for-dollar offset of pension or retirement benefits against the unemployment benefits that would normally be due.

II. Focus: Misconduct

This section will help you understand what you need in order to respond to an unemployment claim involving a claimant who has been discharged for some kind of misconduct. "Misconduct" under the law of unemployment compensation is basically something that the claimant did or failed to do that 1) caused a problem for the company, 2) was in violation of a rule, a policy, or a law, and 3) was within the claimant's power to control or avoid. The official definition in Section 201.012 of the Texas Labor Code is as follows: "'Misconduct' means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees", but "does not include an act in response to an unconscionable act of an employer or superior."

In any such case, you need to show two main things. First, you need to prove that the claimant was fired for a specific act of misconduct connected with the work that happened close in time to the discharge. Second, you must show how the claimant either knew or should have known he could be fired for such a reason. In the vast majority of cases, employers will need to prove these things with documentation and with firsthand testimony from witnesses who have direct, personal knowledge of the events in question. Following these suggestions should give you a much better chance of success in a case. Not following them, either avoidably or unavoidably, will make it much harder to defend against what you might consider an unjustified claim.

The most common mistakes employers make that cause difficulty in unemployment claims based upon a discharge are:

- failing to give a final warning prior to discharge;
- inconsistent discipline between two similarly-situated employees;
- failing to follow the stated disciplinary policy;
- telling TWC that the claimant was fired for an "accumulation" of incidents, instead of a specific final incident;
- letting too much time pass between the final incident and

the discharge;
- telling TWC that the claimant was "unable" to satisfy performance standards;
- allowing the impression that the discharge was really based upon a personality dispute; and
- failing to present firsthand witnesses and proper documentation when needed.

Employer policies do not need to list every possible thing that might lead to discharge, but it is generally a good idea to identify the broad categories of offenses that would be immediately terminable, and those that would generally lead to some kind of progressive disciplinary action. A policy could have a catch-all provision quoting the first part of the statutory definition of misconduct (see above) and letting employees know that if they commit work-related misconduct as defined in that statute, they will be subject to disciplinary action, up to and potentially including termination of employment, depending upon the severity and repeat nature of the offense.

The question of how many or what types of warnings are necessary to defend against an unemployment claim is not an easy one to answer. As noted above, the employer must show that the claimant either knew or should have known that the final incident could lead to dismissal. In most cases, TWC distinguishes between a) policies that warn that termination could or might occur, or that termination is an option, or that the company reserves the right to impose disciplinary action up to and possibly including termination of employment, and b) policies or warnings to the effect that at a certain point, or as a result of a certain offense, termination of employment will occur. The requirement of a clear final warning is not often satisfied with the former sort of policy, but can be satisfied with the latter kind of policy or warning. An example of a true final warning appears in the last item of the topic titled "Discipline" in the outline of employment law issues in part II of this book.

For precedent cases addressing the importance of putting an employee on notice that their job is in jeopardy prior to discharge, see the following precedents in TWC's Appeals Policy and Precedent Manual: Appeal No. 87-06368-10-041787 in MC 300.25, Case No. 785689-2 in MC 300.40, and Appeal No. 723-CA-77 in MC 490.20. Those cases notwithstanding, there are other precedents in which no prior warnings are required, because the act of misconduct that was the final incident was so bad, i.e., "gross misconduct" or misconduct per se, that no reasonable employee could have expected anything other than discharge as a result of whatever they did.

Appeal No. 97-004948-10-050997 in MC 5.00 and 435.00, Appeal No. 2286-CA-77 in MC 485.80, and Appeal No. 310-CA-77 in MC 490.05, covering the issue of multiple warnings being sufficient to prove misconduct, might help in a case in which no formal final warning has been given. However, since failing to follow a stated disciplinary policy is generally a reason why TWC rules against employers (see Appeal No. 1403-CA-78 in MC 5.00), be sure to address the issue of whether the claimant was, in fact, given the benefit of progression through the progressive disciplinary process prior to discharge, or whether he had otherwise been notified that the general policy would not apply to the claimant's particular problems, in order to have a better chance of winning the appeal.

Explanations That Will Not Help in a Misconduct Case

There are some words and phrases an employer should never use in a claim response, appeal letter, or testimony at a hearing, unless remaining true to the facts makes it unavoidable (above all, tell what really happened – it is better to lose a case than to make false statements). The problem is that many of the claim examiners, hearing officers, and legal staff at TWC can misconstrue an employer's case when they see or hear the following because such terms sometimes confuse the issues and obscure the true problems the employer is trying to get across. Put another way, certain terms mean one thing to many employers, but quite another thing entirely to agency employees who rule on cases:

Specific problem terminology:

- **Inability:** as in "we fired the claimant for inability to do the job", "the claimant was incompetent", "the claimant never performed the work satisfactorily", "he seemed unable to grasp the job", or "she was unable to follow our rules". Inability by itself is not misconduct. The employer must show that the claimant was failing to do his or her best.

- **Accumulation:** as in "we fired the claimant for an accumulation of things". The "shotgun approach" almost never works (however, prior incidents can be used to help explain how a claimant should have known that discharge would occur for the final incident). Concentrate on the final incident - that's what TWC and the courts do.

- **Mutual agreement:** as in "she left by mutual agreement". Most TWC employees think "discharge" when they hear that. If the claimant had no choice but to leave when she did, she was discharged, and the company needs to prove misconduct.

- **Disloyalty:** be more specific than that. Stating that someone was fired for "disloyalty", without giving specifics, makes many TWC employees think that the discharge simply resulted from hurt feelings or a personality dispute.

- **Poor attitude:** again, be more specific. It's not misconduct to fail to be happy at work. Show how the claimant was

failing to get along with coworkers or customers, how that was affecting her performance and the performance of others, and how her actions were within her power to control.

Avoiding misunderstandings caused by using the wrong terminology is essential. Like it or not, employers have to deal with the fact that claim examiners, hearing officers, and agency legal staff have their own terminology that means very specific things to them. Employers need to watch out for themselves in this area and make sure that they are crystal-clear in explaining how the claimant was at fault in the work separation and how a reasonable employee would have known he or she could be discharged for the reason involved.

Special Note for Staffing Firms

Temporary staffing firms or professional employer organizations (PEOs) sometimes run into a problem when they terminate an employee completely with no intent of ever reassigning him or her to another client. TWC claim investigators and hearing officers sometimes fail to recognize the true situation and try to apply the provisions in the UI law relating to a claimant's failure to report back to the staffing firm for reassignment. In cases of complete discharge for misconduct by the ex-employee, emphasize to TWC in the initial claim response that the claimant is permanently separated from employment and is ineligible for reassignment to any client in the future. That information will be in addition to complete details concerning the misconduct that led to the termination. Staffing firms should also keep in mind the great importance of firsthand testimony; many times, the case will depend entirely upon firsthand testimony from witnesses from the client company.

TWC's Appeals Policy and Precedent Manual has many precedent cases illustrating the meaning of "misconduct"; employers may download the file at http://www.texasworkforce.org/ui/appl/mc.pdf.

Special Note About Employment at Will

The right to fire without prior warnings, in and of itself, is usually ineffectual in TWC cases because that is merely a restatement of the basic employment at will rule in Texas. Using the employment at will rule to fire employees without prior warnings, or to escalate the disciplinary process all the way to termination, can be helpful in escaping wrongful discharge liability (employers in "just cause" states like California and others have no such flexibility), but that will not help under the unemployment compensation statutes, since that is a specific law with specific requirements. In an unemployment claim, the question is not whether the employer had the right to let the employee go for any non-illegal reason and without prior warnings, but rather whether what the claimant did to precipitate his discharge was sufficient to meet the definition of misconduct and thus justify the state in denying unemployment benefits to that individual. It is a higher standard, because it is a specific government program, a "remedial" program that, in the words of some prior court decisions, must be interpreted liberally in favor of its intended beneficiaries (claimants). The higher standard for denying unemployment benefits is the trade-off that justifies the public policy in favor of employment at will. Under the employment at will rule, Texas is saying that, as long as a contract or specific employment statute is not violated, those who are fired for any cause, whether a good, random, unknown, or even illogical reason, have no right to win damages in court for the difficulty a termination might cause. On the other hand, while wrongful discharge damages are denied, the state will allow unemployment benefits to any such former employees who are otherwise qualified and eligible. Only the most undeserving of ex-employees, those who did something wrong and should have known they would be fired for that, will be denied unemployment benefits from the state. For an employer, unemployment benefits are a small price to pay when one considers the alternative, which would involve doing without employment at will and having to worry about a huge range of wrongful discharge lawsuits. One way to think about it is that an unemployment claim is like a fly hitting your windshield as you cruise along the highway. A wrongful discharge lawsuit, with compensatory damages, punitive damages, and attorney's fees, would be more like a very large rock hitting your windshield at highway speed. An unemployment claim is for most businesses a relatively minor annoyance that produces a slight increase in the state unemployment tax rate. Losing a wrongful discharge lawsuit is potentially a business-closing event.

Each case is different, and the decisions are highly fact-specific. Outcomes can hinge not only on the facts, but also on less-tangible factors such as who the investigator or hearing officer is, how well the claimant and employer explain their respective positions and come across in terms of relative credibility, the egregiousness of the specific final incident, small differences in number, types, and timing of warnings, and even plain and simple luck.

III. Focus: Voluntary Leaving

This section deals with what you need in order to respond to an unemployment claim involving a claimant who has resigned, i.e., left work voluntarily. In any such case, you need to show three main things. First, you need to show that the claimant left voluntarily while continued work was still available. Second, you should try to show that the claimant left for personal reasons not related to the work, or if the claimant left for work-related reasons, that a reasonable employee would not have quit under such circumstances. Third, if applicable, show that the claimant quit without affording

you an opportunity to address whatever problem allegedly led to the resignation. In the vast majority of cases, employers will be able to prove these things with documentation and with firsthand testimony from witnesses who have direct, personal knowledge of the events in question. Although the claimant has the burden of proving "good cause connected with the work" for quitting, in real life employers still have to be ready to rebut whatever justifications the claimant tries to give for leaving when he did. This is especially the case when an employee quits because of a reprimand or some other adverse job action. In such a situation, the employer's evidence will need to be basically the same as if the claimant had been discharged.

TWC defines "good cause" as being "such cause, connected with the work, as would lead a reasonable employee who is otherwise interested in remaining employed to nonetheless leave the job." As noted in the preceding paragraph, resignation cases involve a kind of "reasonableness" standard: would a reasonable employee have left for such a reason?

Common pitfalls in unemployment claims involving resignations are:

- not inquiring into why an employee wants to quit;
- failing to take employee complaints seriously;
- failing to take prompt, effective action to address confirmed problems;
- allowing coworkers or supervisors to harass employees in any way;
- combining one form of substantial adverse job action with another (such as a pay cut coupled with loss of benefits, demotion, unfavorable transfer or change in hours, and so on - all changes are considered together to determine whether a reasonable employee would have quit as a result);
- explaining that the resignation was the result of "mutual agreement"; and
- explaining the work separation to TWC in such a way that it appears the claimant was actually discharged (as in "the claimant quit after it became clear that she was just not up to the job.").

Explanations That Will Not Help in a Resignation Case

As with claims and appeals involving a discharged claimant, there are some words and phrases an employer should never use in a claim response, appeal letter, or testimony at a hearing, unless remaining truthful makes it necessary to do so (above all, tell what really happened – losing a case is preferable to giving false statements). The problem is that many of the claim examiners, hearing officers, and legal staff at TWC think less of an employer's case when they see or hear the following because such terms sometimes confuse the issues and obscure the true problems the employer is trying to get across. Put another way, certain terms mean one thing to many employers, but quite another thing entirely to agency employees who rule on cases:

- "We asked for the claimant's resignation."
- "We told the claimant to resign."
- "We wanted the claimant to resign."
- "We were glad the claimant resigned."
- "We were relieved when the claimant resigned."
- "The claimant's resignation saved us the trouble of firing her."
- "She quit, but I would have fired her a dozen times if I'd had the chance!" (these are all direct quotes from actual cases)

An employer should never say or write those things to TWC (again, unless telling the truth dictates otherwise) if the company really wants to defend against the claim. Keep in mind that it is best for the case to be regarded as a resignation situation, since the claimant will then have the burden of proving good cause connected with the work for resigning when he did. If the company uses terminology like that in the sentences shown above, it runs the risk that the claim examiner or hearing officer will think that the claimant was really fired, in which case the burden of proof shifts heavily and inexorably toward the employer, and if it cannot prove misconduct on the claimant's part, the case will be unwinnable.

Specific Problem Terminology Oriented Toward Resignations:

Ironically, a lot of employers make unnecessary trouble for themselves in resignation cases by discussing things normally associated with discharges or terminations for cause. Thus, the problematic terms are basically the same in resignation cases as they are for termination cases, the main difference being that in resignation cases, not only can such terminology knock the case into the misconduct arena where the employer has the burden of proof, but it also tends to make a misconduct argument unwinnable. Here is that list again, this time in the context of statements about resignation:

- **Inability:** as in "we needed the claimant's resignation because of inability to do the job", "the claimant was incompetent", "the claimant never performed the work satisfactorily", "he seemed unable to grasp the job", or "she was unable to follow our rules". First, why would the company be talking about the claimant's abilities if she quit? Poor work performance is really only an issue in discharge cases. Second, if it was really a case of discharge (i.e., the claimant was pressured to quit), remember that inability by itself is not misconduct. An employer has to show that the claimant was failing to do his or her best and was warned that discharge could result.

- **Accumulation:** as in "we wanted the claimant's resignation for an accumulation of things". Again, why would the company be talking about the claimant's conduct or work performance if it were really a resignation situation? Those are really only issues for discharge cases. Second, if it was really a case of discharge (i.e., the claimant was pressured to quit), keep in mind that the "shotgun approach" almost never works. Concentrate on the final incident that caused the company to demand the claimant's resignation - that's what TWC and the courts do.

- **Mutual agreement:** as in "she left by mutual agreement". Most TWC employees think "discharge" when they hear that. If the claimant had no choice but to leave when she did, she was discharged, and the employer will have to prove misconduct.

- **Disloyalty:** be careful about describing an employee who resigned as disloyal, since that is usually a justification given by employers for firing an employee. Further, if the claimant's lack of loyalty was somehow related to the reason she quit, the employer needs to be more specific than that. Stating that someone was "disloyal", without giving specifics, makes many TWC employees think that the discharge simply resulted from hurt feelings or a personality dispute.

- **Poor attitude:** again, an employer needs to be more specific, and to be careful about how it brings up "poor attitude" in a resignation case. Such a problem is often cited by employers in discharge cases. If the company talks about the claimant's poor attitude, it would be best to put it in the context of speculation as to why she was unhappy enough to quit. If TWC ends up thinking it was a discharge case, keep in mind that it is not misconduct to fail to be happy at work. Show how the claimant was failing to get along with coworkers or customers, how that was affecting her performance and the performance of others, and how her actions were within her power to control.

Once again, avoiding misunderstandings caused by using the wrong terminology is essential. Employers must reckon with the reality that claim examiners, hearing officers, and agency legal staff have their own terminology that means very specific things to them. Employers need to watch out for themselves in this area and make sure that they are crystal-clear in explaining how the claimant was at fault in the work separation and how a reasonable employee would not have quit the job for the reason involved.

For some important and illustrative TWC precedent cases in the area of voluntary leaving, see the VL section of TWC's Appeals Policy and Precedent Manual, downloadable at http://www.texasworkforce.org/ui/appl/vl.pdf.

Do Not Turn a Resignation Into A Discharge!

If someone tells you they are looking for other work, or will be interviewing with other companies, be patient! Unless there is a compelling reason to discharge the person sooner, simply wait for the employee to resign. Remember, the company still has the right to insist that even a soon-to-be former employee turn in good work performance and follow normal work rules and standards. Just let things take their natural course, and assuming the employee resigns to take another job, your company is fairly certain of never having to worry about a chargeback from a UI claim filed by the former employee. Being patient has another potential advantage: the employee might actually improve to the point where your company would want to keep him or her. That would be a win-win proposition for all concerned. For two TWC precedent cases that show why patience and forbearance are so important, see Appeals No. 87-7940-10-051187 and 87-13371-10-073187 (section MC 135.00, Appeals Policy and Precedent Manual; downloadable at http://www.texasworkforce.org/ui/appl/mc.pdf).

IV. General Terminology to Avoid in Any UI Case

- Lazy / shiftless / good-for-nothing
- Freeloader / freeloading
- Bum / deadbeat
- Parasite / parasitic

These terms, while they may be tempting to use at certain times, tend to make a claim examiner think that a company simply hates the claimant and will do or say anything to get him or her disqualified.

Refrain from using any slurs, profanity, or other derogatory references to a person's skin color, race, religion, gender, family situation, national origin, citizenship status, sexual orientation, gender identity, disabilities, or health - these terms will buy an employer nothing but grief and must be avoided unless the company enjoys the prospect of losing unemployment cases. Keep things on a business-like and professional level. Let the facts speak for themselves. An employer can refer to the above characteristics of a claimant, but should do so only if such characteristics have something to do with the unemployment claim, and then only in non-inflammatory terms that describe the situation in plain language. There is no need to worry about "political correctness". If in doubt, simply imagine how you would describe the situation to a stranger whom you hold in high regard and who you would like to have a good impression of you after hearing your words. Then, put those terms down in writing.

V. Focus: Refusal of Suitable Work

Section 207.047 of the Act disqualifies a claimant who, while in claim status, has refused a referral to, or an offer of, suitable work without good cause. A referral to suitable work can include the situation that occurs when TWC directs a claimant to return to his or her customary self-employment, if they have had their own business in the past. This proceeds directly from the work search and availability requirements that claimants must satisfy in order to be eligible for continued weekly UI benefits. In a nutshell, in all but the most unusual of cases, a claimant must be available and actively searching for full-time work while collecting UI benefits. Claimants are told that if they receive an offer of suitable work, they must accept it, unless there is some good reason not to do so, or else face disqualification. Such a disqualification is every bit as serious as a disqualification for quitting a job without good cause connected with the work or for being discharged for misconduct connected with the work.

"Suitable work", according to TWC, means work that would be in line with the claimant's prior experience or training. Section 207.008(a) lists several factors to consider:

4. the degree of risk involved to the individual's health, safety, and morals at the place of performance of the work;
5. the individual's physical fitness and previous training;
6. the individual's experience and previous earnings;
7. the individual's length of unemployment and prospects for securing local work in the individual's customary occupation; and
8. the distance of the work from the individual's residence.

Section 207.008(b) states that work will not be considered "suitable", and thus no disqualification will be imposed, for refusing to accept new work under the following conditions:

9. the position offered is vacant directly due to a strike, lockout, or other labor dispute;
10. the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or
11. as a condition of being employed, the individual is required to join a company union or to resign from or refrain from joining a bona fide labor organization.

TWC's Unemployment Insurance Manual adds that work will not be considered suitable if it "pays less than the claimant's wage demands which are considered excessive, unless the claimant has been informed that the wage demands are excessive prior to or at the time of the refusal of the referral or work offer."

Before TWC will assess a disqualification, the following criteria must be satisfied (as taken from the UI Manual):

12. A definite work offer or referral must have been made directly to the claimant, with an explanation covering the nature of the work, the wages, hours of work, job location, and other requirements. See AP&P, SW 170.10.
13. The work must be suitable per the requirements of Section 207.047 and 207.008 of the Act.
14. The claimant must have refused the offer or referral or failed to report to the employer when so directed.

The following excerpt from the UI Manual is instructive: unless the above criteria are met, a claimant's reason for refusing, no matter how poor, may not be used as a basis for a disqualification under Section 207.047. An ineligibility ruling is not precluded if the reason for refusing so indicates.

At times, an examiner, after establishing that the preceding three points exist, will be unable to contact the claimant. The claimant's failure to respond should not, by itself, be used as grounds to avoid a disqualification. If the claimant gave the prospective employer or the Placement section a reason for refusing the job or the referral or for failing to report to the employer, a decision should be based on that reason. If the claimant gave no reason, it will be assumed that there was not good cause, and a disqualification would be in order, provided the work meets the suitability requirements.

In some instances, a claimant will refuse a job or a referral solely for personal reasons. While such a reason may constitute good cause, it must be explored in relation to the claimant's availability for work because it may be the basis for an ineligibility ruling.

The fact that an ineligibility is assessed does not necessarily prevent a concurrent disqualification under the provisions of Section 207.047 of the Act. Example: if a claimant is ineligible because of excessive wage demands and refuses an offer of suitable work without good cause, a disqualification is mandatory under the provisions of Section 207.047 if the claimant has been told that the wage demands are excessive. If a claimant refuses an offer of suitable work for some reason which would remove the claimant from the labor market and such reason does not constitute good cause for refusing suitable work, a disqualification under Section 207.047 and an ineligibility under Section 207.021(a)(4) can be initiated on the same date.

If a claimant is ineligible under Section 207.021(a)(3) because of physical inability to work or has good cause for being unavailable for work, a disqualification under Section 207.047 would not be applicable because the claimant would have good cause for refusing the work offer.

The provisions of Section 207.047 may be applied to a claimant at any time suitable work or a referral to suitable work is refused during a benefit year or an extended benefit period subsequent to a benefit year, regardless of who actually

makes the offer.

The effective date of a disqualification assessed under Section 207.047 begins with the date of the refusal.

VI. Layoffs, Unpaid Suspensions, and Medical Separations

Layoffs

This category of work separation was the one that lawmakers had in mind when the unemployment insurance system was created. A laid-off employee will qualify for unemployment benefits on the basis of the work separation, but still has to meet other qualification and eligibility requirements in order to draw benefits. Temporary plant shutdowns and unpaid furloughs are generally considered types of layoffs.

Unpaid Suspensions

An unpaid suspension is a form of work separation. Anytime an employee stops performing work for pay, the conditions for filing an unemployment claim exist. Whether the claim will be paid in such a case depends upon whether the unpaid suspension was the claimant's fault. The length of the suspension is important to the determination. In Appeal No. 96-012206-10-102596 (MC 135.45(2), Appeals Policy & Precedent Manual), the Commission ruled that where an unpaid suspension lasts three days or less, and the claimant quit rather than return to work following the end of the suspension, the work separation is considered voluntary on the claimant's part, and the claimant must prove good work-related cause for failing to return to work. Conversely, if a suspension lasts four or more days, a claimant's refusal to return to work will not matter, and the employer will be expected to prove that the suspension occurred as the result of a specific act of misconduct connected with the work and that the claimant either knew or should have known that suspension or discharge could result from such an action.

Caveat: Please be aware that partial-week suspensions without pay in the case of salaried exempt employees may endanger the exempt status of those workers under the Fair Labor Standards Act.

Medical Separations

There are several ways in which the medical condition of the claimant can be an issue in an unemployment claim. For instance, eligibility rules require claimants to be medically able to work in some field for which they are qualified either by training or experience. Thus, claimants who are too incapacitated to work may not draw unemployment benefits. If the evidence shows that a claimant's work separation resulted from a medical condition of the claimant or the claimant's minor child, the claimant will likely not be disqualified, since the medical condition was presumably beyond the claimant's power to control. If the employer named as the last employing unit on such an initial claim was a base period employer, and if the employer was a private taxed employer, it may be eligible for chargeback protection under such circumstances. In the case of job offers, if a claimant declines an offer of work because such work would be impossible or inadvisable from a medical standpoint, the claimant will not be subject to disqualification for having refused suitable work. Finally, if a claimant was fired for failure to submit medical documentation, an employer may be able to win the unemployment case if the requirement for submission of the documentation was in keeping with a statute or regulation or else arose from a legitimate policy of which the claimant was aware.

Medical chargeback protection is available for private taxed employers under some circumstances. Such protection is easy to obtain if evidence shows that the claimant quit due to a medical condition that no longer allowed him or her to work. It is also easy if the company had to discharge the claimant for documented medical inability to perform the only work available for them. It is a harder case if the employer fired the claimant for frequent absences caused by their personal medical condition or the medical condition of their minor child. Many claim examiners will rule that the claimant is qualified for benefits, but still charge the employer's tax account. One mistake an company should never make in such a case is to start out trying to argue that the medical absences constituted misconduct for which the claimant ought to be disqualified, since that will never work, and the company will run the risk of TWC completely ignoring the possibility of a "pay and protect" ruling. One strategy in a case like this is to note that the company has no problem with the claimant drawing benefits, but feels that its tax account should be protected from chargeback. The employer should point out how long it tried to work around the claimant's frequent medical absences and that eventually, the other employees could no longer cover for him or her. An employer's chances of getting chargeback protection are much better if it can show that it is a small company with not many employees (or that the claimant worked in a small department) and that the employer tried as long as possible to accommodate the claimant, but that it reached the point where the company had to have an employee with reliable attendance in that job. For more information, see the topic "Medical Absence Warnings" in the "A - Z of Personnel Policies" section of this book.

Of course, medical separations can have legal ramifications far beyond the reach of the unemployment compensation

system. Employers with employees who may be protected by the Texas Workers' Compensation Act, the Americans with Disabilities Act, or the Family and Medical Leave Act should consult with private legal counsel before terminating these employees.

VII. Miscellaneous Disqualifications

A. Participation in a Strike

If a claimant is out of work due to a strike or other kind of work stoppage resulting from a labor dispute, he will generally be disqualified until and unless he makes an unconditional offer to return to work that is refused by the employer. Part of the rationale for this disqualification is that with regard to striking workers, the employment relationship has not been severed, and so such employees cannot be regarded as "unemployed".

B. Severance Pay / Wages in Lieu of Notice

A claimant who has received severance pay or wages in lieu of notice is disqualified for the period covered thereby. Wages in lieu of notice is a payment given by an employer to make up for the lack of advance notice of termination and to tide the ex-employee over until she finds new work. The employer has no prior obligation to make such a payment, and it is not based upon any set formula such as length of prior service, but rather upon whatever arbitrary amount the employer deems appropriate at the time it is made. Severance pay is a payment that the employer has previously obligated itself in some way to make and is generally based upon a set formula, such as length of prior service, but does not include a payment that was made to settle a claim or litigation, or was required under a negotiated contract. Neither term applies to other types of post-termination payments made for special reasons, such as an early leave incentive (which can result in a voluntary leaving disqualification), or an incentive paid to obtain a release or waiver of liability from the departing employee with regard to the Civil Rights Act of 1991, or to settle a claim or lawsuit that has already been filed, or in connection with a written contract that was negotiated between the employer and employee prior to the date of the work separation. An employer who gives severance pay or wages in lieu of notice should call it that and should write that term on the memo line of the check, along with the dates covered by the payment.

C. Workers' Compensation Benefits

A claimant cannot draw workers' compensation and unemployment compensation at the same time, except during the claimant's receipt of impairment income benefits or, in rare cases, for those claimants with permanent, partial disability as the result of a pre-1989 injury. However, if a claimant has such a disability, there could be an issue of whether the claimant is ineligible for benefits based upon medical inability to work, and the employer can raise that issue. Remember, prevention of dual receipt of workers' compensation and unemployment insurance benefits is one of the purposes of the new hire reporting laws (see the discussion in the articles titled "New Hire Reporting Laws" and "How Employers Can Help Reduce Claim Fraud").

D. Pension or Retirement Payment

If the claimant is receiving a pension or retirement payment based in part upon wages earned during the base period of the claim, there is a dollar-for-dollar decrease in the UI benefits that would otherwise be payable.

E. Sale of One's Own Business

A claimant who is out of work due to the sale of her business is normally disqualified from UI benefits, assuming that the claimant was a majority owner and had a voice in the sale. This disqualification is basically the same as the voluntary leaving provision of the law that applies to employees who quit; in this case, the business owner decides to quit the business.

F. Quitting to Go to School

This is really no different than the disqualification for quitting for personal reasons.

G. Refusal to Perform Services for a Patient with a Communicable Disease

This disqualification is simply a variation on the disqualifications for discharge for misconduct and quitting for personal reasons. It applies if the employer made normal safety and health equipment available to the worker who had to work with such patients. The disqualification applies if the claimant was fired for refusing to perform services for a patient with a communicable disease or if the claimant quit rather than perform such services.

VIII. Conclusion

The Texas Unemployment Compensation Act provides several ways for claimants to be partially or wholly disqualified from unemployment benefits. Every employer concerned about its state unemployment tax rate should familiarize itself with the various disqualification provisions and keep in mind that if one reason for disqualification does not apply, another reason or two may well apply, and it would be a good idea to let TWC know about any circumstances that might raise a qualification issue.

UNEMPLOYMENT INSURANCE LAW: THE UNEMPLOYMENT CLAIM AND APPEAL PROCESS

I. INTRODUCTION

The Texas Legislature established the Texas Employment Commission in 1936 in response to federal legislation mandating unemployment compensation systems in all 50 states. In 1996, the Legislature created a new agency, the Texas Workforce Commission (TWC), rolled TEC into the new agency, and added several new programs, but TWC has retained the responsibility for the state unemployment compensation program. The agency is headed by a board consisting of three members appointed by the Governor to staggered six-year terms. One board member represents labor, another represents employers, and the third member represents the public at large. Although TWC administers several employment law statutes, the majority of the agency's resources are devoted to carrying out the Texas Unemployment Compensation Act (TUCA) (V.T.C.A. Labor Code, Title 4, Subtitle A, Chapter 201 *et seq.*).

II. THE UNEMPLOYMENT SYSTEM IN A NUTSHELL

A. Initial Claim

Once a worker is no longer performing personal services for pay, a "work separation" has taken place, and the worker is free to file an initial claim for unemployment benefits. Benefits are payable if the claimant shows that he is out of work through no fault of his own and is otherwise eligible. Immediately following the filing of the claim, TWC mails a notice of the initial claim (a "notice of application for unemployment benefits") to the "last employing unit", the organization or individual identified on the claim form where the claimant last performed work for pay. The employer has 14 calendar days in which to file a timely written response and make itself a "party of interest" with appeal rights.

Responding timely and well is a must. An employer will be denied chargeback protection in the event that it successfully appeals an adverse ruling, if TWC finds that the original payment of benefits to the claimant was the result of an untimely or inadequate claim response by the employer, and that the employer has shown a pattern of untimely or inadequate claim responses in the past. A "pattern" exists if at least two prior findings have been made that the employer filed late or inadequate claim responses. A claim response is "inadequate" if it "merely alleges that a claimant is not entitled to benefits without providing sufficient factual information, other than a general statement of the law, to support the allegation". Generally, an "adequate" response must include enough information about potentially disqualifying facts behind the work separation that TWC would be on notice that the claimant's qualification for benefits is in legitimate doubt. Thus, any claim response should be timely and contain something substantial and factual beyond a mere statement that the employer disagrees with the claim and does not feel that the claimant deserves benefits.

B. Initial Determination

The claim examiner at the local TWC office where the claim is filed makes an initial determination ("determination on payment of unemployment benefits"), and TWC then mails copies to all interested parties. If the employer has filed a late response, its initial determination will be a "late protest" ruling. If it has filed no response at all and the claimant begins to draw benefits, it will receive a notice of maximum potential chargeback ("wage verification notice"). No matter which form the initial determination takes for the employer, it should file an appeal and request for a hearing within 14 calendar days of the date that TWC mails the ruling. The wage verification notice is not itself an appealable ruling, but if the employer responds with a written appeal, it should receive a ruling it can appeal. In the case of any ruling that states that the employer filed a late protest, the employer should allege some problem outside its power to control as the reason for not protesting the claim notice in a timely manner, if it wishes a hearing on the underlying merits of the unemployment claim.

C. Appeal Tribunal

Once an appeal has been filed, the Appeals Department will either dismiss the appeal, issue an on-the-record decision, or set up an appeal hearing. It will dismiss the appeal if it is filed outside the 14-day appeal period. It will issue an on-the-record decision affirming the late protest ruling if the employer fails to disagree with the fact that it filed a late protest to the initial claim notice. In all other cases, the Appeals Department will mail notices of the appeal hearing to the claimant, the employer, and any representatives they may have designated.

The hearing will usually be held by telephone. The employer should treat the occasion as if it will be the only chance it ever receives to explain its side of the situation. In general, firsthand testimony from witnesses with direct, personal knowledge of the events leading to the claimant's work separation takes precedence over all other forms of evidence. Documentary evidence may be entered as exhibits. When a hearing is by telephone, the employer must be careful to send copies of any exhibits to both the hearing officer and the claimant. Failure

to send copies to the claimant may result in the hearing officer refusing the items as exhibits. The parties may offer direct testimony, conduct cross-examination, and make concluding statements. The hearing officer will issue, usually within one calendar week, a written decision either affirming, reversing, or modifying the determination that was appealed. If the ruling is not in the claimant's favor, i.e., reverses a prior decision that allowed the claimant to receive benefits, the claimant may be found liable for an overpayment of benefits and may have to repay any benefits received that were not in accordance with the latest decision.

A party who misses a hearing and loses the decision can file a request to reopen the hearing under Commission Rule 16, but must do so within 14 calendar days of the date of the decision. Regarding how many times a party can miss a hearing and still obtain a new appeal hearing, while there is no formal limit, the more hearings a party misses, the more difficult it becomes to obtain another one. A party who misses the first hearing can always get at least one new hearing opportunity by filing a timely request to reopen the hearing, but the first issue at the new hearing will be whether the party had good cause to miss the previous hearing, i.e., something that was outside the party's power to control happened to cause that party to miss the hearing. Most parties who miss two hearings and allege some kind of factor outside their control for missing both hearings can get a third hearing, but will have to prove good cause for missing each of the two prior hearings. Starting at three missed hearings, the risk of an "on-the-record" decision denying a further hearing goes up markedly. After such an on-the-record decision, the next appeal will be sent to the Commission, whose members will vote on whether the party will get a new hearing at that point. In the event of a new hearing granted by the Commission, the party will have to prove good cause to miss each of the prior hearings before getting a chance to testify about the merits of the case. That would be a difficult burden to meet.

For much more detail on appeal hearing procedures, see sections IV and V of this article.

D. Commission Appeal

Any party may appeal an adverse Appeal Tribunal decision to the three- member Commission, but must do so in writing within 14 calendar days of the date the hearing officer's decision is mailed. In case of a timely appeal, the Commission may either affirm, reverse, or modify the Appeal Tribunal decision, or it may order a further hearing. The Commissioners review the records in the appeal and cast their votes in a weekly docket meeting. They do not take testimony from the parties, but may consider relevant written materials submitted after the hearing. In such a case, the Commission will order a rehearing to officially admit the new evidence into the record. The Commission's decision is in writing and signed by all three Commissioners. At this point, the losing party may either file a motion for rehearing or an appeal to a court. The Commission decision has no preclusive or evidentiary effect in any legal proceeding not involving the unemployment claim (see § 213.007 of the Texas Labor Code).

If criminal charges stemming from the final incident are pending against the claimant, include whatever information you have concerning the charges in your letter of appeal to the Commission and ask the Commission to consider the possible relevance of that information.

E. Motion for Rehearing

The final stage of the administrative appeal process is the motion for rehearing, which must be filed in writing within 14 calendar days of the date the original Commission decision is mailed. In order for the Commissioners to grant a rehearing, the motion must offer new evidence, give a compelling reason why it could not have been offered earlier, and show specifically how it could change the outcome of the case. The documents / exhibits previously submitted are already in the appeal file and would be available for review if you refer to them in your motion for rehearing. It is best to be as clear as possible when referring to a particular document, and also to describe its significance with respect to the points made. If the Commission denies the motion, it will mail to each party a written decision that is appealable to a court.

F. Court Appeal

After the Commission decision has become final, the losing party may file a court appeal within 14 calendar days. Since the Commission decision does not become final until 14 calendar days have passed from the date it is mailed, and the statute allows filing of an appeal to a court on or after the date on which the decision becomes final, the court appeal period begins on the 14th calendar day after the date on which the last Commission decision was mailed, and ends on the 28th calendar day following the mailing of the last Commission decision. Since the standard of review is that of the "substantial evidence rule", there is no right to a jury trial in an unemployment compensation case. However, because the law provides for a trial de novo, the parties may put on their entire cases again for the judge. The judge makes no formal findings of fact, but rather decides as a matter of law whether substantial evidence exists to uphold the TWC ruling. The court's decision may be further appealed as in any other civil case; as noted above in section II.D. of this article, the court's decision will not bind courts dealing with other employment issues raised by the ex-employee.

G. Evidence Needed for a UI Claim and/or Appeal

Different situations require different types of evidence in order for the employer to win, but there are some types of evidence that will always be required no matter what happened to cause the claimant's work separation:

(1) Firsthand testimony from witnesses with direct, personal knowledge of the events leading to the claimant's work separation, i.e., "the ones who saw it happen".
(2) Documentation of policies, warnings, complaints, attendance, timecards, pay-related records, or any other subjects relating to the claimant's work separation.
(3) In a discharge case, evidence relating to a specific act of misconduct that happened close in time to the discharge, i.e., the event that precipitated the discharge (the so-called "final incident"), as well as evidence showing that the claimant either knew or should have known that discharge could occur; in a resignation case, evidence relating to whatever motivated the claimant to resign.

If the appeal hearing concerns other important unemployment insurance issues, such as the claimant's ability to work, availability for work, whether the claimant refused an offer of suitable work without good cause, or receipt of other types of benefits that might affect UI benefit eligibility, the employer should be prepared with any witnesses or documentation that might help show that the claimant should not be considered entitled to benefits.

III. IMPORTANT CASE AREAS

The vast majority of TWC cases deal with work separation issues involving resignations, layoffs, and discharges. Before any discussion of specific case areas, there are some basic principles to keep in mind concerning resignations and discharges.

As noted before, unemployment benefits are for those who are out of work through no fault of their own. The burden of proving "fault" is on the party initiating the work separation. A claimant who quit his last work must show that he had good cause connected with the work for resigning. TWC has long defined "good cause" as any reason, connected with the work, that would lead an employee who is otherwise interested in remaining employed to nonetheless leave employment. This, of course, is a "reasonable employee" standard. Good cause to quit has been found in cases involving drastic cuts in pay or hours, other substantial and adverse changes in the work, prolonged and unaddressed harassment of the worker by the employer or its agents, or egregious acts of misconduct by the employer toward the worker. In most cases, the claimant must also show that he gave the employer reasonable notice that he was so dissatisfied he was considering resignation.

In any case involving discharge, the employer bears the burden of proving two main things. First, the employer must show that the claimant was discharged for a specific act or acts of misconduct connected with the work that happened fairly close in time to the discharge. Second, the evidence must indicate that the claimant either knew or should have known he could lose his job for the reason given by the employer. Those dealing with unemployment claims and appeals should keep these basic principles in mind when considering the following specific case areas.

A. Drug Testing

In cases involving drug testing, the employer should always be prepared to fully document its case. At a minimum, the evidence should include a copy of the employer's policy regarding drugs and drug testing and proof of the claimant's awareness of the policy and consent to testing. The employer should also submit a complete chain of custody document showing who handled the claimant's urine, hair, or blood sample at all pertinent times. Finally, specific test result documentation is needed that shows the types of initial and confirmation testing methods and the quantitative results achieved, preferably including a statement of what the test results mean. This kind of evidence should be supplied by any testing service the employer uses. The confirmation test should be of the gas chromatography/mass spectrometry (GC/MS) type.

Companies discharging employees on the basis of only one initial drug screen will almost invariably lose the case if the employee denies the drug use. By the same token, companies that fail to properly document their policies, the test results, and the chain of custody of the sample run a high risk of losing.

The employer's chance of prevailing will, of course, be enhanced by firsthand testimony from any witness who can testify that the claimant was acting impaired before or at the time of testing.

TWC has adopted several precedent cases in the area of drug testing, all of which affirm that the employer must prove that the sampling, sample handling, and testing procedures were reliable enough to allow a reasonable conclusion that the claimant had prohibited substances in his system at the time of testing and knew he could be discharged for such an offense. Once that proof is offered, the Commission has shown that it will disqualify such a claimant, even in the face of a sworn denial of any drug use by the claimant. In general, the employer's burden of proof includes full documentation of every aspect of the policy, consent, testing, and chain of custody procedures.

The leading unemployment compensation case in Texas

involving drug testing is that of *TEC v. Hughes Drilling Fluids*, 746 S.W.2d 796 (Tex. App. - Tyler 1988, *writ denied*). *Hughes* involved a claimant whose employer, at some point after the claimant was hired, instituted a new policy prohibiting the use or possession of drugs on the employer's premises and providing that any employee who refused to allow a search or urine test for drugs would be subject to possible discharge. The claimant refused to sign a form consenting to the policy. A few months later, the employer asked the claimant to sign a consent form and submit to a urinalysis for drug screening. When the claimant refused to give his consent, the employer discharged him.

The claimant filed an unemployment claim and was initially disqualified, but appealed to the Appeal Tribunal and won. The employer appealed to the Commission and lost, with the employer representative dissenting. The employer then appealed to court and won a summary judgment. TEC appealed, and the Twelfth Court of Appeals in Tyler affirmed in the employer's favor.

The Court held that the employer's policy bound the claimant, reasoning that the claimant was an "at will" employee whose act of remaining on the job despite his disagreement with the new policy amounted to acquiescence in that policy. Since the claimant had "accepted" the new rule, his later refusal to abide by its terms was an act of misconduct connected with the work.

The Court also found that the employer's policy was a reasonable attempt to ensure the safety of employees and that it did not impermissibly encroach upon the claimant's Fourth Amendment right to be free from unreasonable searches, especially in view of society's compelling interest in promoting workplace safety by discouraging substance abuse. Although it did not stem from an unemployment claim, the case of *Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497 (Tex. App. - Austin 1989, *writ denied*) upheld an employer's right to institute a reasonable drug testing policy under basically the same rationale as that set forth in *Hughes*.

Special Problems in TWC Drug Testing Cases

TWC has in recent years become stricter in interpretation of its drug testing precedents. Aside from failure to fully document the drug policy and the testing procedures and results, there are other avoidable problems that cause some employers to lose drug testing cases before TWC. Following are two examples of such problems.

One employer lost its case on an insufficient evidence basis because it fired the claimant based upon a single test of a sample of the claimant's hair. No GC/MS confirmation test was done. The employer maintained that the hair test was itself reliable enough to justify disqualifying the claimant. The Commission ruled against the employer, reasoning that the employer had presented no evidence to show that the hair analysis was so reliable that it needed no confirmation by the GC/MS method. In addition, the employer's documentation had no indication of when the drug usage may have taken place. Since hair analysis has the capacity to detect drug usage as far back as the hair is long, the problem was that the claimant may not have ingested drugs while employed with the employer, which would have meant that he was not guilty of any misconduct connected with the work for that employer.

Another employer lost a case because of the unreasonable manner in which it applied its policy. Its policy required "all employees involved in an industrial injury which results in a trip to the doctor" to take a drug test. The claimant injured himself in a job accident admittedly caused by the production foreman. The claimant did not see a doctor until 85 days later, at which time he was told to take a drug test. He refused to take the test unless the foreman was also tested. The employer did not require the foreman to take the drug test and fired the claimant for his refusal. At the Appeal Tribunal hearing, the employer explained that it required only the claimant to undergo testing because he was the only one injured in the accident.

The Commission unanimously ruled against the employer for two main reasons. First, the employer ignored the plain meaning of its own policy in attempting to argue that "all employees involved in an industrial injury" means "the one who was injured". Clearly, the foreman who caused the accident was "involved" in it and arguably was just as likely as the claimant to have been under the influence of drugs. Second, the employer did not explain how any drug test performed 85 days after the accident could have shown what substances affected the claimant on the day of the accident. The employer's policy did not require immediate testing or a prompt visit to a doctor, so the claimant's delay in seeing a doctor could not be held against him.

B. Early Retirement / Voluntary Severance

More and more employers are adopting "downsizing" plans in an effort to reduce labor costs as part of an overall reorganization. These plans generally involve offering an incentive package to induce a number of employees to retire early or resign. The goal is to reduce the likelihood of layoffs. TWC deals with considerable numbers of unemployment claims from people who decided to take advantage of such incentives. Whether the employer will end up with increased unemployment costs in addition to paying out the incentives depends upon several factors:

1. Probably the most important factor is whether the individual claimant was told by someone in authority

that he or she was somehow targeted for layoff or was on some kind of "layoff list". Such a statement can literally lose the case for the employer, which makes it incumbent upon management to exercise tight control over who explains the program and in what way.

2. Another extremely important factor is whether the claimant stood to lose any vested benefits by passing up the program and being laid off later. If any vested benefits are on the line, that will probably be good cause connected with the work to quit, under the rule in the case of *American Petrofina Company of Texas v. TEC*, et al., 795 S.W.2d 899 (Tex. App. - Beaumont 1990, *no writ*). In that case, failure to quit by a certain time would have led to a drastic reduction in pension benefits already promised. Conversely, if no reduction in promised or vested benefits is threatened, the employer is in better shape with regard to a TWC claim.
3. Finally, TWC looks at the ways a claimant's job would have changed if the incentive package had not been accepted. If the job was certain to change in substantial and adverse ways, the claimant may be deemed to have had good cause connected with the work to accept the early retirement incentive.

Disqualification of claimants who voluntarily sign up for early retirement or resignation incentives usually occurs when it is clear that participation is purely voluntary, that no vested benefits are at risk, and that no one has been singled out for layoff or told they "had better take the incentive". Employers that allow employees to change their minds up to a certain point are even more successful in TWC claims. The rationale for disqualifying such claimants is that continued work was available when they left and that leaving a job to collect a short-term economic benefit is basically a personal reason not related to the work.

C. Late Protests or Appeals

Sections 208.004, 212.053, 212.104, and 212.153 of the TUCA and Commission Rule 815.32 ("Rule 32") govern the issue of timeliness of claim protests and appeals. The statute provides no exceptions to the protest and appeal deadlines, but Rule 32 allows a few limited exceptions, mainly in cases where the failure to respond timely was arguably out of the appellant's control. Some exceptions are available if "credible and persuasive evidence" is given, but others require corroborating evidence.

Easiest to win are the timeliness cases involving late U.S. postmarks. If the party presents firsthand testimony from the actual mailer to the effect that the appeal was placed into the custody of the U.S. mail on or before the appeal deadline, the party will generally win on that point. There are three limitations. If too much time passed between the alleged date of mailing and the postmark date, the testimony on timely mailing may not be considered credible. If the internal date of the appeal document is later than the appeal deadline, or if the envelope shows a postal meter date later than the deadline, then the testimony of timely mailing will be insufficient. The party would need corroborating evidence from a credible, preferably disinterested, third party concerning the timely mailing.

Fairly difficult are the cases in which the appeal was late because of alleged non-delivery, delayed delivery, or misdelivery of the document from TWC from which an appeal must be filed. As the rule states, "a document mailed to a party is presumed to be received if the document was mailed to the complete, correct address of record unless there is tangible evidence of non-delivery, such as the document being returned to the Commission by the U.S.P.S., or credible and persuasive evidence is submitted to the Commission" concerning the delivery problem.

The most difficult cases to win in the area of late appeals are the ones in which TWC never received a copy of the alleged timely appeal. In such a case, TWC will not only require firsthand testimony from the actual mailer to establish timely mailing, but will also expect the late appellant to corroborate that testimony with testimony from a disinterested third party or credible physical evidence specifically linked to the appeal in question, such as a return receipt card from the United States Postal Service.

If TWC misaddresses a document, the appeal deadline runs from the date of actual receipt of the ruling or notice. If a decision fails to include a required chargeback ruling, it does not become final against the employer. Appeals that are filed late because of misinformation from a Commission representative will be held timely as long as it is shown that the appellant filed the appeal in a timely manner after receiving actual notice of the need to file an appeal.

D. Poor Work Performance

Among the most difficult cases for an employer to win is the kind involving a discharge for poor work performance. The reason is that even if the employer presents the basic evidence for a discharge case, such as firsthand testimony about a specific final incident of misconduct and evidence that the claimant knew his job was in jeopardy, the employer can still lose if the situation looks like one of "inability" on the claimant's part.

Many employers are surprised to learn that under the law, mere inability to satisfy an employer's performance standards is not misconduct connected with the work. Disqualification is allowed only if the situation leading to the discharge was within the claimant's power to control. As long as the claimant was doing his best, failure to do even better was beyond his

control.

Most employers lose these cases by loosely using terms such as "inability", "incompetence", "never was able to do the work right", "made constant mistakes", and so on. Terms such as these are like red flags to claim examiners and appeal hearing officers, who may get the wrong impression from the start and put all the evidence against the claimant into the "inability" category.

True inability cases are relatively rare. In order to escape the "inability" label, the employer must show that the claimant was actually capable of doing satisfactory work and had in fact done so in the past. Evidence tending to show ability to do good work might include favorable performance evaluations, raises, promotions, and firsthand observations from supervisors. The employer must then go on to show that the claimant was failing to perform the work at levels he was capable of attaining. The best evidence along this line will be factors within the claimant's power to control that tend to explain why the work was so poor. That would include such things as:

- failure to double-check the work
- failure to follow instructions
- excessive absenteeism or tardiness
- taking long lunch or coffee breaks or otherwise not devoting enough time to the job
- excessive personal phone calls or visiting with coworkers
- too much time spent surfing on the Internet, sending and reading non-work-related e-mails, or goofing off with chat rooms or instant messaging;
- an unexplained drop in quality of work, where the claimant had shown satisfactory performance in t he past;
- poor attitude toward customers, or
- failure to accept additional training.

In 1997, the Commission adopted a precedent case, quoted below, that deals with simple, straightforward tasks and whether the term "inability" really applies in such situations (source: Appeals Policy & Precedent Manual - Section MC 300.40(2) (online at http://www.twc.state.tx.us/ui/appl/mc.pdf#page=113)):

> Appeal No. 96-003785-10-031997. The claimant, a cafeteria dishwasher, was discharged after warnings for poor job performance. The claimant's primary job duty was cleaning pots and pans and putting them away. Although claimant contended he performed the job to the best of his ability, food particles and mildew were often found on pots and pans after the claimant washed them and returned them to the storage rack. HELD: Where the work is not complex, an employee's failure to pay reasonable attention to simple job tasks is misconduct.

Specifically in the area of poor sales performance, many claimants win their cases by arguing that they tried their best, but it was just too difficult to make sales in tough economic times. The counter-argument from an employer might be that the sales employee's production was down due to things within the claimant's power to control, such as failure to make a required minimum number of calls, failure to keep appointments with potential customers, failure to follow established sales procedures, failure to properly document sales contacts, making inappropriate comments that result in customer complaints, and the like. In such a case, the focus should not be on the fact that "sales were down" (although it is legitimate to mention that), but rather on the specific acts of misconduct in violation of rules and procedures.

In addition to proving misconduct of the above variety, the employer would need to be able to show that the claimant was on reasonable notice that the problem or problems could result in termination. That is normally done with a formal, final, written warning, but can sometimes be proven with clear firsthand testimony regarding counseling / disciplinary sessions with the claimant regarding the issues and the effect that continued problems could have on his future employment.

Poor attitude cases can be even harder to deal with, simply because of the difficulty of proving some kind of tangible final act of misconduct on the part of the claimant. Too often, an employer's attempt to convince a claim investigator or appeal hearing officer that the claimant had a bad attitude comes off sounding like a personality dispute between the employer and the claimant, and such cases rarely result in a favorable ruling for the employer. In general, do not start off accusing the claimant of having a "bad attitude". Be specific about behavior or conduct that violated a rule or interfered with the work of others. Document the warnings that were given. Present firsthand testimony from those who were affected by the claimant's attitude problems. Their testimony should clearly explain how the claimant's poor attitude made it harder for them to do their jobs, adversely affected customer relations, or otherwise hurt the company. Specifics are extremely important. Depending upon the facts and how the employer explains them, the TWC decisionmaker can independently arrive at the conclusion that the claimant had a bad attitude.

E. Reduction in Hours or Pay Rate

In deciding whether a reduction in earnings constitutes good cause connected with the work for quitting, the Commission starts out with a general guideline known as the "20 percent rule", which holds that a reduction in earnings, whether

from a cut in hours or in rate of pay, of 20 percent or more will generally be good cause connected with the work for quitting, whereas a cut of less than 20 percent will not be good cause. The further away from 20 percent the cut is in either direction, the easier the decision will be for the Commission to make. When examining this issue, the Commission looks at the entire compensation package, so reductions in the rate of pay, hours, benefits, and perks all contribute toward the 20%. In addition, cuts of less than 20% can still provide a worker with good cause to quit when coupled with other changes in the hiring agreement, such as a demotion or the assignment of inappropriate duties. For example, in one case the Commission found the claimant did have good cause to quit after a 7.2% reduction in pay because it was combined with a reassignment from her job in electronics assembly to a more strenuous position as a janitor. Finally, employers should use caution: a retroactive pay cut will not only almost guarantee that TWC will find that the claimant had good cause to quit, but it very probably will also be held to be a violation of the Texas Payday Law (see "Pay Agreements" in the article "The Texas Payday Law – Basic Issues").

Be very careful with disciplinary cuts in pay or hours. To avoid giving an employee good cause to quit, it is best to make cuts in the basic rate of pay a token amount (one or two percent at a time - certainly no more than five percent). If a smaller cut does not get the employee's attention, it can be increased a bit - eventually, the employee will notice. Such a cut should not be imposed until after the employee has been given a prior written warning that his or her hours or pay is in jeopardy for a specific reason, and of course, the employer should maintain documentation of the problem that led to the cut. If the basic rate of pay is reduced, give notice of the cut in a clear written memo to the employee in order to minimize the risk of a wage claim. A recent precedent case adopted by the Commission, Appeal No. 806011-3, AP&P VL 500.35, holds that a claimant who quits because of a disciplinary cut in hours does not have good cause connected with the work to resign if the cut is not more than 25% and the employer proves that the cut was due to work-connected misconduct on the claimant's part.

The Commission is sometimes flexible with reduction-in-hours cases. Such cases are arguably distinguishable from ones where the employer cut the rate of pay. Central to this idea is the realization that a claimant drawing partial unemployment benefits while working the available hours has a higher weekly income than he or she would as a totally unemployed person, and the reduction in work hours usually means a block of free time during which the employee could search for another position. Thus, it simply makes little sense to quit a job altogether and go on total unemployment, when a person could have more money and stay more employable by working whatever hours are available. Most hearing officers at least consider, if not adopt, this underlying rationale when ruling on cases where the claimant has quit due to a decrease in hours of work.

Some common threads run through the cases won by employers in this subcategory. The new reduced schedules allow the employees convenient blocks of time during the day which can be used to search for other work. The overall reductions in hours do not total much more than 20 percent. The reductions are across the board and generally the result of a slowdown in business. Finally, it is apparent that the employers have gone to some trouble to keep as many employees working for as many hours as possible. In view of the Commission's flexibility in this area, any employer receiving an unfavorable decision from the Appeal Tribunal should consider an appeal to the Commission.

The above cases should be distinguished from **"partial unemployment"** cases, i.e., those in which the reduction in hours does not cause the employee to quit, but rather leads the employee to file what is known as a partial-unemployment claim. Partial unemployment is, for the most part, a question of arithmetic: the test is whether a reduction in hours has caused the claimant's weekly pay to drop below 125% of the weekly benefit amount that the claimant would receive if she were totally unemployed. As an example, if the claimant's prior earnings entitle her to a potential weekly benefit amount of $392, 125% of that figure is $490, and if her pay drops below that amount, she is eligible to draw the difference between the lower pay and the 125% figure. Thus, if her pay for a particular claim week is $400, she would get $90 in partial unemployment benefits. That having been said, it is still possible for a claimant who meets the mathematical test for partial unemployment to be disqualified, and that would be in the situation of someone who is partially unemployed by choice or by fault, i.e., they voluntarily chose to reduce their own hours, or else their hours were cut due to misconduct that can be proven.

Take care with any reduction in the amount of any component of pay, lest the reduction give an employee good work-connected cause to quit under the 20% rule explained above. Remember, bonus and commission pay agreements should always be in writing for the company's own protection, and any changes should be in writing as well. Communicate things as clearly as possible: do not let employees think they are being promised a raise in base pay, if all they are being told is that there might be a bonus if the company is doing well. One unemployment case went poorly for an employer that failed to make that clear to the claimant.

Another way to minimize the impact of unemployment claims following an across-the-board cut in hours would be to use a shared work plan, an alternative to layoffs that allows employees whose hours have been reduced by a standard amount between 10% - 40% to remain employed and receive

a percentage of their unemployment benefits equal to the cut in hours. The advantage is that the employer has a better chance of keeping good employees if they remain employed that way. Program requirements are online at http://www.twc.state.tx.us/ui/bnfts/shared-work.html.

F. Severance Pay / Wages in Lieu of Notice

Employers sometimes make termination payments of various kinds to departing employees. The only termination payments that affect a claimant's benefit rights are severance pay (only the kind that is unilaterally promised by the employer) and wages in lieu of notice. This disqualification extends throughout the period represented by the payment. Other payments, such as incentives to sign a release/waiver agreement or payments made under negotiated contracts, are not severance pay or wages in lieu of notice and have no effect on a claimant's unemployment benefits.

Generally, severance pay is a payment that the employer has unilaterally obligated itself to give upon an employee's work separation (such as severance pay promised in a job offer letter or policy handbook). It is often based upon a set formula such as length of prior service. Wages in lieu of notice, on the other hand, is a payment that the employer has never obligated itself to give, either verbally or in writing. It is not based upon any particular formula, but rather upon whatever amount the employer deems appropriate. Just as the name implies, it is given to make up for the lack of advance notice of termination. It disqualifies a claimant because it is basically wage continuation, and the claimant can be regarded as still on the payroll for the period covered by the payment. The effect of such payments is to delay payment of benefits – during the period of coverage of such wages, the claimant is on "hold", and the benefits will not start until the wage period runs out.

Employers may run into some issues in termination payment cases if the payment was negotiated in some way (such as with a union agreement, a bilateral employment contract, or certain claim or lawsuit settlements, for example). Severance pay does not include a payment that was made to settle an existing claim or litigation, or was required under a negotiated contract. Neither term applies to other types of post-termination payments made for special reasons, such as an early leave incentive (which can result in a voluntary leaving disqualification), or an incentive paid to obtain a release or waiver of liability from the departing employee with regard to the Civil Rights Act of 1991, or to settle a claim or lawsuit that has already been filed, or in connection with a written contract that was negotiated between the employer and employee prior to the date of the work separation. Wages paid in lieu of the notice required under the WARN Act likewise do not disqualify a claimant, since the wages are obligatory if the employer does not give the required notice. Conversely, an employer will likely have no problem if the above factors are not present and if the check by which payment is made describes the payment as "[severance pay] / [wages in lieu of notice] from (date) to (date)". Since this can be a tricky area of unemployment law, employees and employers considering any kind of severance pay or release agreement in conjunction with unemployment claims should consult legal counsel prior to any final action.

IV. FOCUS: TELEPHONE APPEAL PROCEDURES

It has long been common for claimants and employers to criticize TWC appeal hearing procedures as being long on convenience for the agency, but short on consideration for the concerns of the parties. Every once in a while, changes come to those procedures, either through evolutionary change within the agency, statutory change, or through court action. Into the latter category falls the 1998 case of *Narcisso Gutierrez, et al v. TWC*, Civil Action H-96-2308 (U.S. District Court, Houston, Texas - not published). Four claimants for unemployment benefits had lost their appeal hearings for one reason or another, but had banded together with the assistance of Gulf Coast Legal Aid and Texas Legal Services to file a lawsuit against TWC charging, among other things, that the agency's appeal hearing procedures were so flawed that they effectively robbed claimants of due process. Specifically, they took exception to hearing procedures that allowed employers to refer to documents that the claimants did not have, that required claimants to call in for hearings, rather than be able to present their cases in person, that required claimants to spend money to send copies of evidentiary documents to both the hearing officer and the employers, and various other procedures that allegedly made it difficult for low-income parties to effectively participate in unemployment benefit appeal hearings. The district court was sympathetic, even questioning the underlying sufficiency of telephone hearings, leading TWC to enter into negotiations with the parties and their representatives that resulted in very broad and sweeping changes to the way the entire appeal process within TWC is handled. The changes went into effect on August 13, 1998, and include the following:

- TWC will mail copies of documents that are relevant to the hearing and to the determination under appeal to all parties. "Parties" include the claimant; the claimant's representative if there is one; any employer involved in the claim, regardless of whether the employer happens to be a "party of interest" with respect to the initial claim; and the employer's representative, if there is one.
- The above documentation will be mailed to the parties in the same envelope that contains the notice of hearing.
- The packet includes the following:
  1. the date of the claim notice

2. any claim protests
3. any information received by TWC in response to a claim
4. fact-finding statements taken by TWC during the claim investigation
5. any appeal letters or forms

- The documents contained in the packet will be formally entered into the record of the case.
- The procedures for hearings, including the *Gutierrez* settlement procedures, will be outlined in a variety of documents sent to parties in connection with claim filing, determinations, and hearing notices, as well as posted on TWC's Web site at www.texasworkforce.org.
- Parties who need access to a telephone, speakerphone, or fax machine in connection with the hearing need only call the TWC Appeals Department to have arrangements made, up to and including private space in TWC local offices.
- Witnesses giving testimony will first have to give identifying information to verify their identity. The nature of such information is explained and, if necessary, modified by the hearing officer.
- The hearing officer will inform the parties that they have the right to request that witnesses be placed "under the rule" (sequestered somewhere else where they cannot hear the testimony of others). Of course, a party may not be excluded from any portion of the hearing.
- The hearing officer must also remind parties that they may not prompt their witnesses or refer to documents not previously disclosed to the other party.
- Documents sent in by the parties to the hearing officer will be entered into the record only if relevant and must be disclosed to the other party. Irrelevant documents will be excluded from the record and not considered in any way.
- If the hearing officer has a relevant document from one party that is not in the possession of the other party, the hearing officer will first attempt to fax a copy to the other party. Failing that, the hearing officer will ask the other party if the party is willing to waive receiving a copy of the document. If a waiver is not granted, the hearing officer must grant a continuance to allow the other party a chance to receive a copy of the document.

Pay close attention to the hearing notice. Call in during the half-hour prior to the start time using the toll-free number highlighted on the notice, leave your name and number, and wait for the hearing officer to return the call. Make sure to get the name of the TWC employee who takes your first call. Ensure that the incoming call line stays clear and that your staff knows to put the hearing officer's call through. Have all of your witnesses ready to go, complete with phone numbers of witnesses at other locations. Be sure to have your notes with you in case you have to call from a location other than your office.

If you miss a hearing and lose the case, you may request a reopening of the hearing, but the first issue at the new hearing will be whether you had good cause to miss the previous hearing. To have a better chance of doing that, you should call the hearing officer beforehand if you know you cannot participate. Ask for a postponement, even if you feel there is little chance one will be granted, and document the call. Good cause to miss a hearing is generally something that was outside the party's power to control.

There has been a positive development in the aftermath of the *Gutierrez* settlement. A strategy largely untapped by employers has been to carefully review the claimant's statements to TWC at various levels of the claim and appeal process and to bring any discrepancies to the attention of hearing officers and the Commission. Since the standard procedure now automatically brings to the employer copies of the fact-finding statements of the claimant, more employers than ever before are learning to use claim statements in the appeal process.

V. WHAT HAPPENS DURING THE APPEAL TRIBUNAL HEARING?

This is the first level of appeal. If you lose the initial determination, the appeal you file is to the Appeal Tribunal. A hearing officer will be appointed to hear your case. The Appeals Department will send you and the claimant a hearing notice, usually about 10 - 14 days in advance of the hearing. Most hearings are held by telephone. Follow the instructions on the hearing notice ***exactly***, including the correct number to call (it is the toll-free number in bold print beside the telephone icon in the black-bordered box - do not call the hearing officer's number shown below the hearing officer's name unless you are calling for some reason other than to participate in the hearing). You should call in during the half-hour before the start of the hearing and leave your phone number with the receptionist. Be sure to take down the name of the person who handled your call, and note the time of your call for your records. The hearing officer will then call you and the claimant and any witnesses at other locations and hold a "teleconference".

Ensure that when the hearing officer calls, the incoming phone line is clear, and that your staff expects the call and is ready to properly handle it.

It is vitally important that you have all of your evidence ready to present at the AT hearing. If you have written documentation to offer as exhibits for your case, you must send copies to both the hearing officer and to the claimant in advance of the hearing. Send the copies to the claimant by registered mail, return receipt requested for your own protection. Have your own copies with you in case you have to call in from a remote location.

Have any witnesses ready to go, complete with phone numbers of witnesses at other locations. Nothing is worse than to claim you have somebody who can support your version of the facts, only to have to confess that you do not have that person ready to testify or do not know where the witness is. The very worst thing is to have to admit that you did not know that witnesses were necessary. Of course, witnesses are necessary. This is the United States; under our legal system, an accused has the right to face his or her accusers. If you allege that the claimant was fired for some type of misconduct, but have no eyewitnesses, and the claimant is giving what sounds like a credible denial, your company will lose the case. It is as simple as that. To have a good chance of winning a case, you need what are known as "firsthand" witnesses. Firsthand witnesses have direct, personal knowledge of what the claimant did to bring about his discharge or of what happened to cause the claimant to quit.

EXAMPLE OF LOSING TESTIMONY: "We fired the claimant after his supervisor told us he saw the claimant removing company property without permission." The claimant then wins by stating "No, I didn't."

EXAMPLE OF WINNING TESTIMONY: "I was the claimant's supervisor. I saw him removing boxes of company property, and he did it without my permission." At this point, the claimant either knows he is going to lose, or else tries a last-ditch excuse by stating that he had permission from someone else, whereupon the well-prepared employer immediately offers to let the hearing officer take testimony from that person as well.

It is not a sufficient excuse for failing to present firsthand testimony that you cannot believe the claimant would deny the charges of misconduct; that you thought written statements or even notarized affidavits would be "good enough"; that the eyewitnesses no longer work for you; or that you thought testimony from people who only heard the reports was "firsthand". Claimants have been known to deny misconduct when their UI benefits are on the line. The problem with written statements and affidavits is that they cannot be cross-examined; sworn testimony subject to cross-examination carries by far the greatest weight in a case. If the eyewitness is a former employee, call him or her and ask for their testimony. If they refuse to cooperate, contact the hearing officer and ask that the person be subpoenaed. If they cannot be located in time for the hearing, then and only then will you have a decent argument that a rehearing should be granted if and when you locate them.

Remember, testimony based on reports from others is secondhand. The person who made the original report is the firsthand witness.

During the hearing, remain calm. It might help to make an outline of your testimony to assist you in hitting all the important points. However, do not read from a prepared statement. It will sound obviously scripted and artificial and might create an unfavorable impression in the mind of the hearing officer.

In addition, hearing officers appreciate brevity. Employers who sound well-organized and in command of their facts always appear more credible. In a close case, that might well tip the balance in your favor.

If the claimant seems to be trying to provoke a confrontation, do not accept the invitation. How the parties conduct themselves during the hearing has at least a subtle effect on how the hearing officer evaluates the relative credibility of both sides. Again, if the case is a close one, that can make all the difference.

AT hearings are meant to be informal hearings and are designed to bring out all the important facts without getting bogged down in courtroom-style procedures. Here is the way a normal hearing proceeds:

(1) Identification of the parties and witnesses; confirmation of addresses; explanation of the law and basic hearing procedures; oath or affirmation given by witnesses; designation of who the parties' primary representatives will be.
(2) Brief statement of case history.
(3) Determination of whether the work separation was voluntary or involuntary; if voluntary, the claimant testifies first; if involuntary, the employer testifies first.
(4) Whoever testifies first gives their explanation of the work separation; the party representative then presents testimony from each witness in turn; after each witness testifies, the representative can ask them questions and the other party's representative can cross-examine them.
(5) The other party then presents its side of the story and presents any witnesses in turn; the party representative can ask questions and the other party's representative can cross-examine those witnesses.
(6) The parties are asked if they have anything to add, and a final opportunity for cross-examination is given if more new testimony comes up.
(7) The hearing officer tells the parties to expect a written decision and closes the hearing.

All hearings are recorded. If a further appeal is necessary, it can sometimes help to order a copy of the recording so that the party filing the appeal can determine what might have gone wrong. Do not be concerned about being under oath and about being recorded. Presumably, you followed your own policies and were fair with the claimant, and thus you have

nothing to worry about. In the absence of a court order, the recording of the hearing cannot be released to anyone but the claimant and employer, or their representatives.

Most employers do not hire attorneys to represent them during appeal hearings. As noted before, the hearings are designed to bring out the facts, not to subject ordinary people to strict courtroom procedures. However, if the situation involves a disgruntled former employee who has threatened a lawsuit over the discharge or related matters (see the following paragraph), it might be a good idea to hire an attorney. This is especially true if the claimant hires an attorney and is represented by the attorney at the hearing -- there is always the risk of saying the wrong thing with a hostile attorney listening to every word. If you hire an attorney, be sure that the attorney is at the very least an experienced employment law attorney; it would be preferable if the attorney also has experience with TWC claims and appeals. If the attorney serves as the party representative during the hearing, that person can be the one to cross-examine the claimant. To be effective, the attorney will of course have to be very familiar with the facts of the case and with the employer's "take" on the events leading to the work separation.

Although the TUCA provides in Section 213.007 that the doctrine of collateral estoppel does not apply to rulings of TWC and courts in unemployment claims, i.e., rulings made on unemployment claims have no preclusive or evidentiary effect in legal proceedings unrelated to the unemployment claim, employers should still be care about how they handle unemployment claims and appeals. There are two main reasons for caution: first, unemployment claims are known as good ways to get information that can be used in other types of legal actions, and second, inconsistencies between what an employer says to TWC and what it says in another type of claim or lawsuit can give an ex-employee's attorney a way to attack the employer's credibility in the other proceeding.

Once the hearing is completed, the hearing officer makes the decision as promptly as possible, usually within a day or two. The decision is always made in writing and is signed by the hearing officer. If a further appeal is necessary (the so-called "Commission appeal" - the second level of appeal), there is a 14-day deadline from the date the Appeal Tribunal decision is mailed.

VI. CONCLUSION

By keeping certain basic principles in mind before, during, and after employees are employed, an employer can prepare itself against the day when an unemployment claim is filed. It can also know which claims are likely to be winners, which ones run the risk of being losers, and which are simply timewasters. By developing sensible workplace policies, documenting problems as well as successes, being consistent in employee relations, and keeping on top of developments in the law, an employer can approach TWC claims and appeals with much greater confidence.

HOW DO UNEMPLOYMENT CLAIMS AFFECT AN EMPLOYER?

Unemployment insurance (UI) claims all have some effect on an employer, but the effect will be small or major, depending upon the circumstances. The main determinants of how a UI claim will affect a given employer are:

(1) the type of employing unit involved;
(2) the type of worker involved;
(3) the date of the initial claim;
(4) the length of time worked by the claimant prior to the initial claim;
(5) the amount of wages reported for the claimant prior to the initial claim;
(6) whether the employer was the only base period employer;
(7) the amount of benefits paid to the claimant;
(8) the nature of the work separation; and
(9) the number of employees the company has.

Types of Employing Units

While anyone who pays a worker for personal services is an "employing unit" under the law, not all employers are liable for unemployment taxes. By the same token, not all money paid for personal services falls under the definition of "wages that are subject to reporting and UI taxation. For example, a person or company that engages an outside attorney to provide occasional legal advice is an "employing unit", but does not thereby become an "employer" liable to report the attorney's fees to TWC as wages and pay UI tax on such earnings. Likewise, some organizations are exempted from wage reporting and tax liability by virtue of special exemptions in the law. Organizations that are liable for wage reporting and UI payments either pay quarterly UI taxes (determined by applying the employer's tax rate to the first $9,000 of each employee's earnings in a calendar year) or have reimbursing status (they reimburse TWC dollar for dollar for any UI benefits paid out that are based on wages reported for the claimant). The following list indicates the most common categories of employing units and whether they are or are not liable for wage reporting and UI tax or reimbursement liability:

(1) Customers/clients of independent contractors: such employing units do not report the money they pay to the independent contractors, owe no UI tax on such payments, and have no financial involvement in any UI claims that might be filed by such workers.
(2) Some employing units are too small or pay insufficient wages to be liable under the UI system. For example, a private-sector employing unit that pays less than $1500 in wages in a calendar quarter is exempt (for household/domestic employers, the threshold is $1000 in a calendar quarter). A tax-exempt non-profit organization with fewer than four employees is also exempt from liability. During the period of non-liability, such employing units are treated like the employing units in the first category.
(3) Some employing units have some exempt and some non-exempt employees. For the exempt employees, they are treated just like the employing units in the first category above. For the non-exempt employees, they are treated like any other liable employer – see below. Some organizations, such as churches, have nothing but exempt employees and are non-liable. For a complete list of UI exemptions, see the Texas Labor Code, Chapter 201, Sections 201.042-201.078, starting at http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.201.htm#201.042 (put the entire address all on one line in your browser).
(4) Private taxed employers report their employees' wages, pay quarterly UI tax on such wages (up to the first $9,000 of each employee's earnings in a calendar year), and have potential financial involvement (chargeback liability) in any UI claims that might be filed by such workers.
(5) Reimbursing employers report their employees' wages, pay no quarterly UI tax on such wages, and have potential financial involvement (reimbursement liability) in any UI claims that might be filed by such workers.
(6) Taxed group account employers are in a large pool of similar governmental employing units and are treated like private taxed employers, except that any chargebacks are pooled and result in a pooled (shared) UI tax rate.
(7) Non-profit organizations can elect either private taxed employer or reimbursing employer status.

Note: Effective with initial claims filed on or after September 6, 2015, a reimbursing employer can be protected from reimbursement liability if the work separation occurred under certain disqualifying circumstances (a discharge for misconduct connected with the work, or a resignation without good cause connected with the work)).

Type of Worker Involved

As noted above, some workers (independent contractors and employees whose services are exempt from the definition of "employment") will not involve their employing units financially in a UI claim. All other types of workers have the potential to involve their employing units financially, depending upon whether a particular employing unit reported wages for the claimant during the base period of the claim. Here is a summary of the potential claim liabilities:

(1) Independent contractors – no wage reporting; no tax, chargeback, or reimbursement liability
(2) UI-exempt employees - no wage reporting; no tax,

chargeback, or reimbursement liability

(3) All other workers* – wage reporting; tax liability if the employing unit is not a reimbursing employer; potential chargeback/reimbursement liability depending upon the base period

None of the three categories above affects the right to file an unemployment claim. Any worker who is no longer performing services for pay can file an unemployment claim. Of course, whether the claimant can actually go on from there and draw benefits depends upon whether the claimant meets the monetary eligibility, work separation, and continuing eligibility requirements under the law.

* The term "all other workers" includes anyone who is not either (a) accurately classified as an independent contractor or (b) an employee whose services are specifically exempted under the UI law. Since there are so many names applied to workers who perform services for pay, it would be impractical to list them all. To illustrate, such a list would include, but not be limited to, probationary employees, new hires, trainees, trial employees, introductory employees, day labor workers, casual employees, temporary employees who are not acquired through a staffing firm, "1099 employees", "contract labor" workers who are really only misclassified employees, regular employees, full-time employees, part-time employees, PRN staff, "permanent" employees, and seasonal employees. The legal presumption in Texas is that all services are in "employment" and are subject to wage reporting and taxation or reimbursementliability, and the burden of proof is on the employer to show that a particular worker is not in employment.

However, the term "all other workers" does not include employees of independent contractors, because those workers are employed by the independent contractor, and any UI claims they might file will involve the independent contractor. It also does not include temporary staff assigned by a temporary staffing firm or leased employees assigned by a professional employer organization (PEO, also known as an employee leasing firm), since such employees are employed by the staffing firms that assign them to clients, and any unemployment claims they might file will be the responsibility of those firms. See "Alternatives to Hiring Employees Directly" in Part I of this book.

Date of the Initial Claim

The initial claim filing date determines two very important things: the benefit year during which the claimant may file weekly claims, and the base period of the claim. The base period in turn determines the wages that will be used to compute the claimant's weekly and maximum benefit amounts and which employers will have potential chargeback or reimbursement liability for any benefits paid to the claimant. Below is a chart showing what the base period looks like.

Only base period employers have potential financial involvement in a UI claim; non-base period employers have no such liability.

Base Period Quarter 1	Base Period Quarter 2	Base Period Quarter 3	Base Period Quarter 4	Lag Quarter	Quarter In Progress When Claim Is Filed
✓	✓	✓	✓	X	X

As an example, if an employer hires an employee in February, and lets the employee go after 30 days, and the claimant files an initial claim prior to April 1, then the base period would not include the first quarter of that year (the quarter in progress), nor the fourth quarter of the preceding year (the lag quarter), but would consist of the fourth quarter of the year before the year preceding the current year, and the first three quarters of the year preceding the current year. Since the employer did not report wages during that base period, it will have no financial involvement in the claim. The same would apply if the claimant waited until April, May, or June to file the initial claim - in that case, the base period would omit the second quarter of the current year, the first quarter of the current year, and consist of the four quarters of the preceding year. If the ex-employee files an initial claim after June 30 of the current year, then the employer could be a base period employer, but its chargeback liability would be limited due to having paid only 30 days' worth of wages (see the next topic).

Length of Time Worked Prior to the Initial Claim

The length of time worked by the claimant prior to the initial claim is important to an employer's potential financial liability because it helps determine whether the employer falls into the base period of the claim. Generally, if an employee works a short period of time, and files a UI claim fairly soon after losing that short-term job, the employer will not fall into the base period of the claim. The longer the employee works for the employer, the greater the chance is that a subsequent UI claim will involve the employer in the base period. In addition, since an employer's chargeback liability is directly proportional to the amount of wages it reported during the claimant's base period, the longer the employee works, the more wages will be reported, and the higher the potential chargeback liability will be. That is why, as a general matter, it is better to separate a clearly unsuitable employee from the company as soon as it becomes clear that, despite your best efforts at counseling and retraining, the employee will not work out in the long term.

Amount of Wages Reported for the Claimant Prior to the Initial Claim

This factor is very closely related to the length of time worked by the claimant prior to the initial claim. The higher the wage amount for the claimant during the base period is, the higher the potential chargeback liability will be.

Whether the Employer was the Only Base Period Employer

Chargeback/reimbursement liability also depends upon whether an employer was the only employer that reported wages for the claimant, or was one of two or more base period employers. An employer's chargeback liability percentage is directly proportional to the amount of wages it reported for the claimant during the base period, measured against the total wages reported by all employers during the base period. As an example, if employer A paid 100% of the base period wages, it will have 100% of the chargeback/reimbursement liability. If A paid one-third of the wages, it will have one-third of the liability.

Amount of Benefits Paid to the Claimant

This factor, along with an employer's chargeback percentage as explained above, determines the amount of the actual chargebacks. To determine the amount, TWC multiplies the chargeback percentage by the amount of benefits the claimant ultimately draws. If the claimant draws half of the potential maximum benefit amount, each base period employer's liability will be half of what it could have been, had the claimant drawn the maximum potential amount.

Nature of the Work Separation

The nature of the work separation goes directly to the issue of whether the claimant will be qualified or disqualified for UI benefits. If the work separation was disqualifying, the claimant will not be able to draw UI benefits, which of course will affect the employer's financial liability for the claim. The first thing TWC does in every UI claim (after determining monetary eligibility) is determine the issue of whether the work separation was voluntary or involuntary, and then whether it was qualifying or disqualifying. A voluntary work separation is one that was initiated by the employee, and an involuntary work separation is one that was initiated by the employer. The burden of proof on the work separation issue depends upon who initiated the work separation.

In a case involving a voluntary work separation, the claimant will try to prove that he or she had good cause connected with the work to quit, and the employer must be prepared to show that continued work was available when the claimant left and that a reasonable employee would not have quit for such a reason. In a case with an involuntary work separation, the employer has the burden of proving two main things: that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, and that the claimant either knew or should have known that discharge could occur for such a reason.

Number of Employees

For private taxed employers, the number of employees is important because it determines the size of the employer's taxable wage base, which is generally the number of employees multiplied by $9,000 (the figure could be lower if some employees do not earn at least that much in the calendar year). A small company will have a small taxable wage base and will experience a proportionally higher impact from a single UI claim than a larger employer with more employees and a higher taxable wage base. For details on how TWC calculates UI tax rates for private taxed employers (the vast majority of employers in Texas), see this Web page: http://www.twc.state.tx.us/ui/tax/uitaxrates.html.

Conclusion

It should be clear from the above information that there are many factors that determine how a given UI claim will impact a particular employer. While some are more under the control of employers than others, all of them are important to understand. Each claim has the potential to affect an employer's financial bottom line, and an employer interested in controlling its labor costs will pay attention to every detail.

QUICK TIPS FOR UI CLAIMS AND APPEALS

Before a claim arises:

1. If an employee is about to be fired, go through a termination checklist; at the very least, ensure that the employee has been given the benefit of whatever termination procedures are outlined in the company policies and in whatever warnings they may have received. Before taking that final step, ask yourself whether termination would be fair and proper under the circumstances. If so, then proceed.
2. If an employee is quitting, do not have the person sign a boilerplate resignation form; have the person do their own letter, in their own handwriting if possible.
3. If an employee is quitting, do not let the person quit until and unless you are satisfied that the company has done everything appropriate to address any legitimate grievances they may have.

After a claim arises:

1. Respond on time to any claim notice, ruling, or appeal decision.
2. Be as specific as possible.
3. Be consistent in your responses, appeals, and testimony.
4. Avoid name-calling or gratuitous derogatory comments toward the claimant.
5. In discharge cases, vague terms such as "inability", "incompetence", "disloyal", "accumulation of things", and "bad attitude" are generally unhelpful in proving misconduct. Inability and incompetence are not misconduct if the claimant was trying his or her best (however, failing to do one's best is arguably misconduct); "disloyalty" is usually too subjective; "accumulation of things" is known as the "shotgun approach" and is understood to mean that the employer is not sure exactly why the discharge occurred when it did; and "bad attitude" often signals a personality dispute, which by itself is not misconduct.
6. Concepts such as "resignation in lieu of discharge" and "mutual agreement" are tricky, since both terms are generally interpreted as meaning that the company likely initiated the work separation and that the claimant did not have the option of remaining on the job. In such cases, the employer should be ready to prove misconduct.
7. In discharge cases, try to show four main things:
   a. that the discharge resulted from a specific incident of misconduct close in time to the discharge;
   b. that the claimant either knew or should have known that discharge could occur for the reason given;
   c. that the employer followed whatever policies it has and whatever warnings were given; and
   d. that the claimant was not singled out for discharge, but rather was treated the same as anyone else would have been under those circumstances.
8. In voluntary leaving cases, avoid references to how bad the ex-employee's work or conduct might have been, or comments on how glad the company might be that the claimant resigned. Instead, concentrate on the fact that the claimant left while continued work was still available and focus on how a reasonable employee otherwise interested in remaining employed would not have left for the reason given.
9. In all cases, have all your evidence and firsthand witnesses ready for the hearing.
10. Make your testimony brief, factual, and concise. Hearing officers like that.

WAGE CLAIM AND APPEAL PROCESS IN TEXAS

The Texas Payday Law provides a specific process by which employees or ex-employees who feel they have not been properly paid may file claims for the wages they believe should have been paid to them. It is a claim-driven system - nothing happens until and unless a claim is filed. Unlike the U.S. Department of Labor, the Texas Workforce Commission does not conduct audits of employers' payrolls or payroll practices. TWC simply accepts wage claims, investigates them, and makes rulings thereon. Following is a summary of the steps in the wage claim process.

The claimant files a wage claim using an official form for that purpose (accessible online at www.twc.state.tx.us/ui/lablaw/ll1.pdf (English) and www.twc.state.tx.us/ui/lablaw/ll1s.pdf (Spanish)). The form asks for very specific information relating to the identities and contact information for the claimant and the employer, the wage agreement, the pay rate, the specific way in which the claimant believes he or she was not properly paid, and other information designed to give TWC's Labor Law Department enough information to. The form must be signed and notarized by the claimant prior to its submission to the agency. The claim may be filed in person at any local TWC office or Workforce Solutions center, by mail, or by fax.

TWC's Labor Law Department opens a claim file and begins the investigation by mailing a notice of the wage claim to the employer, advising the employer that it should respond within fourteen (14) calendar days (the claim notice and response form is available online at www.twc.state.tx.us/ui/lablaw/erwc.pdf). The employer's initial response is vitally important, since it is an excellent chance to set the record straight and to get the employer's side of the situation in front of the investigator in time to make a difference. The response should include copies of whatever wage agreements and fringe benefit policies that might exist, depending upon the specific components of the compensation the claimant is claiming.

The claim investigator conducts initial research into the legal issues, depending upon the nature of the claim made and the information supplied in the employer's response.

The investigator attempts to contact each party by phone in order to pin the parties down on details, resolve conflicts, and evaluate the relative credibility of each side. If the investigator requests additional documentation, the employer should not hesitate to supply copies. In almost every case, that is a good sign, i.e., there is a fairly good chance that the investigator thinks that the documentation would indicate that all or part of the wage claim should be denied or limited in some way that would be favorable for the employer.

Finally, the investigator issues a written decision called a Preliminary Wage Determination Order. The determination notes that it will become the final decision of the Commission unless the losing party appeals in writing within 21 calendar days of the date the determination was mailed. The deadline for appealing is very strict - the only exceptions are for mistakes made by the U.S. Postal Service or TWC in addressing or delivering the determination or in handling the appeal, or for misinformation from a Commission representative that misleads a party as to their appeal rights.

If the employer does not agree with the Preliminary Wage Determination Order, it has the right to file an appeal within 21 calendar days of the date that the decision is mailed by TWC. A late appeal will result in the issuance of an Order of Dismissal, and a hearing on the late appeal issue will not be granted unless the employer files a timely appeal and alleges a potentially valid reason for the late appeal, as described in the preceding paragraph. If the appeal is timely, the employer will be able to have all of its evidence and testimony considered by a hearing officer, who will issue an official ruling on the appeal. Obtaining an appeal hearing and participating in the hearing generally involve the following steps:

- The employer files its appeal in writing. If mailed, obtain proof of mailing; if faxed, use a fax machine that will generate a fax confirmation sheet showing an accurate date and time for the fax.
- The appeal letter does not have to be complex - it can be as simple as "We disagree with the determination dated _____ and would like to have an appeal hearing on the matter." Any details as to the merits of the wage claim should correspond to whatever details the employer supplied in the initial response to the wage claim. Inconsistencies can be very damaging.
- The Special Hearings Unit will mail a packet containing the notice of hearing and instructions for participation to each party. Check the packet carefully to see what is included. Documents that are important to the case, but which are not included in the packet, will need to be sent in copy form to both the claimant and to the hearing officer in order to be admitted as exhibits. Each party is responsible for offering all relevant information at the hearing; failure to properly submit documentation and other evidence at the hearing could mean that the party will lose the ability to use such evidence to present its case, both at the hearing and later, unless a compelling reason exists for the evidence not being offered earlier.
- Prepare an outline of the points to be discussed at the hearing. Include any items that are relevant to the wage claim. Use the outline as a checklist to ensure that no important points are left undiscussed.
- Call in for the hearing during the thirty-minute period

preceding the stated start time, i.e., if the start time for the hearing is shown as 1:30 p.m., call in between 1:00 p.m. and 1:30 p.m. (it is best to during the first twenty minutes of that thirty-minute period, just to allow for differences in clocks). Be sure to use the toll-free number shown on the hearing notice - it is always in bold and bordered in black. The hearing officer will call both parties back and connect everyone via conference call.

- If you have witnesses, tell the hearing officer about them and that they will be expecting a call when the hearing officer is ready to take their testimony. Give the hearing officer their names and phone numbers when asked.
- When the time comes to take testimony from the employer, the hearing officer will ask the first few questions, then allow the employer to make additional points. Do not bring up anything that is not connected to the issues listed on the hearing notice.
- Hearing officers are usually pressed for time and appreciate brevity. They also appreciate witnesses who seem organized and in command of their testimony and exhibits. On the other hand, they do not like it if witnesses are combative, argumentative, or disorganized. Even though it may be hard to resist the temptation to get on a soapbox about the claimant and what a poor performer or dishonest employee they were, it is always much better to concentrate on giving a concise, well-organized, calm description of how the claimant was properly paid according to the wage agreement and any applicable policies. Explain your points, and then turn the hearing back over to the hearing officer.
- As you present witnesses, the hearing officer may ask them a few questions as a start, and then turn them over to you. The claimant will have a chance to cross-examine each witness, just as you will have a chance to cross-examine the claimant and any witnesses who testify on the claimant's behalf. Be as civil and non-confrontational as possible - your attitude and demeanor can influence a credibility determination in a close case.
- If any particular documents are important to your case, mention them specifically to the hearing officer at the appropriate point in your testimony and state that you wish to enter them as exhibits. The hearing officer will ensure that the claimant has a copy of the document before entering it as an exhibit. Once the exhibit is entered, explain its significance and focus on any important details it contains.
- If the claimant says anything you disagree with during his or her testimony, make a note of it and address the issue when it is your turn to testify.
- At the conclusion of the hearing, the hearing officer will ask each party if they have additional testimony or evidence they wish to give. Assuming there is none, the hearing officer will briefly explain that the parties can expect a written decision in the mail, thank the parties for their participation, and conclude the hearing.
- The hearing officer will prepare a written decision, sign it, and mail it to both parties and any representatives they may have.

A party who misses a hearing and loses the case may request a reopening of the hearing, but the first issue at the new hearing will be whether the party had good cause to miss the previous hearing. To have a better chance of doing that in the event that your company cannot call in for a hearing at the designated time, you should call the hearing officer beforehand to give notice of that issue. Ask for a postponement, even if you feel there is little chance one will be granted, and document the call. In general, good cause to miss a hearing is something that was outside your power to control.

A claimant or employer losing the decision issued by the hearing officer may file a further appeal to the three-member Commission in Austin. If such an appeal is filed, the Commission will review all of the evidence in the case and vote on whether to affirm, reverse, or modify the hearing officer's decision, or to order an additional hearing.

Following the Commission appeal, the losing party may either file a motion for rehearing within fourteen (14) calendar days of the mailing date of the decision, or else file an appeal in a court within thirty (30) calendar days of the date the decision was mailed. In order to be granted, a motion for rehearing must offer specific new evidence, give a compelling reason why the new evidence was previously unavailable, and explain how the new evidence is so important that it would change the outcome of the case. It is very difficult to get a rehearing granted, which is why it is so important to put every possible effort into winning the first appeal decision.

Court appeals are also difficult to win. There is no jury for such a trial. The judge conducts the trial (trial de novo) and renders the decision. In so doing, the judge applies the substantial evidence standard of review, which means that if the court finds that there is substantial evidence to support TWC's decision, the agency decision will be affirmed. In practical terms, that means that even if the judge would have personally felt the decision should have gone the other way, the agency decision will be upheld if there is enough evidence in favor of it that a reasonable fact-finder could have ruled that way. On the other hand, if the judge finds that there was no substantial evidence in favor of the agency ruling, i.e., that no reasonable fact-finder could have ruled the way the agency did, the court can render a decision the other way. A case that contains a good discussion of the substantial evidence review standard and the applicable case law is *New Boston General Hospital v. TWC and Becky Borgeson*, 47 S.W.3d 34 (Tex.App.-Texarkana 2001).

HOW EMPLOYERS CAN HELP REDUCE CLAIM FRAUD

Fraud in unemployment claims is a serious issue. Claimants are required to report all work and earnings when filing their weekly continued claims. Work must be reported even if the claimant has not yet received the pay for it. When a claimant reports earnings, the earnings can reduce the unemployment insurance (UI) benefits otherwise payable for that week, which is why some claimants fail to report earnings. Failure to report work and earnings can lead to a fraud ruling. The result of claim fraud is that the claimant forfeits all rights to UI benefits from the date the fraud was first committed. Sometimes that leads to large overpayments if the fraud is discovered after the fact. If the employer is a private taxed employer, any such overpayment would significantly reduce (and possibly even completely eliminate) its chargeback liability, since chargebacks from overpaid benefits would be deleted from its tax account. Any employer suspecting that a claimant might be failing to report work and earnings should report that to any TWC office as soon as possible and should try to furnish as many specifics as are available, such as the name of the employer for whom the claimant is working and the address and phone number of the business. That way, TWC can more easily contact that employer and verify the information.

Sometimes, claim fraud goes hand in hand with tax fraud. That can happen when a claimant finds an employer that is willing to pay the claimant "cash under the table", usually in order to avoid paying state and federal unemployment taxes on the wages. Of course, those wages are not reported to either TWC or IRS. Tax-paying employers suffer because of such abuse of the system, so they should not hesitate to report suspected abuse to TWC. Reports do not have to be signed. The agency follows up on every such report.

How To Report Claim Fraud?

If you suspect that a claimant has found a job, but is not reporting the work or earnings to TWC, or if they are collecting workers' compensation benefits and possibly not reporting such benefits, you can contact TWC by the following means:

1) Call the TWC Fraud Hotline at 1-800-252-3642.
2) Call TWC's Tele-Center toll-free at 1-800-939-6631. For Telecommunications Devices for the Deaf (TDD), call Relay Texas at: 1-800-735-2989.
3) Report it via e-mail by using the e-mail link on TWC's "Reporting Fraud" Web page at www.twc.state.tx.us/ui/bnfts/uifraud.html. Be sure to read the caveat on that page before sending the information via e-mail.
4) Report it anonymously using one of the phone numbers above or by sending a letter to "Fraud Control, Texas Workforce Commission, 101 E. 15th Street, Austin, TX, 78778".

How New Hire Reporting Can Help Control Fraud

Another very important way that employers can help reduce claim fraud is by properly reporting all new hires and rehires under the new hire reporting law in Texas. As required by the federal law known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), employers must report all new hires and rehires to a designated state agency, the Texas Employer New Hire Reporting Operations Center. The report must include the employee's name, SSN, and address. TWC cross-matches the information from the new hire reports with its benefits claim records. Where there is a match, TWC checks to see whether the claimant reported that new work and any earnings from the new job on the benefit claims for the weeks in question. Any discrepancies are referred to the fraud detection unit for further investigation. For more details on new hire reporting, see the article titled "New Hire Reporting Laws" in the Hiring section of this book.

Helping control claim fraud benefits everyone. It benefits employers by reducing chargebacks and UI tax rates, and by occasionally detecting tax fraud on the part of unscrupulous companies, which can also keep tax rates lower. It benefits honest claimants and the public by ensuring that money needed for UI benefits will be there in the UI trust fund when needed. TWC and your fellow employers will appreciate every effort your company can make in this regard.

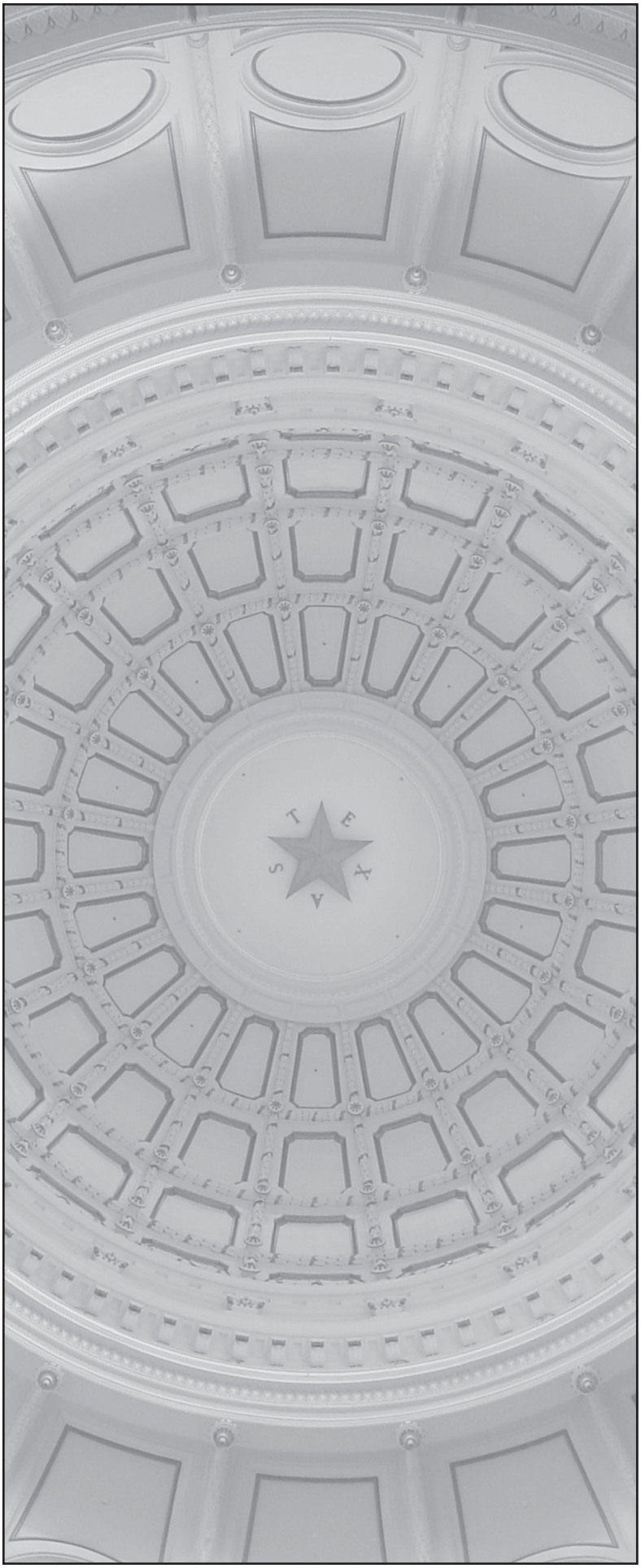
EMPLOYMENT LAW-RELATED WEB SITES

Federal Laws

General U.S. government Web site - FedWorld - www.fedworld.gov/
General legal information site - U.S. and state laws and court decisions - www.law.cornell.edu/
FERPA - general information & links - http://www.ed.gov/policy/gen/guid/fpco/index.html
Code of Federal Regulations - http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=%2Findex.tpl
U.S. Department of Labor (DOL) - Home Page: www.dol.gov
U.S. Department of Labor (DOL) – Required Posters: http://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/matrix.htm
DOL – Small Business Compliance Assistance - http://www.dol.gov/oasam/programs/osdbu/sbrefa/main.htm
DOL – Employment Law Guide - http://www.dol.gov/compliance/guide/index.htm
DOL - Wage and Hour Laws and Regulations - Main Page - www.dol.gov/whd/
DOL - OSHA - www.osha.gov/
Equal Employment Opportunity Commission - www.eeoc.gov/
INS (now USCIS) and I-9 information - www.uscis.gov/graphics/index.htm
Federal Trade Commission - Fair Credit Reporting Act information - www.ftc.gov
Social Security Administration - verification of SSNs - www.ssa.gov/employer/ssnv.htm
IRS Home Page - payroll tax information and forms - www.irs.gov/
National Labor Relations Board - www.nlrb.gov/
Federal Court Sites - www.uscourts.gov/courtlinks
Job descriptions - http://www.dol.state.ga.us/em/faq_em.htm (scroll down to "Occupational Information")
U.S. Small Business Administration - Texas Locations - www.sbaonline.sba.gov/tx/

Texas Laws

Texas - Home Page - www.texas.gov
Texas Online - Business Resources - http://www.texas.gov/en/discover/Pages/topic.aspx?topicid=/business
Texas - State Laws - www.capitol.state.tx.us/statutes/statutes.html
Texas – State Regulations - http://www.sos.state.tx.us/tac/index.shtml
Texas Court Sites - www.courts.state.tx.us
Texas Department of Insurance - employer information - http://www.tdi.state.tx.us/wc/employer/employerresources.html
Texas Attorney General's Office - www.oag.state.tx.us
State of Texas New Hire Program - https://portal.cs.oag.state.tx.us/wps/portal/employer
Texas Association of Business - www.txbiz.org
Nat'l Federation of Independent Business (Texas) - www.nfib.com/page/homeTX.html
Texas Workforce Commission (TWC) - www.texasworkforce.org
TWC Employer Page - www.texasworkforce.org/customers/bemp/bemp.html
TWC Tax Department Page - www.texasworkforce.org/customers/bemp/bempsub3.html
TWC Labor Law Page - www.texasworkforce.org/ui/lablaw/lablaw.html
Required Posters - http://www.twc.state.tx.us/ui/lablaw/posters.html
E*specially for Texas Employers* book - www.texasworkforce.org/news/efte/tocmain.html



The

A to Z

of

Personnel

Policies

THE A TO Z OF PERSONNEL POLICIES

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Social Media Use Policy
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THE A TO Z OF PERSONNEL POLICIES

INTRODUCTION

This short book will not attempt to show you how to write an entire personnel policy manual. It will explain some of the basic legal issues behind policies and why good written policies that are properly followed help employers defend against unemployment claims and other forms of post-termination problems, such as EEOC claims and employment-related lawsuits. This introduction contains outlines of legal issues dealing with certain employment-related situations not directly addressed in other sections of *Especially for Texas Employers*, and Part II features sample policies and forms that illustrate many of the policy and documentation concepts discussed in the book.

All policies and procedures should be included in the handbook. Every aspect of the employment relationship should be addressed. These areas can be divided into categories such as:

- Employer expectations - Attendance, leave, job requirements or drug policy
- Employee expectations - Compensation, benefits, grievance procedures, equal employment opportunity, sexual harassment and right to privacy
- Administrative issues - Changes to the handbook, representations and disclaimers

Following this general outline of personnel policy issues, the rest of this book outlines some of the major topics that should be covered in an employee handbook. A checklist is provided for each topic. In addition, sample policies are presented in the Appendix to this book for some of the topics in order to illustrate what a typical policy in that area of employee relations looks like. Finally, the Appendix includes some sample forms that are sometimes important for employees to sign.

Important Caution!

While this book attempts to help employers as much as possible with this difficult but essential area of workforce management, it cannot serve as a substitute for individual legal advice from a competent and experienced employment law attorney licensed in Texas or in your other state(s) of operation. These sample policies and forms are not meant to be taken "as is" and incorporated directly into an employee handbook. Rather, they are meant to help employers visualize what is meant by certain policies and legal issues and to help them prepare to work more efficiently with their own employment law attorneys. In addition, employers may always take advantage of the toll-free help line, offered by the employer Commissioner's office at TWC, for employers in Texas: 1-800-832-9394 (direct line: 1-512-463-2826).

Basic Legal Issues

1. Policies are generally up to the employer to define and enforce. The employment at will doctrine in Texas gives employers the right to set policies and change them at will depending upon the needs of the business. The few exceptions are so well-established that most employers do not even consider them to be policy areas:
   - pay (minimum wage and overtime restrictions);
   - no illegally discriminatory hiring, personnel, or termination practices;
   - safety (OSHA and Texas workers' compensation regulations); and
   - other areas, such as how benefit plans are communicated, modified, and administered (ERISA and COBRA).
2. Policies can be oral or written or a combination of both, but ideally, all important policies should be in writing.
3. Employers can generally change policies at a moment's notice.
4. In Texas, policies are not regarded as binding employment contracts.

Preparing an Employee Policy Manual

1. Decide what your company is all about and what kind of culture your company is trying to have within the workplace. Communicate those goals and culture in your policies.
2. Assemble all previous policies and procedures, whether written or unwritten. You will need to determine what will be continued or changed in the new policies.
3. Talk with employees and managers about their concerns in the area of employee policies.
4. Draft a preliminary document.
5. Have key company personnel review the draft, incorporate any needed changes, and have the final version reviewed by an employment law attorney.
6. Give every employee a copy of the policy handbook and have each employee sign and date a form acknowledging receipt. The acknowledgment of receipt form should have each employee affirm that they have received a copy, have had an opportunity to ask questions about the handbook, and that they agree to comply with the company's policies. Have a company representative witness the employee's signature and sign and date the same form.
7. After giving all employees copies, train all supervisory personnel in how to use the handbook.

Practical Issues with Policies

1. Although employers have the right to change policies at will, it may not be advisable to do so without at least attempting to give advance notice. If a policy change alters an employee's work relationship so much and so adversely that a reasonable employee would quit under the circumstances, the employer could face a loss in an unemployment claim.
2. Employers should attempt to anticipate potential problems and think of alternatives when considering policy changes. Aside from unemployment claims, employers could also face a loss in employee morale and productivity with ill-advised or ill-timed policy changes.
3. Whatever the policies are, it is usually best to have them in writing and give copies to all employees. The best policies in the world will do no good at all if the employees are unaware of them. Employers sometimes lose unemployment claims if they are unable to show that the claimant had been informed of the policies he or she violated.
4. Above all, employers should try to follow their own policies, especially with respect to disciplinary matters. One of the easiest ways to lose an unemployment claim is to have to admit that the disciplinary process that was announced in the policy was for some non-compelling reason not followed in the claimant's case. Remember, one thing that must be shown in every discharge case is how the claimant either knew or should have known he could lose his job for the reason given. If the policy talks about two verbal warnings, a written warning, a suspension, and then discharge, and the claimant is fired after only two verbal warnings, the employer will lose the case, unless it can somehow show a compelling reason for why the policy was ignored in the claimant's case. Proper and reliable enforcement of policies will also help the employer defend itself in discrimination claims and lawsuits.
5. Similarly, employers must be vigilant and careful to enforce the policies even-handedly and consistently. If the claimant was fired for an offense for which others were only warned, and there was no compelling reason for treating the claimant differently, the employer will lose an unemployment claim. Even-handed enforcement of policies will also help employers defend against claims of discrimination and wrongful discharge.

APPENDIX - SAMPLE POLICIES AND FORMS

Important disclaimer: The sample policies and forms available in this Appendix are only examples and are furnished merely as illustrations of their categories. They are not meant to be taken and used without consultation with a licensed employment law attorney. If you are in need of a policy for a particular situation, you should keep in mind that any sample policy or form such as the ones available here would need to be reviewed, and possibly modified, by an employment law attorney in order to fit your situation and to comply with the laws of Texas or your other state or states of operation. Downloading, printing, distributing, reproducing, or using any policy or form in this book in any manner constitutes your agreement that you understand this disclaimer; that you will not use the policy or form for your company or individual situation without first having it approved and, if necessary, modified by an employment law attorney of your choice; and that if you use it without such consultation, you assume any risks associated with its use.

Again, it is not recommended to simply adopt these sample policies and forms for your situation without first seeking the advice of an employment law attorney. There is almost an infinite variety of policies and forms for various kinds of workplaces and different kinds of situations. Moreover, the laws vary widely from state to state in some areas of employee relations. Thus, it is very important to make sure that what you have in your policy handbook and what you have employees sign not only truly meets your needs, but also complies with Texas and federal laws, as well as the laws of any other states in which your company operates.

List of Sample Policies and Forms in This Book

Acknowledgment of Receipt of Employee Handbook
Attendance Policy
Authorization for Background Check
Authorization for Prior Employer to Release Information
Company-Issued Credit Cards
Confidentiality of Information
Conflict of Interest
Driver Policy
Drug-Free Workplace Policy
Employee Agreement and Consent to Drug and/or Alcohol Testing
Harassment and Disrespect Toward Others
Internet, E-Mail, and Computer Usage Policy
Job Offer Letter
Limits on Leave Benefits
Medical Absence Warnings
Medical Information Confidentiality Policy
Neutral Absence Control Policy
Personnel Files Policy
Property Return Security Deposit Agreement
Relationships Within The Workplace
Request for Change in Employment Status
Searches
Smoking Policy
Social Media Use Policy
Vacation and Sick Leave
Video Surveillance / Search Consent Form
Volunteer Application and Service Agreement
Wage Deduction Authorization Agreement
Wage Overpayment/Underpayment Policy
Work Schedules and Recording of Work Time

ACKNOWLEDGMENT OF RECEIPT OF EMPLOYEE HANDBOOK

The Employee Handbook contains important information about the Company, and I understand that I should consult the Administrator/Office Manager/General Manager/Branch Manager/Human Resources Manager [designate one] regarding any questions not answered in the handbook. I have entered into my employment relationship with the Company voluntarily, and understand that there is no specified length of employment. Accordingly, either the Company or I can terminate the relationship at will, at any time, with or without cause, and with or without advance notice.

I understand and agree that no person other than the Executive Director/President/Chief Executive Officer [designate one] may enter into an employment agreement for any specified period of time, or make any agreement contrary to the Company's stated employment-at-will policy.

Since the information, policies, and benefits described herein are subject to change at any time, I acknowledge that revisions to the handbook may occur, except to the Company's policy of employment-at-will. All such changes will generally be communicated through official notices, and I understand that revised information may supersede, modify, or eliminate existing policies. Only the President of the Company has the ability to adopt any revisions to the policies in this handbook.

Furthermore, I understand that this handbook is neither a contract of employment nor a legally-binding agreement. I have had an opportunity to read the handbook, and I understand that I may ask my supervisor or any employee of the Human Resources Department any questions I might have concerning the handbook. I accept the terms of the handbook. I also understand that it is my responsibility to comply with the policies contained in this handbook, and any revisions made to it. I further agree that if I remain with the Company following any modifications to the handbook, I thereby accept and agree to such changes.

I have received a copy of the Company's Employee Handbook on the date listed below. I understand that I am expected to read the entire handbook. Additionally, I will sign the two copies of this Acknowledgment of Receipt, retain one copy for myself, and return one copy to the Company's representative listed below on the date specified. I understand that this form will be retained in my personnel file.

_____
Signature of Employee

_____
Date

_____
Employee's Name - Printed

_____
Company Representative

_____
Date

ATTENDANCE POLICY

The Company expects all employees to conduct themselves in a professional manner during their employment. This includes practicing good attendance habits. All employees should regard coming to work on time, working their shift as scheduled, and leaving at the scheduled time as essential functions of their jobs, i.e., good attendance habits form an integral part of every employee's job description.

Among other things, "good attendance habits" mean the following:

- appearing for work no sooner than 5 minutes prior to the start of the shift and no later than the start of the shift;
- being at your work station ready for work by the start of the shift;
- remaining at your work station unless the needs of the job require being elsewhere, except during authorized breaks (including restroom breaks);
- taking only the time normally allowed for breaks;
- remaining at work during your entire shift, unless excused by a supervisor;
- not leaving work until the scheduled end of your shift, unless excused by a supervisor;
- leaving promptly at the end of your shift, unless you have been given advance permission from your supervisor to work past that point; and
- calling in and personally notifying your supervisor or another member of management if you are going to be either absent or tardy, unless a verifiable emergency makes it impossible for you to do so (see "Notice of Absence or Tardiness" below for details).

Notice of Absence or Tardiness

Under some circumstances, absence or tardiness on your part may be excused, but only if you give proper notice of such a problem before the start of your shift. The Company needs advance notice of attendance problems so that other arrangements can be made to cover your absence, if necessary. "Proper notice" means that you call the Company at a designated number for such calls prior to the start of your shift and personally notify your supervisor or another member of management about the problem, unless a verifiable emergency makes it impossible for you to do so. It is not sufficient to call in and leave a message with a coworker or someone else who is not in a supervisory position. Office staff have been instructed to route all such calls to supervisory personnel. All supervisors and managers have been advised to make themselves available to take calls such as these, so there should be no reason to worry that you will not be able to reach an appropriate person to advise of your attendance problem. Similarly, the Company's telephone system has been set up to allow your calls to go through promptly and to not route you to an answering machine. If you fail to give proper notice of attendance problems in advance as explained in this policy, you may be subject to disciplinary action, up to and possibly including discharge.

If you are absent without notice for [two; three] days in a row, you will be considered as having abandoned your job, and the Company will process your work separation as a voluntary resignation on your part.

AUTHORIZATION FOR BACKGROUND CHECK

(Please read and sign this form in the space provided below. Your written authorization is necessary for completion of the application process.)

I, _____, hereby authorize [name of company] to investigate my background and qualifications for purposes of evaluating whether I am qualified for the position for which I am applying. I understand that [name of company] will utilize an outside firm or firms to assist it in checking such information, and I specifically authorize such an investigation by information services and outside entities of the company's choice. I also understand that I may withhold my permission and that in such a case, no investigation will be done, and my application for employment will not be processed further.

_____
Applicant's signature

_____
Date

[Note - omit this before printing the form: Under the Fair Credit Reporting Act, this form, or one functionally similar to it, must be signed by an applicant before a prospective new employer may perform a background check on the applicant using an outside, for-profit firm, including search engines on the Internet. No such requirement applies if the background check will be performed solely by the company using databases maintained by government agencies.]

AUTHORIZATION FOR PRIOR EMPLOYER TO RELEASE INFORMATION

(Please read the following statements, sign below, and return to the Human Resources office.)

I, _____, hereby authorize my prior employer, _____, to release any and all information relating to my employment with them to _____ (your company's name). I further release and hold harmless both _____ and _____ (your company's name) from any and all liability that may potentially result from the release and/or use of such information. I understand that any information released by my prior employer will be held in strictest confidence, that it will be viewed only by those involved in the hiring decision, and that neither I nor anyone else not so involved will have the right to see the information.

_____
Applicant's signature

_____
Date

[Note: Have the applicant fill out one of these forms for each prior employer from which you intend to seek job reference information. Using the form will make it much more likely that the prior employer will feel at liberty to release the information you request, or at least more than the usual work dates and salary confirmation that are of limited value in the hiring decision. Also keep in mind that if anyone refuses to sign such an authorization, your company would have the legal right to refuse to consider that person any further for hiring.]

COMPANY-ISSUED CREDIT CARDS

[Note: Although it can be impractical or nearly impossible to not issue company credit cards to certain key employees, there is always some risk involved that a card user might abuse the card by using it for unauthorized purposes. This sample policy and form below are meant to illustrate how an employer might try to protect itself and allow at least some possibility for recovery of improper charges on such cards. The main things to remember are that purchases of items or services for personal use can be considered loans or wage advances to the employee, deductions for which may take an employee below minimum wage under the FLSA; that losses due to unnecessary or negligent purchases of non-personal items or services may not result in deductions below minimum wage; and that both types of deductions need to be authorized by the employee in writing to be valid under the Texas Payday Law.]

Policy on Use of Company-Issued Credit Cards

The Company will issue company credit cards to certain employees for use in their jobs; this policy sets out the acceptable and unacceptable uses of such credit cards. Use of company-issued credit cards is a privilege, which the Company may withdraw in the event of serious or repeated abuse. Any credit card the Company issues to an employee must be used for business purposes only, in conjunction with the employee's job duties. Employees with such credit cards shall not use them for any non-business, non-essential purpose, i.e., for any personal purchase or any other transaction that is not authorized or needed to carry out their duties. Employees must pay for personal purchases (i.e., transactions for the benefit of anyone or anything other than the Company) with their own funds or personal credit cards. The Company will not regard expenses for one's own business-related use, such as lodging and meals while on company-approved business trips, as personal purchases, as long as such expenses are consistent with the Company's travel and expense reimbursement policy. If any employee uses a company credit card for personal purchases in violation of this policy, the cost of such purchase(s) will be considered an advance of future wages payable to that employee, and will be recovered in full from the employee's next paycheck; any balance remaining will be deducted in full from subsequent paychecks until the wage advance is fully repaid. Such deductions may take the employee's pay below minimum wage for the pay period(s) in question. If an employee uses a company credit card for any other type of unauthorized transaction in violation of this policy, i.e., incurs financial liability on the Company's part that is not within the scope of the employee's duties or the employee's authorization to make business-related purchases, the cost of such purchase(s) or transaction will be the financial responsibility of that employee, and the employee will be expected to reimburse the Company via deductions from pay until the unauthorized amount is fully repaid. Such deductions will be in the amount of the unauthorized purchase(s), but if a deduction for such amount would take the employee below minimum wage for the workweek in question, the deductions will be in two or more equal increments that will not take the employee's pay below minimum wage for any workweek involved. In addition to financial responsibility and liability for wage deductions, any purchases an employee makes with a company credit card in violation of this policy will result in disciplinary action, up to and possibly including termination of employment, depending upon the severity and repeat nature of the offense.

Agreement for Wage Deductions Associated with Improper Use of Company-Issued Credit Cards

I, (employee's name), hereby certify that I understand and agree to abide by the Company's policy regarding use of company-issued credit cards, a copy of which I have received, and which has been explained to me. I agree that if I make any personal purchases (i.e., transactions for the benefit of anyone or anything other than the Company) in violation of that policy, the amount of such purchases is an advance of future wages payable to me, that the Company may deduct that amount from my next paycheck, and that if there is a balance remaining after such deduction, the Company may deduct the balance of the wage advance from my future paychecks until the amount is repaid in full. I further agree that if I make any non-personal transactions in violation of the policy in question, i.e., incur financial liability on the Company's part that is not within the scope of my duties or my authorization to make business-related purchases, I am financially responsible for any such expenses and agree to reimburse the Company via wage deductions for such amounts until the unauthorized amounts are fully repaid. Such deductions will be in the amount of the unauthorized purchase(s), but if such amount would take my pay below minimum wage for the workweek in question, the deductions will be in two or more equal increments that will not take my pay below minimum wage for any workweek involved.

_____ _____
(Employee's name) Date

_____ _____
(Company witness) Date

[Note: Another item to consider in such a policy is whether the company or the employee owns any points or discounts accruing from use of company credit cards. That is left to an employer's discretion.]

CONFIDENTIALITY OF INFORMATION

In the course of performing their duties, employees may have access to or gain knowledge of confidential information concerning the Company, its customers/clients, and other employees. "Confidential information" is defined as information to which the public does not have general access. This policy governs the use or further disclosure of such information.

With respect to confidential information concerning the Company, other employees, the Company's vendors and contractual partners, and/or its customers/clients, such information should be safeguarded. An appropriate manager will grant the necessary access if an employee needs such information to perform his or her duties. No other access is permitted. Any release, duplication, distribution, transmittal, disclosure, or discussion ("release") of such information that is not required by law or by the duties of the employees involved is strictly prohibited.

Unauthorized access to, and unauthorized release of, confidential information will violate this policy and may result in appropriate disciplinary action against the employee(s) involved, up to and potentially including termination of employment, depending upon the severity and/or repeat nature of the offense.

CONFLICT OF INTEREST

A conflict of interest policy should include at least the following considerations:

- The employee owes a duty of loyalty to the company.
- At all times when on duty, without regard to time or place, employees should devote their full attention to the company's business and their duties.
- An employee must avoid any activity which conflicts with the interests of the company.
- An employee must disclose a potential conflict in advance.
- Outside employment is prohibited unless approved by the employer in advance.
- The company will deny permission for such outside employment if at any point it adversely affects the employee's ability, fitness, or readiness to work.

It is generally inadvisable to flatly prohibit all outside employment. Many people work two or three jobs. The real concern should be with outside work that interferes with the employee's ability to be a good employee for the employer. For example, an employer may legally prohibit any outside work for a competitor of the company; that conflicts with the working hours for the company; that undercuts the company's image, mission, or goals; or that makes the employee so tired that the employee cannot function effectively in the job he or she performs for the company.

Outside business interests, including passive or active investments, may be limited or prohibited by the company if they adversely affect the employee's work or the company's business operations.

An example of a conflict of interest would be that of an employee who attempts to work out his or her own deals with the company's customers. If the employee is essentially competing against the company, the company would have the right to require the employee to give up such an activity and to take appropriate corrective action. Although a company has the right to require employees to sign non-competition agreements, such agreements are notoriously difficult to enforce and should be undertaken only with the assistance of a qualified employment law attorney. No-solicitation agreements, whereby an employee agrees not to solicit the employer's current customers for personal business, accomplishes much of what a non-competition agreement seeks to enforce, and is less difficult to enforce than a general prohibition against any commercial activity in the employer's industry. Non-disclosure and trade secret agreements are generally much easier to enforce. Any such agreement should not be in a policy handbook with other policies; rather, it should be a standalone agreement signed by both the employer and the employee.

In Texas, it would not violate any law to adopt a policy such as the following: "XYZ Company prohibits any activity or exchange of goods, property, or services that significantly promotes, supports, or enables any business activity of a competitor, unless such activity or exchange has been discussed and approved in advance by a designated supervisor. Such activities or exchanges would include, but not be limited to, working for the competitor as either an employee or a contractor, advertising the competitor in any way, becoming a creditor or landlord of the competitor, or entering into any other kind of contractual arrangement whereby the competing business could be furthered in any way."

This is a good example of the kind of policy that should be reviewed by an experienced employment law attorney of the company's choice.

DRIVER POLICY

Employees assigned to driving duties ("drivers") must at all times meet the following criteria:

- drivers must have a current, valid driver's license for the state in which the employee performs his or her driving duties; and
- drivers must maintain a clean driving record, i.e., must remain insurable under our company's liability insurance policy.

Any employee driving a Company vehicle or driving on Company business must observe all safety, traffic, and criminal laws of this state. No driver may consume alcohol or illegal drugs while driving a Company vehicle, while on Company business, while in a Company vehicle, or prior to the employee's shift if such consumption would result in a detectable amount of alcohol or illegal drugs being present in the employee's system while on duty. In addition, no driver may consume or use any substance, regardless of legality or prescription status, if by so doing, the driver's ability to safely operate a motor vehicle and carry out other work-related duties would be impaired or diminished. No driver may pick up or transport non-employees while in a Company vehicle or on Company business, unless there is a work-related need to do so. Any illegal, dangerous, or other conduct while driving that would tend to place the lives or property of others at risk is prohibited.

Anything a driver does in connection with the operation of motor vehicles can affect that driver's fitness for duty or insurability as a driver. Regardless of fault, circumstance, on- or off-duty status, time, or place, any driver who receives a traffic citation from or is arrested by a law enforcement officer, or who is involved in any kind of accident while driving, must inform an appropriate supervisor about the incident immediately or as soon as possible thereafter. Any penalty, fine, imprisonment, fee, or other adverse action imposed by a court in connection with such an incident must be reported immediately to an appropriate supervisor. In both of the above situations, the matter will be reported to the Company's insurance carrier so that a prompt decision on continued coverage of the employee can be made. The driver involved in an accident or cited by a law enforcement official for violating a motor vehicle law must turn over any documentation relating to such incident as soon as possible to the employer, and must cooperate fully with the employer in verifying the information with other parties involved and with law enforcement authorities. While parking tickets will not affect a driver's insurability, any parking ticket issued on a vehicle that is being used for company business should be reported to an appropriate supervisor at the earliest possible opportunity.

Any employee who violates any part of this policy, or who becomes uninsurable as a driver, will be subject to reassignment and/or disciplinary action, up to and possibly including termination from employment. All employees with driving duties must sign the following agreement:

> I have read and understand the Company's Driver Policy, and I agree, in the event that I am ever found to be uninsurable, or that I lack a clean driving record or a valid and current driver's license, that if necessary, I will accept whatever alternative assignment the Company may give me and that I understand that a reduction in pay, change in hours, change in duties, and/or change in work location may result from the reassignment. I further understand that the Company does not and cannot guarantee that any particular reassignment will be available in the event of a problem with my driver's license, driving record, or insurability as a driver, and that if no reassignment is possible, termination of my employment may occur.
>
> /signed/
>
> _____
> Employee
>
> _____
> Date

DRUG-FREE WORKPLACE POLICY

XYZ Corporation, Inc. (the Company) intends to help provide a safe and drug-free work environment for our clients and our employees. With this goal in mind and because of the serious drug abuse problem in today's workplace, we are establishing the following policy for existing and future employees of XYZ Corporation, Inc.

The Company explicitly prohibits:

- The use, possession, solicitation for, or sale of narcotics or other illegal drugs, alcohol, or prescription medication without a prescription on Company or customer premises or while performing an assignment.
- Being impaired or under the influence of legal or illegal drugs or alcohol away from the Company or customer premises, if such impairment or influence adversely affects the employee's work performance, the safety of the employee or of others, or puts at risk the Company's reputation.
- Possession, use, solicitation for, or sale of legal or illegal drugs or alcohol away from the Company or customer premises, if such activity or involvement adversely affects the employee's work performance, the safety of the employee or of others, or puts at risk the Company's reputation.
- The presence of any detectable amount of prohibited substances in the employee's system while at work, while on the premises of the company or its customers, or while on company business. "Prohibited substances" include illegal drugs, alcohol, or prescription drugs not taken in accordance with a prescription given to the employee.

The Company will conduct drug and/or alcohol testing under any of the following circumstances:

- RANDOM TESTING: Employees may be selected at random for drug and/or alcohol testing at any interval determined by the Company.
- FOR-CAUSE TESTING: The Company may ask an employee to submit to a drug and/or alcohol test at any time it feels that the employee may be under the influence of prohibited substances, including, but not limited to, the following circumstances: evidence of prohibited substances on or about the employee's person or in the employee's vicinity, unusual conduct on the employee's part that suggests impairment or influence of prohibited substances, negative performance patterns, or excessive and unexplained absenteeism or tardiness.
- POST-ACCIDENT TESTING: Any employee involved in an on-the-job accident or injury under circumstances that suggest possible use or influence of prohibited substances in the accident or injury event may be asked to submit to a drug and/or alcohol test. "Involved in an on-the-job accident or injury" means not only the one who was or could have been injured, but also any employee who potentially contributed to the accident or injury event in any way.

If an employee is tested for prohibited substances outside of the employment context and the results indicate a violation of this policy, or if an employee refuses a request to submit to testing under this policy, the employee may be subject to appropriate disciplinary action, up to and possibly including discharge from employment. In such a case, the employee will be given an opportunity to explain the circumstances prior to any final employment action becoming effective.

(For an example of what a drug/alcohol testing consent form might look like, see the following page.)

EMPLOYEE AGREEMENT AND CONSENT TO DRUG AND/OR ALCOHOL TESTING

I hereby agree, upon a request made under the drug-free workplace policy of _____ (the Company), to submit to a drug or alcohol test and to furnish a sample of my urine, breath, and/or blood for analysis. I understand and agree that if I at any time refuse to submit to a drug or alcohol test under company policy, or if I otherwise fail to cooperate with the testing procedures, I will be subject to immediate termination. I further authorize and give full permission to have the Company and/or its company physician send the specimen or specimens so collected to a laboratory for a screening test for the presence of any prohibited substances under the policy, and for the laboratory or other testing facility to release any and all documentation relating to such test to the Company and/or to any governmental entity involved in a legal proceeding or investigation connected with the test. Finally, I authorize the Company to disclose any documentation relating to such test to any governmental entity involved in a legal proceeding or investigation connected with the test.

I understand that only duly-authorized Company officers, employees, and agents will have access to information furnished or obtained in connection with the test; that they will maintain and protect the confidentiality of such information to the greatest extent possible; and that they will share such information only to the extent necessary to make employment decisions and to respond to inquiries or notices from government entities.

I will hold harmless the Company, its company physician, and any testing laboratory the Company might use, meaning that I will not sue or hold responsible such parties for any alleged harm to me that might result from such testing, including loss of employment or any other kind of adverse job action that might arise as a result of the drug or alcohol test, even if a Company or laboratory representative makes an error in the administration or analysis of the test or the reporting of the results. I will further hold harmless the Company, its company physician, and any testing laboratory the Company might use for any alleged harm to me that might result from the release or use of information or documentation relating to the drug or alcohol test, as long as the release or use of the information is within the scope of this policy and the procedures as explained in the paragraph above.

This policy and authorization have been explained to me in a language I understand, and I have been told that if I have any questions about the test or the policy, they will be answered.

I UNDERSTAND THAT THE COMPANY WILL REQUIRE A DRUG SCREEN AND/OR ALCOHOL TEST UNDER THIS POLICY WHENEVER I AM INVOLVED IN AN ON-THE-JOB ACCIDENT OR INJURY UNDER CIRCUMSTANCES THAT SUGGEST POSSIBLE INVOLVEMENT OR INFLUENCE OF DRUGS OR ALCOHOL IN THE ACCIDENT OR INJURY EVENT, AND I AGREE TO SUBMIT TO ANY SUCH TEST.

(Important note for the company [*omit this from any consent form!*]: Remember, "involved in an on-the-job accident or injury" means not only the one who was injured, but also anyone who arguably or potentially contributed to the accident or injury event in any way, i.e., the person suspected of causing someone else to get hurt gets tested as well. Testing only accident or injury victims can, in the eyes of some, appear to be a way of discouraging workers from filing workers' compensation claims, and that in turn can have a very unfavorable effect on workers' compensation retaliatory discharge lawsuits. See the sample drug/alcohol testing policy for an idea on how to reflect that caution in the policy.)

_____
(Employee's name)

_____
(Date)

_____
(Name of company representative)

_____
(Date)

POLICY ON HARASSMENT AND DISRESPECT TOWARD OTHERS

To promote equal employment opportunity for all employees, XYZ Company ("XYZ") strives to maintain an atmosphere of mutual respect and understanding in the workplace. Toward that end, XYZ considers the use of demeaning, belittling, humiliating, insulting, or other forms of disrespectful language toward or about yourself or others to be unacceptable. One or more of the following tests may be useful in determining whether particular terms are unacceptable under this policy:

1. Whether you would feel discriminated against or insulted if someone else who is different from you were to use that term when referring to you or speaking to you about someone else;
2. Whether referring to yourself or another person in such a way would tend to segregate yourself or others on a minority basis;
3. Whether such terminology tends to perpetuate racial, ethnic, gender, or other minority stereotypes; and
4. Whether such terms would make a normal person feel belittled, needled, or picked on.

While the context of such statements can be important in judging whether the statements violate this policy, in general, XYZ will consider any such language unacceptable and will follow up on any complaints it receives.

The following examples illustrate what is unacceptable under this policy (the list is not exhaustive and is only a general guide):

- Slurs and other disrespectful terms relating to a person's race, color, religion, age, national origin, citizenship status, gender, sexual orientation, gender identity or expression, genetic information, or disability
- Excessive or habitual use of terms relating to a person's characteristics
- Referring to people in terms of their assumed nationalities
- Words relating to gender stereotypes
- Profane or obscene references to yourself or others

It is no excuse that you apply an unacceptable term to yourself. Such terms inevitably disturb others, even if they do not say so out loud. Further, they perpetuate unfavorable stereotypes and foster a hostile work environment. While we are all different, and appreciate everything that makes us unique individuals, there is no need to dwell upon those differences to the point where we become preoccupied with ourselves and what separates us from one another. We are all employees here, we are team members, and we are united in working to give our customers the best possible value and experience with our company.

In sum, using unacceptable language in the workplace calls into question the speaker's maturity, judgment, and suitability as a team member. Such language will not be tolerated. Depending upon the severity and repeat nature of a particular offense, a violation of this policy will result in appropriate corrective action, up to and potentially including termination of employment. XYZ hopes that no such action will be necessary, but will act where action is needed.

INTERNET, E-MAIL, AND COMPUTER USE POLICY

Policy Statement

The use of XYZ Company (Company) electronic systems, including computers, fax machines, and all forms of Internet/Intranet access, is for company business and for authorized purposes only. Brief and occasional personal use of the electronic mail system or the Internet is acceptable as long as it is not excessive or inappropriate, occurs during personal time (lunch or other breaks), and does not result in expense or harm to the Company or otherwise violate this policy.

Use is defined as "excessive" if it interferes with normal job functions, responsiveness, or the ability to perform daily job activities. Electronic communication should not be used to solicit or sell products or services that are unrelated to the Company's business; distract, intimidate, or harass coworkers or third parties; or disrupt the workplace.

Use of Company computers, networks, and Internet access is a privilege granted by management and may be revoked at any time for inappropriate conduct carried out on such systems, including, but not limited to:

- Sending chain letters or participating in any way in the creation or transmission of unsolicited commercial e-mail ("spam") that is unrelated to legitimate Company purposes;
- Engaging in private or personal business activities, including excessive use of instant messaging and chat rooms (see below);
- Accessing networks, servers, drives, folders, or files to which the employee has not been granted access or authorization from someone with the right to make such a grant;
- Making unauthorized copies of Company files or other Company data;
- Destroying, deleting, erasing, or concealing Company files or other Company data, or otherwise making such files or data unavailable or inaccessible to the Company or to other authorized users of Company systems;
- Misrepresenting oneself or the Company;
- Violating the laws and regulations of the United States or any other nation or any state, city, province, or other local jurisdiction in any way;
- Engaging in unlawful or malicious activities;
- Deliberately propagating any virus, worm, Trojan horse, trap-door program code, or other code or file designed to disrupt, disable, impair, or otherwise harm either the Company's networks or systems or those of any other individual or entity;
- Using abusive, profane, threatening, racist, sexist, or otherwise objectionable language in either public or private messages;
- Sending, receiving, or accessing pornographic materials;
- Becoming involved in partisan politics;
- Causing congestion, disruption, disablement, alteration, or impairment of Company networks or systems;
- Maintaining, organizing, or participating in non-work-related Web logs ("blogs"), Web journals, "chat rooms", or private/personal/instant messaging;
- Failing to log off any secure, controlled-access computer or other form of electronic data system to which you are assigned, if you leave such computer or system unattended;
- Using recreational games; and/or
- Defeating or attempting to defeat security restrictions on company systems and applications.

Important exception: consistent with federal law, you may use the Company's electronic systems in order to discuss with other employees the terms and conditions of your and your coworkers' employment. However, any such discussions should take place during non-duty times and should not interfere with your or your coworkers' assigned duties. You must comply with a coworker's stated request to be left out of such discussions.

Using Company electronic systems to access, create, view, transmit, or receive racist, sexist, threatening, or otherwise objectionable or illegal material is strictly prohibited. "Material" is defined as any visual, textual, or auditory entity. Such material violates the Company anti-harassment policies and subjects the responsible employee to disciplinary action. The Company's electronic mail system, Internet access, and computer systems must not be used to violate the laws and regulations of the United States or any other nation or any state, city, province, or other local jurisdiction in any way. Use of company resources for illegal activity can lead to disciplinary action, up to and including dismissal and criminal prosecution. The Company will comply with reasonable requests from law enforcement and regulatory agencies for logs, diaries, archives, or files on individual Internet activities, e-mail use, and/or computer use.

Unless specifically granted in this policy, any non-business use of the Company's electronic systems is expressly forbidden.

If you violate these policies, you could be subject to disciplinary action, up to and including dismissal.

Ownership and Access of Electronic Mail, Internet Access, and Computer Files; No Expectation of Privacy

The Company owns the rights to all data and files in any computer, network, or other information system used in the Company and to all data and files sent or received using any company system or using the Company's access to any computer network, to the extent that such rights are not

superseded by applicable laws relating to intellectual property. The Company also reserves the right to monitor electronic mail messages (including personal/private/instant messaging systems) and their content, as well as any and all use by employees of the Internet and of computer equipment used to create, view, or access e-mail and Internet content. Employees must be aware that the electronic mail messages sent and received using Company equipment or Company-provided Internet access, including web-based messaging systems used with such systems or access, are not private and are subject to viewing, downloading, inspection, release, and archiving by Company officials at all times. The Company has the right to inspect any and all files stored in private areas of the network or on individual computers or storage media in order to assure compliance with Company policies and state and federal laws. No employee may access another employee's computer, computer files, or electronic mail messages without prior authorization from either the employee or an appropriate Company official.

The Company uses software in its electronic information systems that allows monitoring by authorized personnel and that creates and stores copies of any messages, files, or other information that is entered into, received by, sent, or viewed on such systems. There is no expectation of privacy in any information or activity conducted, sent, performed, or viewed on or with Company equipment or Internet access. Accordingly, employees should assume that whatever they do, type, enter, send, receive, and view on Company electronic information systems is electronically stored and subject to inspection, monitoring, evaluation, and Company use at any time. Further, employees who use Company systems and Internet access to send or receive files or other data that would otherwise be subject to any kind of confidentiality or disclosure privilege thereby waive whatever right they may have to assert such confidentiality or privilege from disclosure. Employees who wish to maintain their right to confidentiality or a disclosure privilege must send or receive such information using some means other than Company systems or the company-provided Internet access.

The Company has licensed the use of certain commercial software application programs for business purposes. Third parties retain the ownership and distribution rights to such software. No employee may create, use, or distribute copies of such software that are not in compliance with the license agreements for the software. Violation of this policy can lead to disciplinary action, up to and including dismissal.

Confidentiality of Electronic Mail

As noted above, electronic mail is subject at all times to monitoring, and the release of specific information is subject to applicable state and federal laws and Company rules, policies, and procedures on confidentiality. Existing rules, policies, and procedures governing the sharing of confidential information also apply to the sharing of information via commercial software. Since there is the possibility that any message could be shared with or without your permission or knowledge, the best rule to follow in the use of electronic mail for non-work-related information is to decide if you would post the information on the office bulletin board with your signature.

It is a violation of Company policy for any employee, including system administrators and supervisors, to access electronic mail and computer systems files to satisfy curiosity about the affairs of others, unless such access is directly related to that employee's job duties. Employees found to have engaged in such activities will be subject to disciplinary action.

Electronic Mail Tampering

Electronic mail messages received should not be altered without the sender's permission; nor should electronic mail be altered and forwarded to another user and/or unauthorized attachments be placed on another's electronic mail message.

Policy Statement for Internet/Intranet Browser(s)

The Internet is to be used to further the Company's mission, to provide effective service of the highest quality to the Company's customers and staff, and to support other direct job-related purposes. Supervisors should work with employees to determine the appropriateness of using the Internet for professional activities and career development. The various modes of Internet/Intranet access are Company resources and are provided as business tools to employees who may use them for research, professional development, and work-related communications. Limited personal use of Internet resources is a special exception to the general prohibition against the personal use of computer equipment and software.

Employees are individually liable for any and all damages incurred as a result of violating company security policy, copyright, and licensing agreements.

All Company policies and procedures apply to employees' conduct on the Internet, especially, but not exclusively, relating to: intellectual property, confidentiality, company information dissemination, standards of conduct, misuse of company resources, anti-harassment, and information and data security.

Personal Electronic Equipment

The Company prohibits the use in the workplace of any type of camera phone, cell phone camera, digital camera, video camera, or other form of recording device to record the image or other personal information of another person, if such use would constitute a violation of a civil or criminal statute that

protects the person's right to be free from harassment or from invasion of the person's right to privacy. Employees may take pictures and make recordings during non-working time in a way that does not violate such civil or criminal statutes. The Company reserves the right to report any illegal use of such devices to appropriate law enforcement authorities.

Due to the significant risk of harm to the company's electronic resources, or loss of data, from any unauthorized access that causes data loss or disruption, employees should not bring personal computers or data storage devices (such as floppy disks, CDs/DVDs, external hard drives, USB / flash drives, "smart" phones, iPods/iPads/iTouch or similar devices, laptops or other mobile computing devices, or other data storage media) to the workplace and connect them to Company electronic systems unless expressly permitted to do so by the Company. To minimize the risk of unauthorized copying of confidential company business records and proprietary information that is not available to the general public, any employee connecting a personal computing device, data storage device, or image-recording device to Company networks or information systems thereby gives permission to the Company to inspect the personal computer, data storage device, or image-recording device at any time with personnel and/or electronic resources of the Company's choosing and to analyze any files, other data, or data storage devices or media that may be within or connectable to the data-storage device in question in order to ensure that confidential company business records and proprietary information have not been taken without authorization. Employees who do not wish such inspections to be done on their personal computers, data storage devices, or imaging devices should not connect them to Company computers or networks.

Violation of this policy, or failure to permit an inspection of any device under the circumstances covered by this policy, shall result in disciplinary action, up to and possibly including immediate termination of employment, depending upon the severity and repeat nature of the offense. In addition, the employee may face both civil and criminal liability from the Company, from law enforcement officials, or from individuals whose rights are harmed by the violation.

JOB OFFER LETTER

[Date]

Ms. (Offeree's Name)
(Address)
(City, State, Zip Code)

Dear Ms. (Name):

[Name of company] is pleased to offer you the position of Marketing Director for our organization. We are all excited about the potential that you bring to our company.

As we discussed during your interviews, you will be working in our north [city] regional office, where our marketing and customer service departments are located. You will report directly to the Vice-President of Operations and be a member of our Executive Management Team. After finishing orientation for new executives, your initial task will be to help recruit and train a new marketing staff focused on developing our company's e-commerce division, but there will be many other projects associated with our overall marketing efforts that will need your attention.

You will be classified as an exempt executive-level employee. Your initial compensation package includes a weekly salary of $1600 (payable biweekly), full medical and dental coverage through our company's employee benefit plan, and fringe benefits as covered in the enclosed pamphlet. [*If applicable, the following provision can be added*: In addition, [name of company] will loan you an amount equal to all of your reasonable expenses of relocation, including [not including] seller's commission on your old residence and closing costs on your new residence [, plus an additional amount of $(amount) to help you handle miscellaneous unanticipated costs*]. Should you remain with the company at least three years, the loan amount will be forgiven in its entirety. Advances of the loan amount and any repayment of the loan will be according to the schedule in the enclosed agreement, a signed copy of which you should return by mail prior to incurring any relocation expenses.]

In accepting our offer of employment, you certify your understanding that your employment will be on an at-will basis, and that neither you nor any Company representative have entered into a contract regarding the terms or the duration of your employment. As an at-will employee, you will be free to terminate your employment with the Company at any time, with or without cause or advance notice. Likewise, the Company will have the right to reassign you, to change your compensation, or to terminate your employment at any time, with or without cause or advance notice.

We look forward to your arrival at our company and are confident that you will play a key role in our company's expansion into national and international markets. Please let me know if you have any questions or if I can do anything to make your arrival easier.

Sincerely,

_____
[Name]
Senior Vice-President
[Name of Company]

(* This last optional provision can serve as a variety of "sign-up bonus", which by virtue of that and the following sentences is transformed into a loan that can be recouped by proper drafting of a repayment schedule. The repayment schedule should specifically set out the intervals at which differing amounts of the loan will be repayable and should include the event of the employee staying with the company a desired minimum amount of time. If the loan repayments will be made in the form of deductions from pay, be sure to specify that, as well as the amounts, in the loan repayment agreement. The overall effect of these "loan provisions" is to supply a financial incentive to the employee to achieve at least a minimum tenure with the company.)

LIMITS ON LEAVE BENEFITS

In general, no employee may combine any type of paid leave benefit, workers' compensation, disability benefit, or any other paid benefit in such a way that the resulting compensation would exceed the employee's average weekly earnings for the pay period in question.

If an employee is receiving workers' compensation benefits that total less than the employee's average weekly earnings, as determined for purposes of the workers' compensation claim, the employee may elect to use available sick or vacation leave or unused personal holidays to cover the difference between the workers' compensation benefits and the average weekly earnings. Use or application of any type of paid leave beyond that amount will not be permitted during the period covered by workers' compensation.

[Note: the purpose of this policy to prevent the "stacking" of paid leave benefits to achieve higher-than-normal pay. This is usually done in conjunction with workers' compensation benefits, but sometimes crops up as a problem when employees think they can apply multiple forms of paid leave all at once in order to quickly exhaust it and redeem it for pay. The only exception to employers being able to adopt such a policy pertains to state agencies, due to a Texas Attorney General's opinion (Opinion No. JC-0188 (2000), online at https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2000/jc0188.pdf), which states that a state agency may not prevent its employees who are on workers' compensation benefit status from using their available compensatory leave at the same time.]

MEDICAL ABSENCE WARNINGS

Many employers contact the employer Commissioner's office with questions regarding progressive disciplinary procedures for an employee who is missing excessive amounts of work due to medical problems of herself and her minor child/children. Usually, the problem is not lack of notice of absence, lack of medical documentation, or failure to comply with instructions. Rather, the employee's medical absences are so frequent that the employee is basically medically unavailable for work. In cases where a work separation results from such absences, an employer's best bet, or safest route, would be to argue that its tax account should be protected from chargeback under the medical work separation provision in the unemployment insurance law. A verbal warning might be phrased something like this (*do not treat this like a script - such a warning is effective only if it sounds natural and unrehearsed)*:

> _____ , we need to talk about the number of absences you have had during the past _____ months. It's just too much. We're a small company - you're one of ____ employees, and the [only one / one of only two] in your work area, and [the work has been falling behind / your coworker has been hard put to cover for you]. Isn't there some way that someone else could look after your sick child and allow you to come to work - a relative of some kind? Normally, I wouldn't be concerned about an absence here and an absence there, but it's gotten to the point where something needs to change. We can't keep going on with the status quo. I'm interested in trying to work with you on this - what can you offer me here? [Turn the conversation over to the employee - see what, if anything, she is willing to offer in the way of a commitment to try to change things around.]

After the verbal warning, make a memo of the conversation, including the date and time, for the employee's personnel file. In the event of continued problems, a written warning might look something like this (*do not simply copy and paste this into a document - the employer should use its own words - a warning that sounds like standard boilerplate terminology will generally not be as effective as one that appears to have been written with a specific situation or problem in mind*):

FINAL WARNING

> On _____ __, 20__, you and I talked about your absenteeism and how it was causing serious problems for the practice in general and your coworkers in particular. I warned you verbally that you needed to do something to reduce the number of absences from work. At that time, I thought I had your commitment to try as hard as you could to minimize your absences due to medical reasons, but the problem has continued. You are not trying as hard as you could to find other sources of care for your [child/children] when [he/she/they] [is/are] sick. As much as I understand that you and your [child/children] have medical problems, we cannot handle so many absences on the part of one employee. Your position is very important to the company, and the other employees cannot continue to cover your absences to such an extent. The problem has reached the point where I have to place you on final notice that your position within the company is on the line because of your excessive absenteeism. Unless you are able to show me immediate and sustained improvement in your attendance, I will have no choice but to replace you in your position. I value you as an employee and sincerely hope that it will not come to that.
>
> _____
> /s/ (Employer)
>
> _____
> Date
>
> I understand that by signing this warning, I am not necessarily agreeing with its contents, but am merely indicating that I have seen it and have received a copy for my own records. I understand that I may write my own comments on the warning [in the space below / on the reverse side of this page], and that any comments I may write will become a part of my personnel file.
>
> _____
> /s/ (Employer)
>
> _____
> Date

If the employee refuses to sign the warning, the employer or a witness should indicate that on the form. Give the employee a copy of the signed warning, and keep the original copy in the employee's personnel file.

In general, it is permissible to require an employee who is more frequently absent for allegedly medical reasons to submit medical documentation more frequently than other

employees, but such an enhanced requirement should not be imposed until the employee has been warned, preferably in writing, that more frequent medical documentation will become a requirement if the employee fails to correct his or her attendance issues. The employee's work ethic and general motivation may be in a downward spiral, so an enhanced documentation requirement may actually help the employee focus on the needs of the job and on whether so much absenteeism is really necessary. Basically, the employee needs to know that the poor attendance is putting his or her job on the line, and before calling in sick again, he or she needs to think very hard about whether the condition is truly so bad that the employee cannot work. Conclude by emphasizing the bottom line: if the employee is not excited about working for the company, the company will not be excited about having him or her work there, and that kind of attitude will not work in any office the employee is likely to encounter in the future.

In the event of a UI claim under circumstances like this, an employer's best strategy is to argue for chargeback protection under the medical work separation provision of the UI law. A disqualification is basically impossible to achieve in a case involving mere medical absenteeism, due to the wording of the unemployment statutes, so the only other way to get chargeback protection is to have TWC decide that the medical chargeback protection provision applies. The way to do that is to point the TWC decisionmakers in that direction from the outset, without any distracting language about how the medical absences were "misconduct" - all that does in most cases is make a claim examiner or hearing officer think along the lines of "hmmm, no misconduct shown, so charge the employer's account." Thus, start off with a direct statement about how the case is not about misconduct, and continue with a direct appeal for chargeback protection. Here is an example of how such a claim response might be worded (*again, do not copy and paste this into a claim response - the employer should use its own words in order to avoid claim responses that sound like standard boilerplate terminology*):

> We have no issue with Ms. _____ being entitled to unemployment benefits, since we understand that her medical absences were out of her control. However, in view of the small size of our company, and the number of times she was not at work due to medical problems, we feel that our tax account should not be charged. Her absenteeism rate was ____%, which unfortunately placed a huge burden on the other employees in our small office. We tried as long as we could to accommodate her problems, but it reached the point where the other employees had too much stress to continue like that, and we reluctantly had to replace Ms. _____ due to her medical unavailability for work. Since the work separation was the result of her medical problems, please protect our account from chargeback.

If the employer loses on the chargeback issue, it should appeal all the way up to the Commission, if necessary, and continue to make the same points about the medical nature of the work separation.

MEDICAL INFORMATION CONFIDENTIALITY POLICY

The Company strives to protect the privacy of its employees' medical information to the greatest possible extent. To that end, we provide the following guidelines regarding the confidentiality of medical information:

1. "Medical information" is any information, data, or documentation relating to an employee's mental or physical condition. The term includes, but is not limited to, oral, written, or digital information concerning an employee's mental or physical condition; medical records; dental records; disability records; workers' compensation records; medical leave records; genetic information; health insurance information; and/or information concerning visits or payments to any health care professional, hospital, emergency room, or other type of short- or long-term health care facility.

2. Any medical information concerning employees will be maintained in separate, confidential medical files apart from regular personnel records. Only authorized employees may ever have access to such files.

3. Employees are hereby notified that medical information concerning employees is absolutely confidential under state and federal laws and may not be discussed at any time with any person under any circumstances, unless an employee needs to do so in order to carry out his or her job duties, or unless the person discussing the information is talking or otherwise communicating with the subject of the information at that person's invitation. If an employee is concerned about a possible medical condition on the part of a coworker, the employee must not discuss such concern with anyone other than [designate the person to whom such concerns should be brought].

4. Any employee who is found to have discussed medical information about another employee with anyone else in violation of this policy, or who is found to have released such information without authorization, will be subject to severe disciplinary action, up to and possibly including immediate termination from employment. In addition, state and federal laws may subject such an employee to both civil and criminal action in a court of law.

NEUTRAL ABSENCE CONTROL POLICY

An absence control policy that is neutral on its face (otherwise known as a "facially-neutral absence control policy") can sometimes help in situations with employees who miss so much time from work that their work is simply not getting done, and the work of the entire department or even company can be delayed. In such cases, having a neutral absence control policy can sometimes help. The idea is to set an outside limit on the overall amount of absenteeism that an employee can have before being subject to being replaced due to unavailability for work. The neutrality of the policy can help an employer demonstrate that if an employee out on potentially job-protected leave is replaced, the work separation had nothing to do with whatever caused the leave to occur, but rather had to do with the limit being reached under the policy. There are certain things that should not be counted toward such a policy, such as military leave, jury duty, time spent voting (up to two hours per election), and time missed from regular or alternative duties for work-related medical examinations or care (that is work time). Moreover, few policies are exception-proof, and this is one such policy. Special situations exist in which a company might need to take extra care. For example, the FMLA prescribes up to twelve weeks of job-protected leave for eligible employees of covered employers. Employers with 15 or more employees are covered by the ADA and may need to allow more time for employees with disabilities than normally provided under the policy if to do so would be a reasonable accommodation for such employees.

Case law generally supports the use of neutral absence control policies. In the area of workers' compensation, in which avoidance of retaliatory discharge liability under Chapter 451 of the Texas Workers' Compensation Act is of great importance, a leading case is *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313 (Tex. 1994) ("Uniform enforcement of a reasonable absence-control provision, like the three-day rule in this case, does not constitute retaliatory discharge."). See also *Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309 (Tex. 2015). Under the ADA, which can require extended leave if such an accommodation is "reasonable", i.e., can be made without undue hardship to the business, an important case for Texas employers is the Fifth Circuit's decision in *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) ("... courts are in agreement that regular attendance is an essential function of most jobs." … An employee who cannot be present at work on a regular basis is "not otherwise qualified" to perform the job.) The court in *Hypes* concluded that when attendance in the workplace is necessary for productive work to be accomplished, an employee who cannot be present at work on a regular basis is "not otherwise qualified" to perform the job. Similarly, the Fifth Circuit ruled in 2003 that "[re]porting on time and regular attendance is (sic) an essential function of any job." (*Smith v. Lattimore Materials Co.*, 287 F. Supp. 2d 667, 672 (E.D. Tex.), *affirmed*, 77 F. App'x 729 (5th Cir. 2003)). See also *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), citing the Fifth Circuit's *Hypes* decision with approval and collecting similar cases from other circuits; also *Whitaker v. Wisconsin Dept. of Health Services*, 849 F.3d 681 (7th Circuit 2017) (Rehabilitation Act case). Still, in *Carmona v. Southwest Airlines*, 604 F.3d 848 (5th Cir. 2010), even though the employee missed 33% - 50% of the workdays in each month, he was able to prevail on his ADA claim due in part to evidence that his job involved flexible scheduling and that other employees had been treated more favorably under the employer's point-based attendance policy than he had been. As these cases show, each case is different, and slight differences in facts can sometimes produce vastly different outcomes. Ultimately, application of a neutral absence control policy is a balancing act that requires an equal mix of consistency, discernment, and readiness to be flexible when needed. Without a doubt, any employer with a case like this involving any kind of leave protection law should seek the counsel of an experienced employment law attorney prior to taking adverse action against an employee.

(Suggestion: if adopted, this policy may be titled something like "Limitations on Leaves of Absence". The period of six months is not any kind of requirement, but is only an example. Courts have found in favor of employers in cases involving periods as short as several weeks, and in the *Carrozzo* case cited above, the neutral policy that supported a finding of non-discrimination under Chapter 451 was a three-day no-call, no-show rule.)

LIMITATIONS ON LEAVES OF ABSENCE

With the exception of leaves of absence for military duty, no leave of absence, by itself or in combination with other periods of leave, may last longer than six months. Any employee who for any reason or combination of reasons misses a total of six months of work in a twelve-month period, or a total of nine months of work in an eighteen-month period, will be separated from employment due to unavailability for work, subject to any reasonable accommodation duties the company may have under the ADA or similar law. Any employee so separated will be eligible for rehire and will be able to apply for any vacancies that may exist at any given time, depending upon qualifications and availability of job openings.

PERSONNEL FILES POLICY

(General information about personnel files: Federal law does not specifically require employers to maintain "personnel files", and it does not regulate the question of whether and to what extent employers must allow employees to view, copy, or add documents to their personnel files. However, many of the kinds of documentation needed to defend against discrimination claims and lawsuits, and other types of employment actions, are normally kept in personnel files. Some states have laws requiring employers to give certain degrees of access to their files. Other states (such as Texas) leave that up to an employer and employee to work out between themselves. If you are in doubt about the prevailing legal requirements, be sure to consult an attorney. For more details about personnel files, see the topics "Personnel Files - General" and "Personnel Files - Details" in the Pay and Policies section of *Especially for Texas Employers*. Although everything in the sample policy that follows is optional, except for the employer's duty to safeguard the confidentiality of the information in the files, the sections that most companies do not allow are designated with "[Optional for employers:]".)

Personnel Files

The Company keeps certain records relating to your employment in a personnel file. The documents contained within that file are the property of the Company and must be maintained for government and Company recordkeeping purposes. Some employment records are kept in separate files, such as records relating to medical conditions and leave, records relating to investigations, and records relating to I-9 requirements. All files connected with an employee are considered strictly confidential, and access will be limited only to those who have a job-related need to know the information and who have been authorized to see the file in question.

If an employee wishes to view the contents of his or her personnel file, the employee should report during off-duty time or, with permission from his or her immediate supervisor, during work time to the Human Resources office and file a written request with the records clerk [or other designated individual]. The clerk will verify your identity and show you to a table where you can view the contents of the file. [Optional for employers:] If you would like to get a copy of a company record relating to your employment, you should let the clerk know which document(s) need to be copied. Copies are ten cents apiece, payable in advance.

You may not take or alter any document found within your personnel file. If you disagree with one of the documents, you may ask the Human Resources Manager for permission to add a document containing your comments regarding the document with which you disagree.

[Optional for employers:] Both at and following the time you separate from employment, you may make copies of documents in your personnel file if you wish. Copying of such documents should be arranged with the Human Resources office and will cost ten cents per copy, payable in advance. Your personnel file will be maintained in company archives in accordance with all applicable legal requirements.

PROPERTY RETURN SECURITY DEPOSIT AGREEMENT

A common problem for employers is how to deal with costs associated with loss or unusual damage to equipment issued to employees in connection with their jobs. Going to court against the employees would generally be prohibitively expensive in terms of time, trouble, and expense when measured against the expected return. If an employee causes a loss during employment, it is easy enough to have the employee repay the loss in installments from future paychecks, as long as the deductions do not take the employee below minimum wage and are made with the employee's written authorization. However, the solution is not so easy when the loss first becomes apparent at the time the employee leaves the company. There would be no series of future paychecks from which installment payments could be made. Although a properly-worded wage deduction authorization agreement would make it possible to deduct a loss from the final paycheck in a lump sum, such a deduction could not take the final paycheck below what would amount to minimum wage, and if there were a balance remaining, the employer might well have to absorb it. For those reasons, some employers utilize what is sometimes called a "property return security deposit", which amounts to a type of fund in which money is held in escrow against the possibility that it might be needed to pay for the reasonable cost of repairing or replacing lost or damaged items that were checked out to the employee in connection with the employee's work. Such a security deposit is normally composed of money contributed each pay period by the employee. It would be entirely within the bounds of the FLSA and the Texas Payday Law to deduct a specified amount from an employee's pay each pay period, as long as the deduction met the following two requirements:

1. the deduction does not take the employee below minimum wage (see 29 C.F.R. 531.3(d); Field Operations Handbook Section 30c03(a) and 30c04(7) (1988)); and
2. the deduction is authorized in writing by the employee (see Texas Labor Code § 61.018(3) and 40 T.A.C. § 821.28(b)).

For maximum protection from the risk of a Texas Payday Law wage claim, it would be advisable to cover the property return security deposit in three different places: 1) a separate policy regarding the deposit in the employee handbook (have the employee initial or sign such a section); 2) a standalone agreement wherein a) the employee agrees to the necessary deductions, and b) the conditions for use of the deposit by the employer and/or the return of all or a portion thereof to the employee are addressed; and 3) within the list of deductions covered in the general wage deduction authorization agreement that every employer should utilize with employees.

Employers should keep in mind that a property return security deposit should not be used as a means of getting employees to pay for what should be considered normal business costs. For example, employers should not take normal wear and tear out of such a deposit. That happens to equipment all the time and is a normal cost of doing business that should not be passed on to employees. (For more on legal risks associated with deductions for out-of-pocket business expenses, see"Deductions for Other Costs to the Employer".) Similarly, loss of an item should not be viewed as an opportunity for an upgrade. If a particular type of cell phone or pager is lost, replace the item that was lost - do not purchase a better model at a higher price and effectively force the employee to finance the company's equipment improvements. Deductions like this work as long as both parties act reasonably and maintain a proper sense of balance. In short, do not take advantage - take only what is needed to make the company whole.

Important disclaimer: The form available below is only a sample and is furnished only as an illustration of its category. It is not meant to be taken and used without consultation with a licensed employment law attorney. If you are in need of a form for a particular situation, you should keep in mind that any sample form such as the one available here would need to be reviewed, and possibly modified, by an employment law attorney in order to fit your situation and to comply with the laws of your state. Downloading, printing, reproducing, or using this or any of the other forms in this book in any manner constitutes your agreement that you understand this disclaimer and that you will not use the form for your company or individual situation without first having it approved and, if necessary, modified by an employment law attorney of your choice. Comments about certain provisions of the agreement, marked with asterisks and numbers, are notes only for the employer's attention and should, of course, not be included in the form to be signed by the employees.

Sample Property Return Security Deposit Agreement

I understand and agree that my employer, _____ (the Company), may deduct $ _____ from my pay each pay period for the purpose of paying it into a property return security deposit that will be held in my name. I understand that no such deduction will reduce my pay below minimum wage for the pay period in question. I further understand that if I return all company-owned property issued to me in connection with my employment in good shape, notwithstanding normal wear and tear, the full amount of the property return security deposit will be paid to me within ____ days of the date that the last of such items have been returned to the Company, and that if I fail to return an item, or if an item I return must be

repaired to be usable by another employee or to restore it to its condition before I damaged it, the Company may deduct the reasonable cost of replacing or repairing the item from the amount of the property return security deposit and pay any remaining balance to me within ____ days of the date such deduction is made.

I give my permission for the Company to deduct $ _____ from my pay each pay period for the above purpose.

_____
(Employee's name)
(Name of company representative)

_____
(Date) (Date)

To cover the issue of deductions toward the property return security deposit, the wage deduction authorization agreement (a sample form is at http://www.twc.state.tx.us/news/efte/wage_deduction_authorization_agreement.html) could have an item like this:

> Amounts paid into the Property Return Security Deposit under the agreement of the same name, a copy of which I have separately received and signed;

[*Note for the employer (do not include this note in the actual form to be signed by employees) - deductions for a property return security deposit may not take an employee's pay below minimum wage under the FLSA.*]

Again, it is not recommended to simply adopt this sample form for your situation without first seeking the advice of an employment law attorney.

Many employers are concerned about inappropriate relationships within a company's workforce. The extent to which an employer may legitimately respond to what it determines is inappropriate behavior between employees in terms of interpersonal relationships is really dependent upon the employer's policy. The answer, at least in the area of employment law, is that while an employer should not necessarily try to limit any and all on- or off-duty contact or relationships between employees, it may certainly impose reasonable limits on any such relationships or conduct when the conduct threatens work relationships, jeopardizes work flow, or harms the employer's reputation among its customers or in the community at large. An example of a policy that an employer might adopt with such concerns in mind could be something like the following:

Policy Regarding Interpersonal Relationships and Fraternization

While XYZ Company encourages a collegial and supportive atmosphere at work for its employees, interpersonal relationships between employees may become a concern if they have the effect of impairing the work of any employee; harassing, demeaning, or creating a hostile working environment for any employee; disrupting the smooth and orderly flow of work within the office; or harming the goodwill and reputation of the company among its customers or in the community at large. For this reason, XYZ Company reminds its employees that the following guidelines apply in their relations with other employees, both on and off duty:

1. A supervisor should not engage in any form of relationship with a subordinate employee that could potentially have the appearance of creating or promoting favoritism or special treatment for the subordinate employee. In the event of such a relationship, the employees involved will be given the opportunity to choose which of them will be reassigned to an alternative position where favoritism or special treatment will not be an issue, or one or both employees may be subject to dismissal, depending upon the nature of the situation. All employees, especially managers, are reminded that the qualities of good judgment, discretion, and compliance with guidelines are all taken into account when considering future advancement opportunities and salary increases.
2. If a relationship or social activity between two or more employees:
   a. has the potential or effect of involving the employees, their coworkers, or the company in any kind of dispute or conflict with other employees or third parties;
   b. interferes with the work of any employee;
   c. creates a harassing, demeaning, or hostile working environment for any employee;
   d. disrupts the smooth and orderly flow of work within the office, or the delivery of services to the company's clients or customers;
   e. harms the goodwill and reputation of the company among its customers or in the community at large; or
   f. tends to place in doubt the reliability, trustworthiness, or sound judgment of the persons involved in the relationship,

the employee(s) responsible for such problems will be subject to counseling and/or disciplinary action, up to and potentially including termination of employment, depending upon the circumstances.
3. No employee may use company equipment or facilities for furtherance of non-work-related activities or relationships without the express advance permission of [designated member of management].
4. Employees who conduct themselves in such a way that their actions and relationships with each other become the object of gossip among others in the office, or cause unfavorable publicity in the community, should be concerned that their conduct may be inconsistent with one or more of the above guidelines. In such a situation, the employees involved should request guidance from [designated member of management] to discuss the possibility of a resolution that would avoid such problems. Depending upon the circumstances, failure to seek such guidance may be considered evidence of intent to conceal a violation of the policy and to hinder an investigation into the matter.

Friendships and social contacts between employees are not a matter of concern as long as they are consistent with the above guidelines. Employees may address any questions on this policy to [designated member of management].

Disclaimer: This is only a sample policy and does not constitute an official policy or recommendation of the TWC or the State of Texas. As is the case with any of the sample policies and employment forms found in this book, it is best to have such a policy reviewed by an employment law attorney of your choice who can consider all of the factors and aspects of the situation and determine whether the policy meets your company's needs.

If your company adopts such a policy, all employees should sign for copies of the policy and be trained in what it means. The best way to do that would be to hold a mandatory staff meeting, distribute an agenda to all employees in which discussion of the policy appears as an action item, have all employees sign an attendance roster, hand out copies of the new policy, discuss it, hold a question-and-answer session with everyone present, pass out copies of acknowledgement of receipt of policy forms for everyone to sign specifying the

policy received, collect the signed forms, adjourn the meeting, and distribute copies of the minutes of the meeting in which the action items accomplished at the meeting are set forth with specificity.

REQUEST FOR CHANGE IN EMPLOYMENT STATUS

I am requesting the following change(s) in my employment status with [name of company]:

- ❑ **Transfer in position** from _____ (my current position) to _____ (the position I would like to have).
- ❑ **Change in hours of work** from my current schedule of _____ to _____ to the new hours of _____ to _____.
- ❑ **Change in days of work** from my current schedule of _____ to _____ to the new days of _____ to _____.
- ❑ **Change in work location** (if applicable - this would usually apply to telecommuting requests).

Result(s) of transfer in position: I understand that if the Company grants my request, the following change(s) will also occur:

- ❑ **Change in pay rate** from _____ per _____ to _____ per _____.
- ❑ **Change in department** from _____ to _____.
- ❑ **Change in supervisors** from _____ to _____.
- ❑ **Change in schedule** from _____ to _____ to the new hours/days of _____ to _____.
- ❑ **Change in work location** from _____ to _____.
- ❑ **[Loss][Addition] of [bonus]/[parking space]/[type of benefit]/[access to certain type of training]/[access to type of resource]**.

I understand that if the Company decides to grant my request and hires, transfers, trains, or otherwise changes the employment status of any employee in response to it, I will most likely not be able to withdraw my request at a later date and that the change will remain in effect.

I further understand that no particular change is guaranteed; that if the Company grants my request, it may later rescind the decision at its discretion; that any granting of such request is contingent upon my meeting the performance standards for my position; and that the granting or denial of this request will not alter the employment-at-will relationship that I have with [name of company].

/signed/

_____
Employee

_____
Date

SEARCHES

The Company reserves the right to conduct searches to monitor compliance with rules concerning safety of employees, security of company and individual property, drugs and alcohol, and possession of other prohibited items. "Prohibited items" includes illegal drugs, alcoholic beverages, prescription drugs or medications not used or possessed in compliance with a current valid prescription, weapons, any items of an obscene, harassing, demeaning, or violent nature, and any property in the possession or control of an employee who does not have authorization from the owner of such property to possess or control the property. "Control" means knowing where a particular item is, having placed an item where it is currently located, or having any influence over its continued placement. In addition to Company premises, the Company may search employees, their work areas, lockers, personal vehicles if driven or parked on company property, and other personal items such as bags, purses, briefcases, backpacks, lunch boxes, and other containers. In requesting a search, the Company is by no means accusing anyone of theft, some other crime, or any other variety of improper conduct.

There is no general or specific expectation of privacy in the workplace of XYZ Company, Inc., either on the premises of the Company or while on duty. In general, employees should assume that what they do while on duty or on the company premises is not private. All employees and all of the areas listed above are subject to search at any time; if an employee uses a locker or other storage area at work, including a locking desk drawer or locking cabinet, the Company will either furnish the lock and keep a copy of the key or combination, or else allow the employee to furnish a personal lock, but the employee must give the company a copy of the key or combination. The areas in question may be searched at any time, with or without the employee being present. As a general rule, with the exception of items relating to personal hygiene or health, no employee should ever bring anything to work or store anything at work that he or she would not be prepared to show and possibly turn over to Company officials and/or law enforcement authorities.

All employees of XYZ Company, Inc. are subject to this policy. However, any given search may be restricted to one or more specific individuals, depending upon the situation. Searches may be done on a random basis or based upon reasonable suspicion. "Reasonable suspicion" means circumstances suggesting to a reasonable person that there is a possibility that one or more individuals may be in possession of a prohibited item as defined above. Any search under this policy will be done in a manner protecting employees' privacy, confidentiality, and personal dignity to the greatest extent possible. The Company will respond severely to any unauthorized release of information concerning individual employees (for more details, see the policy on "Confidentiality").

No employee will ever be physically forced to submit to a search. However, an employee who refuses to submit to a search request from the Company will face disciplinary action, up to and possibly including immediate termination of employment.

SMOKING POLICY

The Company maintains a smoke- and tobacco-free office. No smoking or other use of tobacco products (including, but not limited to, cigarettes, e-cigarettes or vaping devices, pipes, cigars, snuff, or chewing tobacco) is permitted in any part of the building or in vehicles owned, leased, or rented by the Company. Employees may smoke outside in designated areas during breaks. When smoking or otherwise using tobacco or similar products outside, do not leave cigarette butts or other traces of litter or tobacco use on the ground or anywhere else. No additional breaks beyond those allowed under the Company's break policy may be taken for the purpose of using tobacco or similar products. Dispose of any litter properly in the receptacles provided for that purpose.

Please remember to conform to the smoking or tobacco use policies of our customers when working at a customer's site.

All employees are expected to abide by this policy in all respects while at work, whether on company premises, at a customer's site, or while in transit between work locations or assignments, as well as while the employee is off duty, if the employee is on company premises or in vehicles owned, leased, or rented by the company. Being permitted to use tobacco products during breaks is a privilege, as long as such use does not interfere with the employee's work, fitness for duty, or professional appearance. If that privilege is abused, it may be withdrawn altogether.

A more restrictive form of the above policy could take the following form:

The Company maintains a smoke- and tobacco-free office. No smoking or other use of tobacco or similar products (including, but not limited to, cigarettes, e-cigarettes or vaping devices, pipes, cigars, snuff, or chewing tobacco) is permitted at any point during a workday, while on company business, while in transit between work locations or assignments, while at client locations, in any part of a company building or within "x" feet of such buildings, or anywhere on or in company parking areas. There are no designated smoking areas inside or on Company premises, nor does the Company allow smoking breaks during the workday, i.e., no additional breaks beyond those allowed under the Company's break policy may be taken for the purpose of using tobacco or similar products. If returning from a meal break during which you have used tobacco or similar products, do not leave cigarette butts or other traces of litter or tobacco use on the ground or anywhere else. Dispose of any litter properly in the receptacles provided for that purpose.

Employees may not have the smell of tobacco smoke about their persons during work hours or while on company business. In general, employees should not use or consume any substance, the effects or traces of which could interfere with the employee's presentation of a clean and professional appearance to clients and the public in general.

Please remember to conform to the smoking or tobacco use policies of our clients when working at a client's site.

All employees are expected to abide by this policy in all respects while at work, whether on company premises, at a customer's site, or while in transit between work locations or assignments, as well as while the employee is off duty, if the employee is on company premises or in vehicles owned, leased, or rented by the company. Being permitted to use tobacco or similar products while off duty is a privilege, as long as such use does not interfere with the employee's work, fitness for duty, or professional appearance. If that privilege is abused, it may be withdrawn altogether.

POLICY REGARDING USE OF SOCIAL MEDIA BY EMPLOYEES

The following is excerpted from NLRB memo OM 12-59 (May 30, 2012, online at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd) and is a social media policy that was found by the NLRB to be lawful. It is reproduced here in its entirety. It is important to keep in mind that the NLRB's position on social media policies is still evolving and can be very tricky. Thus, it would be advisable to have your company's policy reviewed by an experienced labor law attorney before putting it into place.

Social Media Policy

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly-expanding world of electronic communication, social media can mean many things. The term "social media" includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal, or diary, personal web site, social networking or affinity web site, web bulletin board, or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy, and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers, or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video, or audio that reasonably could be viewed as malicious, obscene, threatening, or intimidating, that disparage customers, members, associates, or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion, or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer], or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how, and technology. Do not post internal reports, policies, procedures, or other internal business-related confidential communications.

- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website, or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers, or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] e-mail addresses to register on social networks, blogs, or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.

VACATION AND SICK LEAVE

Vacation Leave

- Specify the categories of employees who are eligible to accrue and use paid vacation leave; i.e. full-time, temporary, or part-time employees. As with sick leave, explain how your company defines "full-time" and "part-time".
- Describe how and at what rate vacation leave is earned and explain whether the company allows carryover of vacation leave from year to year, as well as whether the company pays employees for unused vacation leave when they leave the company.
- Specify whether the vacation time is earned on a monthly basis, by pay period, or after a certain period of service with the company, such as one year.
- State the company policy for payment of unused vacation in the event of layoffs or other work separations. Explain whether there is a distinction between those who voluntarily separate from the company and those who are discharged.

Sick Leave

- Specify the categories of employees who are eligible to accrue and use paid sick leave; i.e. full-time, temporary, or part-time employees. Explain how your company defines "full-time" and "part-time".
- Describe how and at what rate sick leave is earned and explain whether the company allows carryover of sick leave from year to year, as well as whether the company pays employees for unused sick leave when they leave the company.
- Specify whether the sick leave time is earned on a monthly basis, by pay period, or after a certain period of service with the company, such as one year.
- Describe how employees qualify to use sick leave for periods of absence and whether the company may require medical documentation in order to use available paid sick leave.

No Texas or federal law requires private-sector employers to provide paid or unpaid leave of any kind, although some amount of unpaid leave may be necessary as a reasonable accommodation in the event of a disability, pregnancy, or other condition protected under a specific statute. In the area of family or medical leave, the only employers that are required to provide up to 12 weeks of unpaid job-protected leave under the federal Family and Medical Leave Act are those with 50 or more employees stationed within 75 miles of the employee who is to take such leave, and even then the employee has to meet the various eligibility conditions in order to be entitled to the leave. However, most employers do provide some kind of paid leave, in varying amounts that are up to a company to determine for itself. If such leave is promised in a written policy or agreement, the leave is an enforceable part of the wage agreement under the Texas Payday Law. The written policy or agreement will be enforced according to what it provides.

Accrued Leave Payouts

No Texas or federal law requires employers to make payouts of accrued but unused paid leave, although in rare instances, usually involving express contracts, some courts have required such payments to former employees. That is a matter left to employers to specify in their company policies. Thus, it is very important for employers to develop a clear, preferably written, policy regarding paid leave and follow it exactly. If the policy is silent on what happens to accrued, untaken leave, it is not enforceable under the Texas Payday Law. An example of a policy that clearly states a company's position would be as follows:

> Generally, ABC Company does not pay accrued [type of] leave to employees who leave employment. Any unused paid [type of] leave is forfeited upon an employee's work separation. However, unused [type of] leave may be paid out under the following circumstances:
>
> 1. If an employee is involuntarily separated from employment for economic reasons as part of a company reorganization or a reduction in the workforce, the employee will receive the full balance of accrued, but unused [type of] leave.
> 2. If an employee retires from employment pursuant to the Company's retirement policy, the employee will receive the full balance of accrued, but unused [type of] leave.
> 3. If an employee voluntarily resigns from employment with at least two weeks' advance written notice, the employee will receive the full balance of accrued, but unused [type of] leave.
> 4. If an employee voluntarily resigns from employment with less than two weeks' notice, but with at least one week's advance written notice, the employee will receive fifty percent (50%) of the balance of accrued, but unused [type of] leave.
>
> Paid or unpaid leave time may not be counted toward a notice period under this policy. Any payment made under this provision will be subject to set-offs and deductions for any amounts due or owing pursuant to legal requirements and to the wage deduction authorization agreement signed by the employee.

For a simpler policy than the one above, see "Accrued Leave Payouts" in the article on the Texas Payday Law.

Remember the general rule that any written promises regarding compensation, including paid leave, should be followed exactly as written, because that is how the Texas Payday Law will enforce such guarantees. While not having a written paid leave policy can seem tempting from the standpoint that non-written leave policies cannot be enforced under the Texas Payday Law, that can lead to other problems such as lack of consistency, complaints from aggrieved and confused employees, and even discrimination complaints. Past practices sometimes become enforceable in court if a discrimination charge is based on unpaid compensation. Finally, if an employee entitled to a payout of accrued paid leave is also subject to a court order for child or spousal support, the amount of wage withholding specified in the court order may have to be made from the amount corresponding to the leave payout. For details, see the final paragraph of the topic on final pay for commissions and bonuses in the article on the Texas Payday Law.

VIDEO SURVEILLANCE /SEARCH CONSENT FORM

Acknowledgement, Consent, and Release

I acknowledge that I have received a copy of XYZ Company's updated policies, that I have been given the opportunity to read and ask any questions that I might have about the same, and that by signing this acknowledgement, I agree to adhere to the policies as a condition of my employment and/or continuing employment with XYZ. I understand and agree that in acknowledging and signing this form, no contract of employment is hereby created, and further understand that no promise or guarantee of employment for any particular term is hereby made. I also acknowledge that I am an employee-at-will and that either I or XYZ may end the employment relationship at any time, with or without notice or cause. I further acknowledge that my failure to adhere to these policies may subject me to disciplinary action, up to and possibly including immediate termination without warning.

In accordance with XYZ's policy regarding searches, I understand that all desks, storage areas, lockers, and all vehicles owned, financed, or leased by XYZ or used by XYX to transport employees, goods, and/or products are subject to search at any time without my knowledge, presence, or permission. With the exception of my personal vehicle, I understand I am prohibited from locking or otherwise securing any such desk, storage area, locker, or vehicle with any lock or locking device not supplied or approved by XYZ. If I use my own lock on any such item, I agree to give my supervisor a copy of the key or combination to the lock so that the company may open the lock at any time that it may deem such action necessary. In the event that a search of my personal vehicle becomes necessary, I agree to allow personnel designated by XYZ to conduct such a search at any time the company may direct during my duty shift.

I further understand that in order to promote the safety of employees and company visitors, as well as the security of its facilities, XYZ may conduct video surveillance of any portion of its premises at any time, the only exception being private areas of restrooms, showers, and dressing rooms, and that video cameras will be positioned in appropriate places within and around XYZ buildings and used in order to help promote the safety and security of people and property. I hereby give my consent to such video surveillance at any time the company may choose.

I hereby release XYZ from all liability, including liability for negligence, associated with the enforcement of these policies and/or any searches or surveillance undertaken pursuant to these policies.

_____
Signature of Employee

_____
Date

_____
Employee's Name - Printed

_____
Company Representative

_____
Date

VOLUNTEER APPLICATION AND SERVICE AGREEMENT

Name _____ __

Telephone # _____ - _____ - _____

Address _____

Town _____ Zip _____

Are you 18 years of age or older?
Circle one: YES NO

IF UNDER AGE 18, PARENT OR GUARDIAN MUST SIGN BELOW

Description of volunteer services to be performed and where:

Date Started: _____
Day(s) Volunteered: _____

Emergency Contact: _____
Phone # _____

I understand and agree that:

- If I am accepted as a participant in a charitable program to perform the volunteer services described above for the Aid Association of Austin (AAA), I will not be an employee of AAA, I will not be entitled to any compensation for my services (other than selected items of food if I am volunteering to help with the Capital Area Food Bank), and I will not be entitled to any benefits from AAA.
- If I am volunteering services to the Capital Area Food Bank under the auspices of AAA, I will be required to comply with all regulations that might apply to anyone working at or for the food bank operations.

I understand and agree that no particular schedule or hours of service are guaranteed for the volunteer work I will perform for AAA, that AAA may determine at any time that it no longer needs such volunteer services performed, and that I may decide at any time to end my volunteer activities for AAA. I further understand that AAA assumes no responsibility or liability for my safety or for the consequences of my activities.

Signature: _____
Volunteer

Date: _____

IF YOU ARE NOT 18 YEARS OF AGE OR OLDER, YOUR PARENT OR GUARDIAN MUST COMPLETE THE FOLLOWING STATEMENT AND SIGN IT.

I have read the Volunteer Service Agreement and confirm that _____ has my permission to participate as a volunteer in the program as described for the Aid Association of Austin.

Signature: _____

Date: _____
Parent or Guardian

Signature: _____
AAA Representative

Title: _____ Date: _____

WAGE DEDUCTION AUTHORIZATION AGREEMENT

(***Note for employers: Do not include the information in parentheses here in any actual form that employees sign.*** Texas Payday Law Rule 821.28(b) requires written authorizations for deductions to be as specific as possible as to the amount and purpose of the deduction and to make it clear that the deductions will be made from the employee's wages. Rule 821.28(d) requires deductions to be applied to their intended purposes. When drafting such an agreement, try to be specific enough to where a reasonable employee would be able to predict how much a particular deduction would be in a particular situation. ***What appears below is not an official form*** *- it is only a sample that is meant to illustrate how such deductions may be authorized in writing.*)

----- begin sample form -----

WAGE DEDUCTION AUTHORIZATION AGREEMENT

I understand and agree that my employer, _____ (the Company), may deduct money from my pay from time to time for reasons that fall into the following categories:

(1) my share of the premiums for the Company's group medical/dental plan;
(2) any contributions I may make into a retirement or pension plan sponsored, controlled, or managed by the Company;
(3) installment payments on loans or wage advances given to me by the Company, and if there is a balance remaining when I leave the Company, the balance of such loans or advances;
(4) installment payments on loans based upon store credit that I use for my own personal purchases, including the value of merchandise or services that I purchase or have purchased for personal, non-business reasons using my employee charge account or credit card, an account or credit card assigned to another employee, or a general company account or credit card, regardless of whether such purchase was authorized, and if there is a balance remaining when I leave the Company, the balance of such store credit or charges;
(5) if I receive an overpayment of wages for any reason, repayment to the Company of such overpayments (the deduction for such a repayment will equal the entire amount of the overpayment, unless the Company and I agree in writing to a series of smaller deductions in specified amounts);
(6) the cost to the Company of personal long-distance calls I may make on Company phones or on Company accounts, of personal faxes sent by me using Company equipment or Company accounts, or of non-work related access to the Internet or other computer networks by me using Company equipment or Company accounts;
(7) the cost of repairing or replacing any Company supplies, materials, equipment, money, or other property that I may damage (other than normal wear and tear), lose, fail to return, or take without appropriate authorization from the Company during my employment (except in the case of misappropriation of money by me, I understand that no such deduction will take my pay below minimum wage, or, if I am a salaried exempt employee, reduce my salary below its predetermined amount)[a];
(8) the cost of Company uniforms and of cleaning the uniforms (the Company will deduct only the actual price it pays for uniforms and cleaning costs)[b];
(9) the reasonable cost or fair value, whichever is less, of meals, lodging, and other facilities furnished to me by the Company in connection with my employment[c];
(10) administrative fees in connection with court-ordered garnishments or legally-required wage attachments of my pay, limited in extent to the amount or amounts allowed under applicable laws;
(11) if I take paid vacation or sick leave in advance of the date I would normally be entitled to it and I separate from the Company before accruing time to cover such advance leave, the value of such leave taken in advance that is not so covered;
(12) the value of any time off for absences to which paid leave is not applied (except in the case of those who are paid a fixed salary for fluctuating workweeks,[d] non-exempt salaried employees will have all such unpaid leave deducted from their salary, while exempt salaried employees will experience salary reductions only in units of a full day or week at a time, depending upon the exact nature of the absence, unless partial-day deductions are specifically allowed under federal law); and
(13) if my employer pays any insurance premiums or retirement system contributions ("payments") on my behalf that I would normally make under the applicable Company benefit plan, the amount of such payments made by the Company, such payments being an advance of future wages payable to me.
(14) (any other items appropriate for your company's situation - go over this with your attorney).

I agree that the Company may deduct money from my pay under the above circumstances, or if any of the above situations occur. I further understand that the Company has stated its intention to abide by all applicable federal and Texas wage and hour laws and that if I believe that any such law has not been followed, I have the right to file a wage claim

with appropriate Texas and federal agencies.

_____
Employee's name

_____
Date

_____
Name of company representative

_____
Date

----- end of sample form -----

[*Notes for employers to keep in mind - do not include the following comments in any form used by the company. They are here only to explain about particular types of deductions:*]

[a] (Deductions for this purpose that take the pay below minimum wage, or that cut into an exempt, salaried employee's salary, are allowed only in the case of misappropriation of money by the employee; in addition, the employer must be able to prove that the employee was personally responsible for the misappropriation.)

[b] (Caution: this is a type of deduction that is strongly restricted by federal wage and hour regulations - see the provision for uniform cost deductions in Part 531 of the regulations (Title 29 of the Code of Federal Regulations, Part 531), and also Section 30c12 of the Department of Labor's Field Operations Handbook.)

[c] (See Part 531 of the wage and hour regulations, as well as Sections 30c00 - 30c09 of the Field Operations Handbook.)

[d] (Caution: Unpaid leave may not result in a deduction from the salary of non-exempt employees who are paid a fixed salary for fluctuating workweeks (see section H.3 of the article "Calculating Overtime Pay).)

Note: do not include the footnotes or the parenthetical comments immediately above in an actual form to be signed by employees. The footnotes and explanations are included here only to call your attention to the issues in question. If you have any questions, call the TWC employer Commissioner's office at the toll-free number 1-800-832-9394, or consult an employment law attorney of your choice.

WAGE OVERPAYMENT/UNDERPAYMENT POLICY

General information about wage overpayments: as noted in the article "The Texas Payday Law - Basic Issues", the U.S. Department of Labor considers wage overpayments to be in the same category as wage advances or loans, and thus finds no minimum wage problem with deductions from future wages to recoup such overpayments. However, the Texas Payday Law requires such deductions to be authorized in writing by the employee in order to be valid. The best practice is to cover this idea in a written policy, as illustrated by the example below, and as part of a wage deduction authorization agreement (see item 5 in the sample wage deduction authorization agreement in this book). This policy is of such importance that it should be separately signed by each employee, in addition to the signed written wage deduction authorization agreement. Keep a copy of the signed version of the policy for each employee's personnel file.)

Wage Correction Policy

The Company takes all reasonable steps to ensure that employees receive the correct amount of pay in each paycheck and that employees are paid promptly on the scheduled paydays.

In the unlikely event that there is an error in the amount of pay, the employee should promptly bring the discrepancy to the attention of the General Manager or Payroll Manager so that corrections can be made as quickly as possible. If the employee has been underpaid, the Company will pay the employee the difference as soon as possible. If the employee has been paid in excess of what he or she has earned, the employee will need to return the overpayment to the Company as soon as possible. No employee is entitled to retain any pay in excess of the amount he or she has earned according to the agreed-upon rate of pay. If a wage overpayment occurs, the overpayment will be regarded as an advance of future wages payable and will be deducted in whole or in part from the next available paycheck(s) until the overpaid amount has been fully repaid. Each employee will be expected to sign a wage deduction authorization agreement authorizing such a deduction.

I understand this policy and agree to its terms, I acknowledge that any wage overpayment constitutes an advance of future wages payable to me, and I give permission to the Company to deduct any wage overpayments [choose one: in full or in installments of $_____ at a time] from any subsequent paycheck(s) to which I become entitled until the overpaid amount has been fully repaid.

_____ _____

Signature of Employee Date

We ask that employees realize that pay errors are not intentional and that employees be understanding if such an event occurs.

WORK SCHEDULES AND RECORDING OF WORK TIME

The Company expects all employees to follow their assigned work schedules unless they have made prior arrangements with their supervisors to work at different times. Employees should not clock in prior to their assigned start times, nor should they clock out later than their assigned ending times, unless they have been instructed by a supervisor to start work early or stop work late. Likewise, employees should not clock in until they are ready and prepared to begin their assigned tasks, and should not clock out unless they are completely finished with their work for the day.

The Company must maintain accurate time records on all employees, and each employee bears primary responsibility for enabling the Company to do that. Properly recording work time and complying with the Company's timekeeping procedures are in each employee's job description, regardless of whether such duties are spelled out in such a document. The [title of resource] explains the procedures for using your swipe cards to clock in and out. Employees must follow those procedures exactly. Failure to properly clock in and out is an imposition on the other employees who must handle such negligence and will result in corrective action as outlined below, and may adversely affect raise reviews and performance evaluations as well.

Each employee must fully and accurately record all time that he or she works each day, without exception, according to the rules and procedures that apply in the department to which the employee is assigned. No employee may alter or otherwise modify his or her time record, record work time for another employee, or alter or modify in any way the time record of another employee, unless specifically instructed or allowed to do so by a supervisor. No employee may work without properly recording the time worked. At the end of each pay period, the employee must sign a certification on the time record that the record accurately and completely reflects all time worked during the period in question and that no hours were worked that do not show up in the record.

Any violation of this policy may lead to disciplinary action, up to and potentially including termination of employment, depending upon the severity or repeat nature of the offense.

Important Employer Contact Information

Commissioner Representing Employers	
http://www.texasworkforce.org/svcs/commrs/empcommr.html	(800) 832-9394
Work Opportunity Tax Credit	(800) 695-6879
Labor Law (Payday & FLSA Questions)	(800) 832-9243
Commissioner Representing Labor	(800) 832-2829

TWC Program Numbers

Tax Department — Austin, Texas	(800) 832-9394 (OPTION 1) (direct line: (512) 463-2700)
TWC Posters	(512) 463-2747
Quarterly Report Forms	(512) 463-2749
Tax Rate Information	(512) 463-2756
New Employers	(512) 463-2731
Workforce Division	
Foreign Labor Certification	(512) 475-2571
Career Schools	(512) 936-3100
Labor Market Information	(866) 938-4444
BLS-790 Reports	(800) 252-3485
Industry Verification Reports	(800) 227-7816
OES Wage Survey	(800) 252-3616
Career Development Resources	(800) 822-7526
Find Local Workforce Centers	http://www.texasworkforce.org/dirs/wdas/wdamap.html
Workforce Development Boards	http://www.texasworkforce.org/dirs/wdbs/wdbweb.html
To post job openings, please contact the Workforce Development Board in your area.	
Civil Rights Division	http://www.twc.state.tx.us/customers/jsemp/jsempsubcrd.html

Equal Employment Opportunity Commission	http://www.eeoc.gov	
Dallas		(214) 655-3355
Houston		(713) 653-3320
San Antonio		(210) 281-7600
Internal Revenue Service	http://www.irs.gov	(800) 829-1040
United States Department of Labor — *Wage and Hour Division*	http://www.dol.gov	(866) 487-9243
Arlington		(817) 861-2150
Austin		(512) 236-2560
Corpus Christi		(361) 888-3152
Dallas		(214) 767-6294
Houston		(713) 339-5500
McAllen		(956) 682-4631
San Antonio		(210) 308-4515
West Texas and Panhandle areas		(505) 248-6100

United States Department of Labor - Employee Benefits Security Administration (EBSA) - COBRA and ERISA (972) 850-4500; 1-866-444-3272

United States Customs and Immigration Service (INS)		(800) 375-5283
Tx Comptroller of Public Accounts	http://www.cpa.state.tx.us	(800) 252-5555
Tx Department of Insurance	http://www.tdi.state.tx.us	(800) 578-4677
Tx Department of Licensing and Regulation	http://www.license.state.tx.us	(800) 803-9202
Tx Department of Public Safety	http://www.txdps.state.tx.us	
Austin Headquarters		(512) 424-2000
Driver License Customer Service		(512) 424-2600
Workers' Compensation Division, Texas Department of Insurance	http://www.tdi.state.tx.us/wc/indexwc.html	(800) 252-7031 (512) 804-4000

Required Workplace Posters

TWC Link: https://www.twc.state.tx.us/businesses/posters-workplace

US DEPARTMENT OF LABOR —
EMPLOYMENT STANDARDS ADMINISTRATION,
WAGE & HOUR DIVISION
Federal Law requires:
Fair Labor Standards Act
Employee Polygraph Protection Act
Family & Medical Leave Act of 1993
USERRA (military reemployment rights)
(all 4 are available online at http://www.dol.gov/elaws/posters.htm)

US DEPARTMENT OF LABOR —
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (OSHA)
Federal Law requires:
Job Safety & Health Protection (available online at http://www.osha.gov)

OSHA area offices in Texas:
Austin, Corpus Christi, Dallas, El Paso, Fort Worth, and Houston

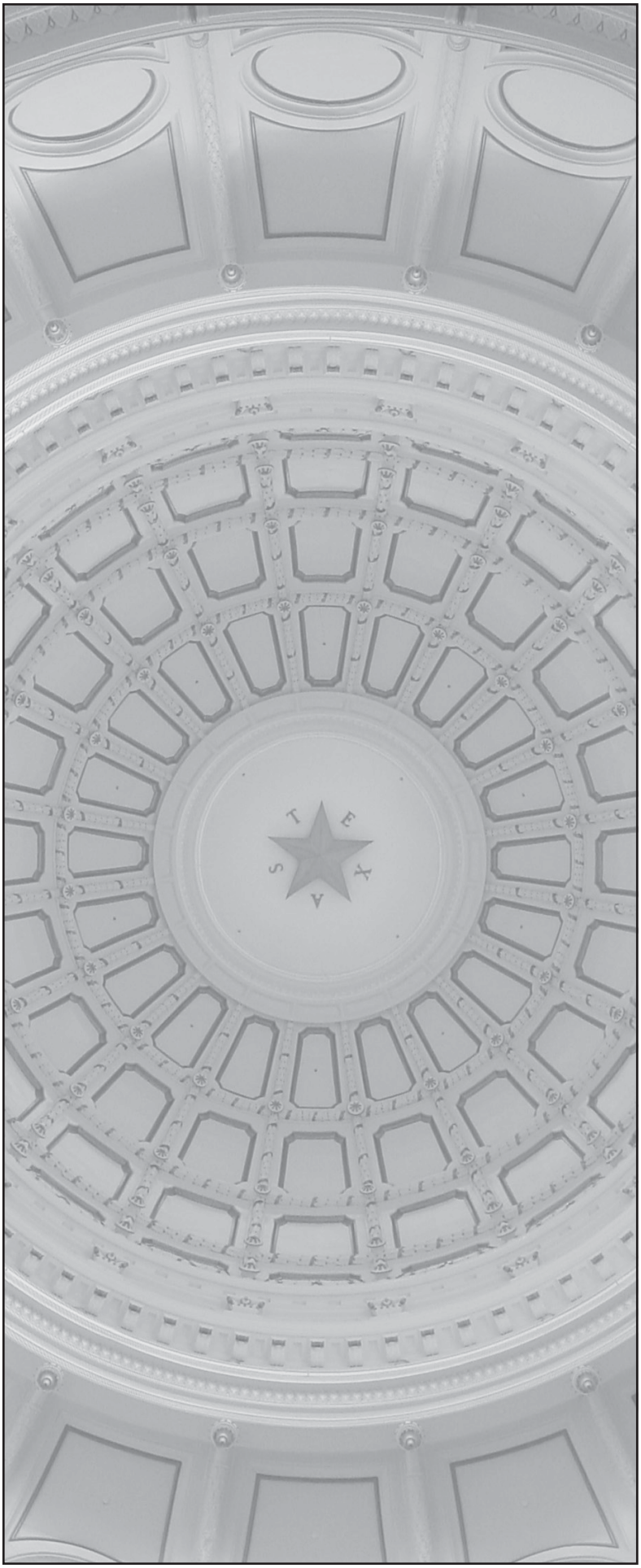
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Federal Law requires:
Equal Employment Opportunity is the Law
American with Disabilities Act of 1990
Genetic Information Non-Discrimination Act
(combined poster is available online at http://www1.eeoc.gov/employers/poster.cfm)

NATIONAL LABOR RELATIONS BOARD
Federal Law requires:
Employee Rights under the NLRA (online at http://www.nlrb.gov/poster)

TEXAS WORKERS' COMPENSATION COMMISSION
State Law requires:
Do or Do not Carry Worker's Comp Insurance
How Employees can Report Workplace Safety Violations
(available online at http://www.tdi.state.ts.us/wc/forms/index.html#employerforms)

TEXAS WORKFORCE COMMISSION
State Law requires:
Texas Unemployment Compensation
Texas Payday Law
(available at 512-463-2747)

New business only: "Employer Information Packet"
1 (800) 832-9394, option 1, option 1
(512) 463-2731



Employment

Law Examples

and

Sample Training

Materials

Employer Policies: Creating Your Human Resources Road Map

(*Editor's note: The following section has been maintained by popular request; however, it has not been updated since 2011. Employers with any questions should call the Employer Commissioner's office at 1-800-832-9394, or else contact their own employment law counsel for guidance.*)

How to Create an Employee Policy Handbook that Works as Hard as You Do

Introduction

Many Texas employers agonize over creating the "perfect" policy handbook for their company. Some even fall victim to "perfection paralysis": in their quest to create an unattainably ideal document; they spend years drafting and redrafting their company handbooks, as if somehow putting the "right" words on paper or hiring the "best" consultant will magically create the workplace environment they desire. Meanwhile, back in the real world, they have employees who are habitually tardy and absent, make excessive personal phone calls, send sexually explicit e-mails, and use the company credit card to make personal purchases – all because nobody ever informed them that these actions were prohibited.

In reality, there is no such thing as a "perfect" policy handbook. However, the good news is that while perfection is impossible, it is not necessary. You have done your drafting job correctly if your handbook tells your employees what is expected of them, what the consequences of failing to meet those expectations will be, and provides a solid basis for taking action and defending against claims of employer unfairness or discriminatory treatment. It can also be an invaluable tool if a workplace situation evolves into an unemployment claim, a discrimination charge, or a harassment lawsuit. The workplace rules and expectations contained in your policy handbook will be a critical foundation for proving work-related misconduct or defending the legality of your actions.

There are many undeniable advantages to having a well written, well thought out policy handbook. Quite simply, a straightforward, clearly written, well-organized employee handbook is your best and most effective tool for introducing common sense into the workplace and communicating with your employees. Your policy handbook serves as written evidence of your company's expectations and requirements as well as of the types of conduct you deem to be totally unacceptable.

While a well-written handbook can be a valuable weapon in your ongoing crusade to simplify the day to day business of managing employees and minimizing possible legal liability, a poorly written handbook can spell disaster. Poor draftsmanship can include adopting language which destroys the company's employment at will status and results in the creation of an implied contract, or omitting crucial policies, disclaimers and information. And, the very worst policies you can have are those which you choose to ignore, selectively enforce, or simply forget about.

Also keep in mind that new developments in employment law are occurring constantly; what is valid and permissible one day can subject you to serious liability the next. This means that your handbook should be considered a "living document" that is continuously evaluated and updated to make sure that it remains compatible with ever-changing local, state and federal laws and court decisions. And, for those employers with operations in several states, the situation is even more complex because employment laws often vary wildly from state to state. Employment policies and practices which are totally legal in Texas may be unlawful in New York or Florida. If you do have multi-state locations, you must also make sure that your policies are legal and up to date in all of the states in which you do business.

Drafting your Policies

The first order of business is deciding what policies need to be included in your handbook. Consider this to be your very best chance to tell your employees what is expected of them, the types of conduct that will not be tolerated, and the consequences that will result if company standards are violated. This paper sets forth a quick checklist of possible topics every Texas employer should seriously consider including in their handbooks, forms, and employment applications.

Too often, employers simply allow company policies to evolve on a case by case basis. Unfortunately, policies and procedures created on such an "ad hoc" basis can lead to confusion, chaos, inconsistent treatment, and sometimes, claims

of discrimination or wrongful termination. If that happens, it can be a very costly and time-consuming experience for an employer. Consequently, more and more employers are using employee handbooks to establish uniform personnel practices, thereby helping to avoid potential lawsuits. When done correctly, an employee handbook is an invaluable personnel tool: in effect, it can provide the company with a human resources road map.

There is no federal or Texas state law that requires employers to commit company policies and procedures to writing. However, in the absence of written policies, day to day company practices can become policy. In other words, what you and your managers do and say in the workplace when dealing with employees – whether it involves paid vacations, the dress code, repeated tardiness, or any other workplace issue – can become policy through action. It is therefore critical to establish who has the authority to amend policies and train managers and supervisors accordingly.

Once you have decided which policies to include in the company handbook, it's time to actually draft the provisions. Because the primary function of an employee handbook is to explain the company's practices, procedures and rules to your workers, write the handbook with your audience in mind. Be sure to follow the "KISS principle": keep it super simple. Every employee should be able to read and comprehend the handbook in its entirety. The policies should be understandable and clear, with a minimum of "legalese". Use as many one-syllable words as you possibly can and keep sentences short and focused. Remember: one idea, one sentence. Define important terms (i.e., "sexual harassment", "drug", "tardiness") to avoid confusion and misinterpretation. Organize the handbook so that it's easy to locate various rules and policies; an index or table of contents can be very helpful in this regard.

On a related note, there is no federal or Texas state law requiring a private sector employer to translate company documents into a language other than English. However, serious safety issues can quickly arise when workers are totally unfamiliar with your workplace procedures. And, if you are going to even attempt to argue that your non-English speaking workers were aware of your policies and fired in violation thereof, you will have to be able to show that steps were taken to actually introduce and explain your handbook to these employees. Such efforts could include mandatory staff meetings where all workers must sign in at which the policies (and any updates) are explained by a worker who speaks both English and the language spoken by the workers. Some larger employers go so far as to hire certified interpreters to translate documents or verbally explain the rules to non-English speaking employees.

There have been claims for unemployment benefits filed with the Texas Workforce Commission in which a non-English speaking worker was fired for a clear violation of company policy. In some instances, these claimants have successfully won their cases and drawn unemployment benefits by arguing that although they signed their former employer's handbook, they never understood what workplace conduct was required or prohibited. Wise employers will take steps to make sure that all employees know the company's expectations.

Distributing Your Policy Handbook

Distributing the handbook to every covered employee is just as important as good drafting of the policies themselves. You can have the most beautifully written and comprehensive handbook in Texas; however, if it remains in your file cabinet, desk drawer, bookshelf or computer, it's totally meaningless. And, as far as your employees are concerned, it simply doesn't exist.

Also keep in mind that if you are to have any hope of prevailing on an unemployment claim filed by a former employee, the Texas Unemployment Compensation Act requires that you be able to prove something called "work-related misconduct." One very common type of misconduct involves actions "in violation of a policy or rule adopted (by the employer) to ensure the orderly work and the safety of employees." Texas courts have long held that for an employer to prove misconduct "in violation of a policy," it must be able to show two things: 1. That a policy in fact existed; and 2. That the employee had actual and specific knowledge of this policy. (*Levelland Independent School District v. Contreras,* 865 SW2d 474 (Tex. App. – Amarillo 1993, writ denied)). The good news here is that to a large extent, you have the opportunity to define "work-related misconduct" for your company through your handbook. The more sobering news is that you are going to be expected to actually get the word out (and prove that your did so) to your employees.

Develop a standard mechanism to distribute the policy handbook to your employees. Many employers provide their policies at new hire training sessions or during company orientation programs. Ask all employees to acknowledge receipt of the company handbook and other documents by signing acknowledgment forms that you

provide. If you are called upon to prove that an employee was actually made aware of your company's policies, such forms are considered the "best evidence" that the employee knew or should have known what was expected of them.

Updating Your Policy Handbook

It's very easy to become complacent about policies and handbooks that are already in existence but haven't been challenged recently. Don't let this quiet before the storm lull you into a false sense of security. Remember: procedures that are routinely ignored (but are promised in a handbook) and outdated or discriminatory policies can quickly turn into a lawsuit in search of an attorney.

Take the opportunity to review, revise and update existing employee handbooks before there is an immediate crisis staring you in the face. All outdated procedures and policies need to be revamped and redrafted. It can also be a very worthwhile investment of time and money to consult with private legal counsel to make sure that your policies are in compliance with current law and court decisions.

You may wish to date stamp any updates or new policies to make sure that all of your employees are aware of and following the newest handbook provisions. Many employers collect and dispose of outdated employee policy handbooks to avoid misapplication or confusion about current company rules and regulations. Employers frequently choose to put their handbooks in three-ring binders. That way, when changes, updates, deletions or revisions are made, it's very easy to remove the old pages and substitute the newest, most up-to-date version of the handbook quickly and with a minimum of trouble.

It is also critical that new and updated policies are distributed to and acknowledged by all employees in a systematic fashion. Just as with the initial distribution of the handbook, a mechanism needs to be established and followed for all updates and changes, including requiring a signed acknowledgement that the distribution was made.

Consistently Enforcing Your Policy Handbook

To get the full benefit of well drafted, widely distributed and carefully updated policies and procedures, it is imperative that they are consistently applied and enforced. To do otherwise is to invite allegations of discrimination under state or federal law.

This is an area where managerial training and consistency is especially important. For example, several landmark sexual harassment cases decided by the United States Supreme Court in 1998 made it very clear that an employer can – and will - be held liable for the discriminatory, harassing acts of its managers. Not only do your managers need to receive adequate training in what your policies say, they need to act in compliance with those policies, every time, with everybody – even with their favorite employees who sometimes "bend the rules."

It is also very important to make it clear to your managers/supervisors and all other employees who has (and doesn't have) the authority to amend your policies. Your managers need to know that they do not have the authority to make any statements that sound like promises, contracts, or policy amendments to your employees; otherwise, you may very well end up paying for those promises.

Conclusion

A carefully drafted, well thought out policy handbook may very well protect you in some extremely tricky situations. Remember: perfection is not the goal here. It is not humanly possible to address every single issue that can arise during the course of the employer/employee relationship. And, new issues are constantly developing that require employers to revise their handbooks to ensure that they continue to be in compliance with the law. However, deciding matters on a day by day basis with no thought to consistency, legality or fairness is simply not an option in the 21st Century. If your handbook is well researched, clearly written, regularly updated and consistently enforced, it is still one of the best tools you have at your disposal.

The bottom line with policies is simply this: make them as clear, straightforward and easy to understand as possible. Carefully evaluate, widely disseminate, and thoroughly explain what it is you expect from your employees and what you simply won't tolerate. Develop policies that you can live with, every time, with everybody. In this complicated and litigious era, you may well find that your policy handbook is your best offense and quite often the only defense in a world that often seems increasingly hostile to employers.

EMPLOYEE HANDBOOK CHECKLIST

Once you decide to adopt, review or revise a policy manual or handbook, certain topics should be addressed. All policies and procedures should be included in the handbook, and every aspect of the employment relationship should be addressed. These areas can be divided into categories such as:

- Employer expectations – Employment at will, attendance, tardiness, progressive discipline, dress code, leaves of absence, job requirements, drug and alcohol testing policies;
- Employee expectations – Compensation, pay, hours of work, overtime, pay days, benefits, grievance procedures, equal employment opportunity policy, sexual harassment, non-discrimination, policy against retaliation, harassment complaint and investigation procedures;
- Administrative issues – Who has the authority to make changes to the handbook and disclaimers.

The following checklist includes some of the major topics that you may wish to address in an employee handbook or policy manual. It is not intended to be an exhaustive list; rather, consider it to be a starting point:

- Employment at Will Statement and Disclaimer – no employment contract has been created, the employment relationship is indefinite in duration;
- Notice of Employer's Right to Unilaterally Change Policy Handbook;
- Non-discrimination and Equal Employment Opportunity Policy;
- Policy prohibiting retaliation;
- Policy against sexual harassment and acknowledgment form;
- Introductory or training period (as opposed to "probationary period");
- Drug and Alcohol Policy;
- Smoking Policy;
- House rules (i.e., use of company credit cards, expense accounts, parking, weather emergencies, behavior by employees when representing the company off site);
- Grievances and complaints;
- Leaves of absence;
- Conflict of Interest and Confidentiality;
- Access to Personnel and Employee Files;
- Accidents and Safety;
- Reference Inquiries;
- Weapons Policy; Acknowledgment, Release and Consent form;
- Zero-Tolerance Workplace Violence Policy;
- Information considered confidential;
- Use of company equipment to make personal telephone calls;
- Telephone monitoring policy;
- Voice mail, e-mail, the Internet;
- Pay days, hours of work, overtime requirements;
- Employee evaluations;
- Discipline, Rules of Conduct, Termination;
- Deductions from pay;
- Absenteeism/Attendance/Tardiness policies;
- Neutral leave of absence policy (duration, procedures for requesting leave, obligations during leave, status of compensation and benefits, return to work);
- Employee benefits;
- Holidays;
- Vacations (eligibility, accrual, pay in lieu, pay upon termination);
- Sick leave (eligibility, pay in lieu, use, pay upon termination, procedures for requesting such leave, FMLA if applicable);

- Other Leaves of Absence (voting, personal, military, funeral, jury duty);
- Form Acknowledging Receipt and Agreement to be Bound By Employee Policy Handbook.

Renee M. Miller, Attorney at Law

CREATING YOUR HUMAN RESOURCES ROAD MAP

THESE SAMPLE FORMS, DISCLAIMERS, POLICIES AND CHECKLISTS ARE MERELY GUIDELINES. NO SINGLE POLICY CAN FIT ALL OR EVEN THE MAJORITY OF EMPLOYERS' NEEDS. WITHIN THE FRAMEWORK OF THE LAW, EVERY EMPLOYER'S POLICIES MUST BE TAILORED BY INDIVIDUAL CIRCUMSTANCES. ALL POLICIES, PROCEDURES AND DISCLAIMERS SHOULD BE DRAFTED BY LEGAL COUNSEL TO ENSURE THAT ALL LEGAL REQUIREMENTS ARE MET.

NEITHER THE STATE OF TEXAS NOR THE TEXAS WORKFORCE COMMISSION IS LIABLE FOR ANY LEGAL ACTION THAT MAY RESULT FROM THE ADOPTION OR USE OF ANY MATERIAL INCORPORATED IN THIS ARTICLE. AGAIN, BEFORE IMPLEMENTING ANY POLICIES, MANAGEMENT SHOULD CONSULT WITH LEGAL COUNSEL TO ENSURE COMPLIANCE WITH APPROPRIATE FEDERAL STATE STATUTES AND CASE LAW TO REDUCE THE POSSIBILITY OF ARBITRATION OR LITIGATION.

This article outlines some of the major topics that should be covered in an employee handbook. Sample policies are presented for many of the topics in order to illustrate what a typical policy in a particular area of employee relations looks like. While the article is an effort to help Texas employers as much as possible with this difficult but essential area of workforce management, it cannot serve as a substitute for individual legal advice from a competent and experienced employment law attorney licensed in Texas or in your other state(s) of operation.

1. At-Will Employment Statement

Texas courts have recognized the employment at will doctrine since at least 1888. Under this doctrine, employees are hired for an undefined and indefinite period of time, meaning that either party may end the employment relationship at any time, with or without notice or a reason. Texas employers are free to fire employees for a good reason, a bad (but not illegal or discriminatory) reason, or for no reason at all.

However, while the at-will doctrine is still alive, the federal and state courts that interpret Texas law are frequently called upon to wrestle with a variety of challenges to this long-established rule of law. Courts will carefully examine an employee handbook to decide whether a fired employee had an employment contract for a specific period of time, meaning they could only be fired for cause. It is critical that any employee policy handbook contains a clear and unequivocal statement that all employment with the company is at will, that the policy handbook does not create a contract for employment, and that the employer retains the right to unilaterally withdraw or amend the handbook at any time, with or without advance notice. All employees should be asked to sign a statement acknowledging receipt of the handbook.

A. Sample At-Will Statement and Disclaimer in Applications for Employment:

I understand that nothing in this application, or in any prior or subsequent written or oral statement, creates a contract of employment or any rights in the nature of a contract. I agree and understand that if I am hired by the XYZ Corporation (XYZ), my employment will be at-will, for an indefinite period of time, and may be terminated at any time, with or without cause or notice, at the option of XYZ or myself. I understand that I have the right to end my employment at any time and that XYZ retains that same right. I also understand that no one has the authority to enter into any contract, agreement or modification of the foregoing unless such contract, agreement or modification is in writing and signed by the president of XYZ.

B. Sample At-Will Statement and Disclaimer in Employee Handbook:

THE POLICIES AND PROCEDURES SET FORTH IN THIS EMPLOYEE HANDBOOK ARE NOT A BINDING EMPLOYMENT CONTRACT. THIS HANDBOOK PROVIDES GENERAL GUIDELINES ONLY AND NONE

OF ITS PROVISIONS ARE CONTRACTUAL IN NATURE. I UNDERSTAND THAT ALL EMPLOYMENT WITH XYZ IS "AT WILL," MEANING THAT MY EMPLOYMENT MAY BE TERMINATED AT ANY TIME, WITH OR WITHOUT NOTICE, FOR ANY REASON OR NO REASON, BY EITHER XYZ OR THE EMPLOYEE.

THIS HANDBOOK IS NOT A CONTRACT GUARANTEEING EMPLOYMENT FOR ANY SPECIFIC PERIOD OF TIME. EITHER XYZ OR THE EMPLOYEE MAY END THIS RELATIONSHIP AT ANY TIME, WITH OR WITHOUT CAUSE, NOTICE OR REASON. NO MANAGER, SUPERVISOR OR REPRESENTATIVE OTHER THAN XYZ'S PRESIDENT OR CHIEF OPERATING OFFICER HAS THE AUTHORTY TO ENTER INTO ANY AGREEMENT GUARANTEEING YOU EMPLOYMENT FOR ANY SPECIFIC PERIOD OF TIME OR TO MAKE ANY WRITTEN OR ORAL PROMISES, AGREEMENTS OR COMMITMENTS CONTRARY TO THIS POLICY. FURTHER, ANY EMPLOYMENT AGREMEENT ENTERED INTO BY THE PRESIDENT OR CHIEF OPERATING OFFICER WILL NOT BE ENFORCEABLE UNLESS IT IS IN WRITING.

THIS HANDBOOK REPLACES AND SUPERCEDES ALL EARLIER XYZ PERSONNEL PRACTICES, POLICIES AND GUIDELINES.

C. Sample Acknowledgement and Receipt of Employee Handbook Form

RECORD OF RECEIPT OF EMPLOYEE HANDBOOK

I (employee) acknowledge receiving the XYZ employee policy handbook. I CLEARLY UNDERSTAND THAT THIS POLICY HANDBOOK DOES NOT CREATE A CONTRACT FOR EMPLOYMENT WITH XYZ, AND THAT XYZ MAY CHANGE OR MODIFY THE POLICIES AND PROCEDURES IN THIS HANDBOOK AT ANY TIME, WITH OR WITHOUT PRIOR NOTICE. I HAVE READ AND UNDERSTOOD THE POLICIES OUTLINED IN THE XYZ HANDBOOK, AND AGREE TO BE BOUND BY THE COMPANY'S RULES AND REGULATIONS DURING MY EMPLOYMENT WITH THE COMPANY. I UNDERSTAND THAT VIOLATING THE POLICIES AND RULES SET OUT IN THIS HANDBOOK MAY LEAD TO DISCIPLINE, UP TO AND INCLUDING TERMINATION.

_____ _____

EMPLOYEE SIGNATURE DATE

2. Making Changes to the Employee Handbook/Requiring Employee Acknowledgment

Employers rarely have trouble with brand new workers refusing to acknowledge receipt of the company's policy handbook. Very few employees will resist an employer's request to acknowledge policies upon hire; however, trouble can arise when new policies are adopted later during the employment relationship or when workers are presented with written disciplinary warnings for violating those policies. Fortunately, employers are not without authority to exercise direction and control in these situations while minimizing the risk of losing an unemployment claim. Be sure to include a written policy that requires employees to acknowledge policy changes or disciplinary warnings with a signature or face discipline up to and including termination.

Many Texas employers have already distributed employee policy handbooks to their employees. Sometimes, these employers have an unfortunate tendency to become lax and complacent about their handbooks if their policies have not been challenged recently. This is a recipe for disaster: the absolute worst policies an employer can have are those it ignores, selectively enforces, or become illegal due to legislative changes and recent court decisions.

The safest course of action is to treat all policy handbooks as works in progress, not one time drafting jobs that are expected to last for the life of the company. It's become very clear in recent years that what is legal, sound employment policy one day may very well result in a lawsuit the next. For example, think of the changes wrought – almost overnight - by the implementation of the Americans with Disabilities Act or the Family and Medical Leave Act. After consultation with legal counsel, all outdated procedures and policies need to be revised to comply with current law. It is also important to

point out that the employer reserves the right to eliminate, add to or modify the handbook's provisions at its sole discretion, with or without notice.

Although employers have the right to change policies at will, it may not be advisable to do so without at least attempting to give advance notice. If a policy change alters an employee's work relationship so much and so adversely that a reasonable employee would quit under the circumstances, the employer could face a loss in an unemployment claim. Aside from unemployment claims, employers could also face a loss in employee morale and productivity with ill-advised or ill-timed policy changes.

Many employers put their employee handbooks in three-ring binders to make it easier to add, delete or update company policy provisions. At a minimum, outdated employee handbooks should be collected and taken out of circulation to prevent misapplication or confusion about current policies. Employers may wish to date new policies or manuals to ensure that all employees are aware of and following the most current provisions.

A. Sample Unilateral Change Disclaimer:

THE POLICIES AND PROCEDURES FOUND IN THIS EMPLOYEE HANDBOOK MAY CHANGE FROM TIME TO TIME AT THE SOLE DISCRETION OF XYZ. XYZ EXPLICITLY RESERVES THE RIGHT TO CHANGE OR MODIFY ANY OF THE PROVISIONS CONTAINED IN THESE POLICIES AND PROCEDURES AT ANY TIME, WITH OR WITHOUT ADVANCE NOTICE.

3. Equal Employment Opportunity (EEO) Policy

There are seven major federal EEO laws that can apply to Texas employers:

1. Title VII of the Civil Rights Act of 1964 (Title VII);
2. Section 1981 of the Civil Rights Act of 1866;
3. The Equal Pay Act of 1963;
4. The Age Discrimination in Employment Act of 1967 (ADEA);
5. The Immigration Reform and Control Act of 1986;
6. The Americans with Disabilities Act of 1990 (ADA); and
7. The Genetic Information Non-discrimination Act of 2008.

Most charges of employment discrimination are brought under Title VII (applicable to both private and public employers with 15 or more employees), the ADEA (applicable to private employers with 20 or more employees), or the ADA (applicable to employers with 15 or more employees). These federal laws prohibit employment discrimination on the basis of race, color, sex, religion, age, national origin, citizenship status and disability. Congress also passed the Civil Rights Act of 1991 which substantially expanded the rights and remedies of plaintiffs under several of these laws.

The Texas Commission on Human Rights Act (the Act) is modeled after Title VII and the federal the Civil Rights Act, and prohibits discrimination on the basis of race, color, religion, disability, sex, age or national origin. Like Title VII, this Act applies to employers with 15 or more employees in each of 20 or more calendar weeks. This Act also created the Texas Commission on Human Rights, a state deferral agency empowered to remedy employment discrimination. The Commission's primary purpose is to provide for the execution of the policies found in Title VII of the Civil Rights Act of 1964, the ADEA, and the ADA. The Commission may bring a civil action against an employer if it finds that the company engaged in an unlawful, discriminatory employment practice.

Every company that is covered by these laws should have a handbook containing an EEO policy which clearly states that discrimination based on race, color, sex, religion, national origin, age, or disability status is strictly prohibited, and that the company complies with all federal and state laws in this regard. It is also important to designate a contact person or persons for employees to go to with questions, problems or complaints. In most larger companies, that contact is generally in the human resources department. Even in smaller companies, make certain that employees are aware that they can bring their concerns to someone other than their immediate supervisor or department head.

Under certain very limited circumstances, it may be permissible to exclude members of a protected class where a Bona

Fide Occupational Qualification (BFOQ) exists. A BFOQ is a requirement necessary and related to the performance of a job. For example, the EEOC has indicated that the BFOQ exception could apply to the consideration of only native-born French persons for the position of maitre d' in an authentic French restaurant. On the other hand, an airline's policy of hiring only female flight attendants because the majority of its customers (who were male business travelers) preferred women attendants was held to violate Title VII. Business necessities, not business preferences, provide a basis for asserting the BFOQ exception. Employers should remember that there is never a BFOQ for race and only rarely is there a BFOQ for sex.

A. Sample Equal Employment Opportunity Policy:

XYZ provides equal employment opportunity without regard to race, color, sex, religion, national origin, age or disability. XYZ conforms with all applicable federal and state laws, rules, guidelines and regulations and provides equal employment opportunity in all employment and employee relations.

XYZ assures that all applicants for employment and all XYZ employees are given equal consideration based solely on job-related factors, such as qualifications, experience, performance and availability. Such equal consideration applies to all personnel actions, including but not limited to recruitment, selection, appointment, job assignment, training, transfer, promotion, merit increases, demotion, termination, pay rates and fringe benefits. XYZ reviews, evaluates and monitors all personnel matters to ensure that they are in accordance with this policy.

XYZ takes seriously and will investigate promptly and thoroughly all charges of alleged discrimination in employment, and informs XYZ employees of their rights in regard to equal employment.

XYZ requires its personnel to act in conformity with the principles outlined in this policy through strict adherence to the above statements and recognizes that the effective application of equal opportunity in employment must involve more than a non-discriminatory policy statement. XYZ recruits, hires, trains and promotes into all job levels the most qualified persons without regard to race, color, religion., sex, national origin, age or disability status. XYZ takes positive steps to eliminate any discrimination from its personnel practices, and creates an environment that encourages equal opportunity for all of its employees.

XYZ distributes information regarding equal employment opportunity through the employee handbook, new employee orientation materials, training materials, staff meetings, and various publications. EEO-related complaints may be made to any of XYZ's human resource counselors who are located in Room 123.

4. Attendance/Tardiness/No Call/No Show Policies

Employers have the right to expect their employees to be present and ready to begin work in a timely fashion on a daily basis. However, based on the number of phone calls received in the employer commissioner's office (and the thousands of unemployment claims that come through the office each year), it seems that the most common reasons Texas employees are fired are chronic absenteeism, repeated tardiness, or for being no call/no shows. Your policy handbook is not only a very good way to communicate your goal of reducing absenteeism and tardiness, it can be used to clearly define your standards of acceptable attendance as well.

There is no federal or state law that sets a national standard for "excessive absenteeism" or "chronic tardiness." In a sense, this gives you the opportunity to make law for your company by communicating your standards in writing, in your policy handbook. The same is true for being a "no call/no show – there is no law telling employees how many times they can simply fail to call or show up before they no longer have a job with you. This is a matter for you to define for your company.

In the area of attendance/tardiness, each employer must create guidelines for attendance and hold all workers to the same standards. Explain in detail the company's position on absences related to illness or injury. Remember: absences due to personal illness are not viewed as work-related misconduct under the unemployment benefit laws. If a worker's final absence is due to a medically verified personal injury or illness, they will most likely be eligible to receive unemployment benefits once they are medically released to return to work. In that case, you will want to request chargeback protection for your account. Further, those employers that are subject to the Family and Medical Leave Act (i.e. those with more than

50 employees stationed within 75 miles of each other) will be required to give 12 weeks of unpaid, job protected leave for certain serious medical conditions of the employees or their family members, or for the birth, adoption, or placement in the home of a foster child.

Establish a policy of counseling employees who violate company attendance/tardiness standards. And, as in all areas of discipline, use consistent and uniform discipline for violations of the policy. Any warnings given to employees for excessive absences or tardiness should be in writing and signed by the employee. Record the reason given by the employee for the absence or tardy arrival. Put all such documentation in the employee's personnel file and be prepared to provide it as evidence if the employee is ultimately fired and files a claim for unemployment benefits with the Texas Workforce Commission.

A. Attendance/Tardiness/No Call/No Show Policy Checklist:

1. Clearly state the company's policy on attendance, tardiness, absenteeism, and being a no call/no show;
2. State the consequences for violating the policy – when are written warnings warranted? When can employees be fired? What happens in a no call/no show situation?
3. Explain the procedure you expect to be followed for notifying the employer of an absence – whom should your employees notify? How should the notice be given? Is leaving a voice mail sufficient? How much in advance of a scheduled shift should notice be given? What are the consequences of failing to give proper notice? What is expected in the event an employee cannot reach the designated contact person? What are the consequences of failing to do so?

B. Sample Attendance Policy

XYZ expects all employees to conduct themselves in a professional manner during their employment. This includes practicing good attendance habits. All employees should regard coming to work on time, working their shift as scheduled and leaving at the scheduled time as essential functions of their jobs, i.e., good attendance habits are an integral part of every employee's job description.

Among other things, "good attendance habits" include the following:

- Appearing for work no earlier than 5 minutes prior to the start of the shift and no later than the start of the shift;
- Being at your work station ready for work by the start of the shift;
- Remaining at your work station unless the needs of the job require being elsewhere, except during authorized beaks (including restroom breaks);
- Taking only the time normally allowed for breaks;
- Remaining at work during your entire shift, unless excused by a supervisor or manager;
- Not leaving work until the scheduled end of your shift unless excused by a supervisor or manager;
- Leaving promptly at the end of your shift unless you have been given advance permission by your supervisor or manager to work past that point; and
- Calling in and personally notifying your supervisor or another member of management if you are going to be either absent or tardy, unless a verifiable emergency makes it impossible for your to do so.

Giving Notice of Absence or Tardiness

Under some circumstances, an employee's absence or tardiness may be excused, but only if that employee gives proper notice of such a problem before the start of their shift. XYZ needs advance notice of attendance problems so that other arrangements can be made to cover an employee's absence if necessary. "Proper notice" means that the employee will call XYZ at a designated telephone number prior to the start of the employee's shift and personally notify their supervisor or another member of management about the problem, unless a verifiable emergency makes it impossible to do so.

It is not sufficient to call in and leave a message with a co-worker or someone else who is not in a supervisory position. Office staff have been instructed to route all such calls to supervisory personnel. All supervisors and managers have been advised to make themselves available to take calls such as these, so there should be no reason to worry that you won't be able to reach an appropriate person to advise of your attendance problem. Similarly, XYZ's phone system has been programmed to allow your calls to go through promptly and will not route you to an answering machine. If you fail to give

proper notice of attendance problems in advance as explained in this policy, you may be subject to disciplinary action, up to and possibly including discharge.

If you are absent without notice for (two, three – whatever the company has deemed appropriate) days in a row, you will be considered to have abandoned your job, and XYZ will process your work separation as a voluntary resignation on your part.

5. Disciplinary Policy

Straightforward, fair and reasonable disciplinary rules for the workplace are essential for the efficient operation of any business. Establish reasonable standards of conduct for the company and communicate them to all employees in writing; all company rules of conduct should be contained in the employee handbook. A description of prohibited actions or behavior and the resulting disciplinary action should be outlined. This information can serve as written notice and warning of the consequences for misconduct in the workplace.

You may wish to provide an employee "Bill of Rights" which provides for due process -that is, notice of the infraction and an opportunity to be heard. If you decide to take this route, consider including the following:

1. Notice – Explain how employees can expect to be advised about misconduct and/or unsatisfactory behavior;
2. Opportunity to be heard – Give employees a chance to explain a situation;
3. Corroboration – Thoroughly investigate, examine the evidence, interview witnesses while events are still fresh in everyone's mind and check the facts as they are explained;
4. Action – Have a system of penalties for infractions and make sure the punishment fits the "crime"; also make sure that penalties are enforced in an evenhanded, consistent and fair manner – don't play favorites and treat everybody the same way, every time;
5. Appeals – You may wish to provide a "court of last resort" for employees who think they have been treated unfairly.

Employees should know the penalties for misconduct in advance. Unless an offense is so serious that it requires immediate dismissal, you should use progressive discipline, meaning that warnings and reprimands are issued and the employee is given the chance to
improve their performance. In most cases, you will appear to be much more fair and reasonable if you give employees a second chance to perform satisfactorily. And, quite frankly, short of serious criminal activity on your premises, there is almost nothing an employee can do a single time which will be held to amount to work-related misconduct. Let your employees know the stages of your disciplinary policy and follow them consistently. Progressive discipline can include variations of:

1. Employee counseling or verbal reprimand;
2. Written reprimand(s)
3. Final written job in jeopardy warning;
4. Suspension;
5. Termination

There are five magic words that every employer should use when warning an employee that they are in danger of being fired: YOUR JOB IS IN JEOPARDY. Put all job in jeopardy warnings in writing and ask the employee to sign the warning. If they refuse to do so, try to make sure that there at least two individuals representing the employer in the disciplinary counseling session. Simply write on the document, "This job in jeopardy warning was given to John Doe on June X, 20XX. He refused to sign the document, but he has clearly been notified and is aware that his job is in immediate jeopardy." Have both employer representatives sign the document and put it in the employee's personnel file. Be prepared to provide all such documentation as evidence if the employee is ultimately fired and files a claim for unemployment benefits with the Texas Workforce Commission.

A. Disciplinary Policy Checklist:

1. Do not ignore disciplinary problems hoping that they will magically go away or get better over time; they won't. With discipline, it's always best to follow the "KISS and DIS" rule: keep it super-simple, and handle it in a direct, immediate

and specific manner;
2. Identify the types of conduct that are so serious that they may result in immediate dismissal; always allow for termination without advance notice or warning if the misconduct is severe enough;
3. Outline the types of employee actions that may result in disciplinary action. As with all workplace rules, be sure to allow for additions, changes, modifications or deletions to your policy;
4. Clearly state that the prohibited conduct outlined is not an exhaustive list;
5. Identify the penalties which will be imposed for policy violations;
6. Describe the company's disciplinary procedure. If you decide to provide a process for appealing any disciplinary actions taken, advise employees of their "Bill of Rights;"
7. Advise employees that all disciplinary action will be documented in writing by the company and placed in their personnel files; make it mandatory that both employee and supervisor sign counseling documents;
8. Advise employees that they have the right to provide their own written accounts of incidents to be included in their personnel file;
9. Again, retain the flexibility to fire without notice if employee misconduct is severe enough.

Above all, employers should strive to follow their own policies, especially with respect to disciplinary matters. One of the easiest ways to lose an unemployment claim is to have to admit to a hearing officer that the disciplinary process that was announced in the policy was not followed in the claimant's case and that there was no compelling reason for ignoring it. Remember: one thing that must be shown in every discharge case is how the claimant either knew or should have known that they could lose their job for the reason given. If the policy promises two verbal warnings, a written warning, suspension,, and then discharge and the claimant is fired after only two verbal warnings, the employer will lose the case unless it can somehow show a compelling reason why the policy was ignored. Proper and reliable enforcement of policies will also help the employer defend itself in discrimination claims and lawsuits.

Similarly, employers must be vigilant and careful to enforce policies even-handedly and consistently. If the claimant was fired for an offense for which others were only warned and there was no compelling reason for treating the claimant differently, the employer will lose an unemployment claim. Even-handed enforcement of policies will also help employers fight off claims of discrimination and wrongful discharge.

Any time an employer disciplines an employee, care should be taken to document the entire process. If it's serious enough to discipline or fire an employee about, it's serious enough to put in writing. Document, document, document! Paper the files. A good rule of thumb: if there is no paper in the file, the (mis)conduct did not occur. Another good rule of thumb: don't put anything in your employees' personnel files you wouldn't want a jury to see. Remember: without documentation, all you've got is a swearing match. Put it in writing immediately, and be factual, objective and fair.

B. Some Do's and Don'ts of Documenting:

1. Don't delay! Make a record immediately following the incident while the facts are still fresh in everyone's mind and witnesses are readily available;
2. Do document, document, document – everything. When in doubt, write it out!
3. Don't get bogged down with petty details and personal opinions. Stick to the main points, develop the facts and don't cloud the issues;
4. Do relate the incident(s) to the company manual, policies and procedures which the employee has acknowledged receiving and agreed to be bound by as a condition of employment;
5. Don't be vindictive, retaliatory or profane – take the high road. Disciplinary action should not be a character assassination no matter how upset or angry you may be. Stay focused on work-related issues;
6. Do consider giving your employees the chance to provide their side of the story in writing. This makes good business sense for several reasons: it builds confidence in your disciplinary procedure and helps reduce the appearance of "building a case" against employees; it also preserves an account of the facts of the incident and minimizes the chances of employees changing their story later (i.e. when they get to the TWC, EEOC, DOL, OSHA, etc.)

6. Sexual Harassment Policy

Various forms of workplace harassment – especially sexual harassment – have become among the most frequently litigated and costly claims in the employment litigation arena. During the last decade, a number of highly publicized sexual

harassment cases have dramatically increased public interest in and awareness of this entire area.

In 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines which established that sexual harassment is a form of sex discrimination which is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e-2(a) (Title VII). Since that time, courts around the country have repeatedly ruled that employers have a legal obligation to provide a workplace which is free of sexual harassment.

The EEOC's guidelines define sexual harassment as unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
2. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

While the most common type of harassment alleged in the workplace still involves male/female harassment, "same sex" sexual harassment and other types of harassment cases – including age, race and disability harassment – are making their way to courthouses around the nation with increasing regularity. This is due in large part to the fact that the United States Supreme Court decided three very important cases in mid-1998 that had dramatic impact on employer liability. *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998) expanded the definition of sexual harassment to include same-sex sexual harassment. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) broadened employer liability for the harassing actions of their supervisory employees by ruling that employers could be held vicariously liable for sexual harassment committed by their supervisors.

Nationwide, employers are wisely updating their anti-harassment policies to recognize these rulings for two critical reasons. First, in the years since these opinions were issued, a number of federal district courts and Courts of Appeal have published opinions which interpret these landmark decisions. While the Supreme Court's three opinions specifically focused on sexual harassment, several courts have applied the standards set out in the 1998 rulings to other types of harassment such as race, disability and age. What this means is that employers now face liability for the discriminatory actions of their supervisory employees in a wider variety of employment settings than ever before.

Second, there's some good news for employers here. In both the *Ellerth* and *Faragher* cases, the Supreme Court created a two-pronged affirmative defense for employers to avoid liability for their supervisors' harassing conduct. An employer may escape liability if it can prove that:

- It exercised reasonable care to prevent and promptly eliminate any harassing behavior; and
- The complaining employee unreasonably failed to take advantage of the employer's anti-harassment policy and complaint procedures.

While the Court did not provide much guidance on part 1 above of this affirmative defense, it did emphasize that an employer's failure to have an anti-harassment policy will be a large factor in deciding whether that employer exercised reasonable care to prevent and correct the harassing behavior. Basically, the decision implies that having a well drafted, clearly articulated harassment policy in place -–and following it – will go a long way to establish that an employer exercised reasonable care.

The Court was somewhat clearer in discussing part 2 of the affirmative defense described above. The justices reasoned that if an employer has an anti-harassment policy that includes a reasonable complaint procedure, but the employee does not use this complaint procedure, the employer may escape liability for the sexually harassing conduct of its supervisory employees. However, it must be stressed that the employer can avoid liability only if there was no tangible employment action taken against the complaining employee. Employers are still strictly liable for the sexually harassing behavior of a supervisor when a tangible employment action (for example, demotion or firing) results. If a threat or demand is carried out, the employer cannot raise the affirmative defense.

An effective policy must:

- Be in clear, straightforward, understandable language;
- Be regularly communicated to all employees;
- Describe the actions that can constitute illegal harassment, including inappropriate jokes, comments, e-mail and Internet sites;
- Point out the penalties for engaging in harassing behavior up to and including termination;
- Educate employees that they have the right to complain about sexual harassment;
- Provide a clear and detailed procedure for voicing complaints. Any effective policy must include a complaint procedure that gives employees the option of bypassing an allegedly harassing supervisor when registering complaints. Create two or more options for employees to report harassment, and make sure that one of them is outside the employees' supervisory chain of command. Providing options to make anonymous complaints such as telephone hotlines, complaint boxes, open door policies, an ombudsperson and attitude surveys can help identify problem areas before they blow up;
- Assure employees that all complaints will be taken seriously and investigated immediately. Prompt remedial action should be taken if necessary, and the complainant should be notified when the investigation is concluded;
- Reassure employees that there will be no retaliation, discrimination or adverse employment action taken against them for making the complaint or assisting in an investigation of alleged harassment;
- Be signed by all employees to indicate that they have received and understand the policy.

A. Sample Harassment Policy:

XYZ Corporation (XYZ) is committed to providing a work environment which is free of unlawful harassment and intimidation. Company policy prohibits harassment because of sex (including sexual harassment, harassment due to pregnancy, childbirth or related medical conditions and gender harassment) and harassment because of race, religion, color, national origin, medical condition, physical or mental disability, age or any other basis protected by federal, state or local law, regulation, or ordinance. ALL SUCH HARASSMENT IS ILLEGAL.

XYZ's anti-harassment policy applies to all individuals involved in the operation of the company, and prohibits unlawful harassment by an employee of XYZ including officers, supervisors and co-workers, or by any vendors and/or independent contractors and their employees.

Non-employee violators of this policy are subject to expulsion from XYZ's facilities when harassment occurs on company premises. XYZ may discontinue service to off-XYZ premise violators of this policy. Furthermore, XYZ may report violators to the appropriate authority for civil or criminal action. XYZ prohibits retaliation of any kind against employees, who, in good faith, bring harassment complaints or assist in investigating such complaints.

B. Examples of Prohibited Unlawful Harassment

Prohibited unlawful harassment because of sex, race, religion, color, national origin, medical condition, physical or mental disability, age, marital status or any other protected basis includes, but is not limited to, the following behavior:

1. Verbal actions such as slurs, derogatory comments or jokes, epithets or unwanted sexual invitations, advances or comments;
2. Visual conduct such as sexually-oriented, pornographic and/or derogatory photographs, posters, drawings, cartoons, gestures, e-mail or Internet sites;
3. Physical actions such as unwanted touching, assault, blocking another's way or interference with work because of sex, race or any other protected category;
4. Threats or demands to submit to sexual advances or requests as a condition of continued employment, offers of employment benefits in return for sexual favors, or to avoid some other negative employment action; and
5. Retaliation against any employee for making an allegation of harassment or for participating in such an investigation.

C. Sexual Harassment

XYZ seeks to assure that it maintains a workplace free of all types of unlawful harassment, including sexual harassment and intimidation. Sexual harassment is defined as "unwelcome" sexual advances, requests for sexual favors or other verbal

or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
2. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individuals; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

XYZ has a zero tolerance policy for vulgar, abusive, humiliating or threatening language, practical jokes, or other inappropriate behavior in the workplace. XYZ will not tolerate the harassment of any employee or non-employee by another employee or non-employee, supervisor, manager or director for any reason. Harassment of a sexual nature is a violation of various state and federal laws which may subject the individual harasser to liability for any such unlawful conduct.

D. Procedure for Reporting Harassment

Any employee who believes that he or she is the victim of any type of harassment, including sexual harassment, should immediately report such actions to their supervisor, or to any manager or corporate officer, to a human resources counselor, or to the director of human resources. If an employee's immediate supervisor is involved in the alleged harassment, it is unnecessary to make a report to that individual. Employees are encouraged to promptly report the alleged harassment within three calendar days of the offense. It is not necessary to file a formal complaint or grievance to complain of sexual harassment. XYZ takes all complaints seriously and handles complaints as promptly, thoroughly and confidentially as possible. XYZ will clearly inform the employee of his or her rights to assistance and how to preserve and protect those rights.

E. Investigating Alleged Harassment

XYZ will fully and completely investigate any report of alleged harassment and will take appropriate corrective action depending on the severity of the conduct. This can include disciplining or discharging any individual who is found to have violated this prohibition against harassment. The complaining employee will be informed of the action taken. An employee who engages in acts of harassment contrary to XYZ's policy may be personally liable in any legal action brought against them.

Interviews, allegations, statements and identities will be kept confidential to the extent possible and allowed by law. However, XYZ will not allow the goal of confidentiality to be a deterrent to an effective investigation, and it may be necessary to reveal certain information to various state or federal agencies or courts.

Employees should also be aware that as an employer, XYZ has a duty to prevent and correct harassment even when the complaining employee asks that no action be taken and that the complaint be kept confidential. To minimize any conflicts that could arise when an employee complains of harassment but asks that no action be taken, XYZ has established an informal toll free phone line for employees to use when they wish to discuss their concerns anonymously. That toll free number is 1-800-XXX-XXXX.

No information related to the complaint or any investigation will be filed in the personnel files of the employees involved. Rather, these reports will be kept separately in the human resources department, and marked "confidential." At the end of each inquiry, the investigator will prepare a report that sets forth the dates that various witnesses and parties were interviewed, summarizes witnesses' statements, describes factual issues on which the parties disagree, offers the investigator's conclusions, and outlines the actions taken by XYZ.

If the investigation reveals that the harassment occurred, XYZ will inform the parties that immediate and appropriate action, up to and including termination, will be taken. The discipline will be proportional to the severity of the conduct. The alleged harasser's employment history and any similar complaints of prior unlawful harassment will be taken into consideration. Disciplinary measures may include counseling, sexual harassment or diversity training, suspension, transfer, demotion or discharge. These remedial measures are intended to placed the complaining employee in the position which he or she would have been had the harassment not occurred.

Exercising rights under this policy does not in any way affect an employee's right to seek relief through the Texas Workforce Commission's Civil Rights Division, the Equal Employment Opportunity Commission, or a court of proper jurisdiction for any complaint for which a remedy is provided under federal or state law.

F. Retaliation

XYZ Corporation will not tolerate retaliation against any employee for making an allegation of harassment or for participating in such an investigation. Retaliation in any form is prohibited. Any employee who violates this policy is subject to disciplinary action up to and including dismissal. It is the responsibility of each XYZ employee to be aware of the details of the foregoing policy.

G. Sample Acknowledgment of Receipt and Understanding of XYZ Corporation's Policy Against Harassment in the Workplace

I acknowledge that I have received a copy of XYZ Corporation's (XYZ) Policy Against Harassment (policy), that I have read and understand the policy, and that by signing this acknowledgment, I agree to adhere to the policy as a condition of my employment and/or continuing employment with XYZ. I acknowledge that I understand how to follow the procedures set out in this policy and that if I have any questions, I will ask for clarification. I agree to report any incident of harassment in a timely manner and I understand that there are a number of different individuals who are authorized to take my complaint and act on it appropriately. I further acknowledge that my failure to adhere to this policy may subject me to disciplinary action, up to and including immediate termination without advance warning.

I have reviewed the Policy Against Harassment and have been given the opportunity to ask questions about the policy. I know that I may file a complaint of harassment or participate in an investigation without fear of retaliation.

_____ _____

EMPLOYEE SIGNATURE DATE

7. Dress Code/Personal Appearance Policy

During the past decade, casual day became a mainstay in companies nationwide; in many workplaces, casual dress has become the rule rather than the exception. Unfortunately, not everyone shares the same concept of what appropriate "business casual" attire looks like. Given the wildly divergent spectrum of personal taste, it is a very good idea to adopt some reasonable grooming and personal appearance standards.

To avoid possible allegations of discrimination, employers should avoid adopting personal appearance standards that treat men and women differently (i.e., if men are not allowed to wear multiple earrings in each ear, women should not be allowed to, either). However, minor differences in appearance and dress standards may be legitimate if they reflect customary modes of grooming (i.e., allowing women to wear a single pair of earrings while prohibiting men from wearing earrings would probably be acceptable).

Any dress code should be drafted so that male and female employees are held to the same general standards of "casual" or "professional" business wear. If an employee challenges any dress code for religious reasons, an employer should make a reasonable accommodation unless an undue hardship would result; such decisions must be made on a case by case basis.

A. Sample Dress Code Policy

As representatives of XYZ Corporation, employees should remember that their appearance is a direct reflection on the level of professionalism in the company. For this reason, all employees shall follow these basic minimum guidelines in regard to dress and personal appearance. Management may impose additional appropriate standards.

- Employees in positions that require contact with the general public (or clients, customers or patients) should dress in a

manner that is in keeping with the accepted standards of professional office attire. Suits, sport coats, ties, and slacks are preferred dress for men. Slacks, dress shirts, and ties are also acceptable. Suits, dresses, skirts and blouses, and pantsuits are preferred dress for women. Dress slacks are also acceptable.

- Employees in positions that do not require direct contact with the public (or clients, customers or patients) should still dress suitably for a professional office environment. Even though the essential functions of an employee's job may not involve direct contact with the public, being housed in a building where members of the public (or clients, customers or patients) visit constitutes direct contact. Sweatshirts, T-shirts, jeans, leggings, cutoffs, revealing clothing, hot pants, halter tops, visible body piercing (i.e., nose, eyebrow and tongue rings) and tattoos are not appropriate.
- Footwear should also be appropriate for a professional office environment. Acceptable items include oxfords, loafers, pumps, boots, and flats. Sport shoes, tennis shoes, flip-flops or other casual footwear are not appropriate. Open sandal-type footwear requires the wearing of socks or hosiery.
- If an employee requires a reasonable accommodation regarding their dress for bona fide religious reasons, they should contact their supervisor or the human resources department. Unless an undue hardship would result, such an accommodation will be made.
- Employees who refuse to comply with XYZ's reasonable standards of dress can be sent home to change into more appropriate attire. Repeated violation of this policy can lead to disciplinary action up to and including termination.

An employee who is in doubt about the appropriateness of a particular mode of dress should consult their supervisor or manager in advance. Supervisors and managers are charged with the responsibility of enforcing this policy.

8. Access to Personnel Records

There is no Texas statute or federal law that requires private-sector employers to permit employees to see their personnel files. However, Texas employers with branch offices or operations in other states should be aware that a growing number of states do provide such rights. Currently, the states with the most liberal access laws include Connecticut, Illinois, Massachusetts, Minnesota, Nevada, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin.

While Texas employers are not required to give their employees access to their personnel files, many businesses do so. And, always remember that if an employee files a lawsuit, the entire contents of such a file will be subject to discovery and inspection. Every document, every employee evaluation and every sidebar comment written in an employee's file will be shown to a jury if you are sued.

Many employers are afraid that the contents of the file will embarrass the company or the supervisor/manager who generated the document. A word to the wise: if it's too embarrassing or inflammatory to show the employee, then it shouldn't be in the personnel file in the first place. This is one of those situations where it's a very good idea to think twice and write once; make sure that the contents of all personnel files work for you by reflecting an accurate, fair and objective record of your employees' performance and conduct.

Any policy concerning personnel files should include provisions regarding access by individuals other than employees (i.e., the files may not be reviewed by anyone other than the employee, his or her supervisor, and the human resources department). Employers may also wish to exempt certain documents from inspection by putting them in separate, confidential files that are kept under lock and key. Exempted documents could include medical documentation, written reports summarizing an investigation of alleged sexual harassment or a possible criminal offense, reference letters or sensitive management planning documents on matters such as internal comparative salaries.

The kinds of documents an employer may allow their employees to see include performance evaluations, personnel records such as recommendations and resumes, medical records, and any document an employee has signed. Employers should also have a policy on processing subpoenas that request access to personnel documents. It is a good idea to deal with such situations in a consistent manner by designating one person to facilitate the process.

A. Sample Personnel Records Access Policy

The XYZ Corporation maintains a personnel file for every employee. It is important that accurate, current records be maintained for benefits and employment purposes. Therefore, all employees are required to notify human resources

immediately if there is any change in relevant personal or employment information such as changes in address, phone numbers, marital status, emergency contact, insurance beneficiary, number of dependents or legal name.

All information contained in the personnel file is the property of XYZ and is not available for review by anyone other than the employee, his or her supervisor, and the human resources department. Employees may examine their personnel files after contacting the human resources department in advance to schedule an appointment; however, these documents may not be removed from XYZ's premises or photocopied without the specific authorization of the director of human resources.

If an employee believes that information in their personnel file is incorrect, they must submit a written request to change the information to the human resources department. If such a request is granted, the human resources department will make the change in the presence of the employee. If the request is denied, an employee can ask to place a statement of disagreement in the file. This statement of disagreement will become a permanent part of the employee's file.

XYZ considers falsification of personnel records to be a serious offense, and upon discovery can lead to disciplinary action up to and including termination. XYZ retains all human resource records for seven years after an employees leaves employment.

9. Drug/Alcohol Testing

Private sector Texas employers are relatively free to implement drug and alcohol testing policies for their job applicants and employees. Many companies use drug testing to send a strong message to all job applicants, employees, and supervisors that drug use in the workplace will not be tolerated. These companies believe that the work atmosphere created by this message may actually deter potential drug users and encourage non-drug-using employees to remain drug-free. Employers may do drug testing under a wide variety of circumstances such as:

1. Pre-employment testing;
2. For cause testing (including "reasonable suspicion" testing);
3. Post-accident testing; and
4. Random testing.

It is undisputed that substance abuse (illegal drugs, alcohol, inhalants, and depending on the circumstances, prescription drugs) poses a serious problem in the workplace for employers and employees alike by decreasing productivity, and increasing accidents, absenteeism, product defects, medical and insurance costs, and employee theft. Employers are entitled to expect their employees to report to work without being under the influence of drugs or alcohol. And, employers have a legal duty to provide a safe work environment; many businesses view drug testing as a useful tool to help them meet that obligation.

A good drug/alcohol testing policy should cover ingestion, possession, use, trafficking and being under the influence of the covered substances. Since misusing prescription drugs can also pose significant safety and health hazards, a comprehensive drug testing policy should address abuse of these drugs as well.

The Drug Free Workplace Act of 1988 requires every employer with federal grants or contracts of $25,000 or more to adopt and distribute a policy against the use of drugs by their employees; however, it does not mandate actual drug testing. This Act does require the employee to report to the employer any drug-related criminal conviction for violations occurring in the workplace. The contractor/employer must then report the conviction to the federal contracting agency. Employers must also discipline the employee or require him or her to participate in a rehab program.

Further, federal Department of Transportation rules require alcohol and drug testing policies and testing for drivers of commercial vehicles.

Any drug policy should:

- State the purpose and scope of the policy;
- Point out that the policy includes alcoholic beverages as well as inhalants and illegal drugs. The policy may include abusing prescription drugs;

- Make clear what conduct is prohibited and list consequences for violations;
- Prohibit the use, possession, sale or transfer of illegal drugs on or off company property;
- Prohibit the use, possession or being under the influence of alcohol or drugs on company property or while conducting company business;
- Prohibit the use of alcohol or any illegal drug off company property when it affects the employees' work performance, other employees' safety or the employer's position in the community;
- Verify a positive drug screen by using a different chemical process;
- Assure a chain of custody and proper documentation for test samples;
- Notify employees if the company reserves the right to conduct reasonable searches (of employee property, their work areas or any vehicles on company property) to monitor drug policy compliance;
- Notify employees that the employer has the right to conduct medical tests of employees' urine, hair or blood;
- Make clear that refusal after fair warning to submit to a search or test can lead to immediate discharge for work-related misconduct or can be considered a "voluntary quit";
- Notify employees that a positive, confirmed drug test will result in immediate dismissal even for a first offense;
- Explain the company's treatment programs, if any, and how they may be requested, such as assistance provided by the employee's health care insurance or drug and alcohol abuse rehabilitation programs sponsored by the employer;
- The availability of, and the requirements for participation in, drug and alcohol abuse education and treatment programs, if any;
- Communicate the company policy in writing to all employees and request a signed acknowledgment that employees have received, read, understand and agree to be bound by the terms and conditions of the drug and alcohol policy.

Before submitting to any drug test, job applicants and employees should provide signed, written consent forms authorizing the test and releasing the results. When a drug policy is contained in the company's handbook, it is a good idea to have employees acknowledge in writing that they have read and understand the handbook. A company should also have a separate written consent form for drug testing. It is critical to publicize and communicate in detail all aspects of the employer's drug policy.

There are no laws in Texas that prevent a private employer from conducting reasonable searches pursuant to a drug policy. Likewise, there is no constitutional prohibition against a private sector employer doing so. (Government employers are not so free, due mainly to court decisions holding that testing employees without showing some kind of compelling justification violates government employees' right to be free from unreasonable searches and seizures.) However, any employer conducting searches should include a clear statement to that effect in its handbook. The policy should describe those things subject to a search, including employee purses, backpacks, lockers, work areas, vehicles if driven or parked on company property and other personal items.

An employer should never force its employees to submit to searches. However, it is permissible to condition continued employment on submission to a reasonable search. The drug policy with this condition should state clearly that refusal, after fair warning, to submit to a search or drug/alcohol screen can lead to immediate dismissal.

Random substance abuse testing is most likely to identify any abusers in the workplace. Selection must include everyone within the company and everyone should have an equal chance of being selected so there is no chance for subjectivity, favoritism, or manipulation of the process. This option should be implemented with great caution and only with the advance assistance of legal counsel. Periodic, announced testing is typically implemented during the annual physical exam which includes a drug test as one of many medical tests or procedures.

Choosing a Drug Testing Lab

It's a very good idea to shop around before choosing a drug-testing lab. Most labs will help employers set up testing procedures and assure the chain of custody for the samples. No company should begin drug testing until it has found and engaged a reliable drug testing lab that will be willing to cooperate with the employer in the event that a lawsuit or unemployment claim arises from the test. No lab should be used unless it agrees in writing to routinely provide the company with copies of the test results, showing which tests were performed, what substances were found, and in what amounts (either specific concentrations or an indication of what the cut-off levels for a positive result were). It should also furnish a copy of the complete chain of custody of the urine, blood or hair sample showing who handled the sample at various times in the testing process. Employers that fail to present those types of documentation in response to an

unemployment claim will lose the claim.

If on-site testing is chosen, it is necessary to have a qualified staff person available to operate the equipment. Also, the testing area must be secured from unauthorized entry and must have a refrigerator and adequate air conditioning. Positive test results obtained in on-site testing should be confirmed by an outside laboratory using an alternative method of testing. Initial tests or screens vary, but in order to have the best chance of protecting the company against an unemployment claim, the employer should always have the lab confirm the initial positive result with a confirmation test using the GC / MS (gas chromatography/mass spectrometry) test. The GC/MS test is more expensive than the initial screen, but TWC expects to see the results of both tests before it will disqualify a claimant from receiving unemployment benefits.

If an employee is fired for testing positive for drugs or alcohol in violation of known company policy and then files a claim for unemployment benefits, these test results may be released to the Texas Workforce Commission without violating confidentiality laws. Even highly regulated Department of Transportation testing procedures allow employers to release the results to government agencies dealing with claims arising from the drug test. There is simply no substitute for the specific drug test results in an unemployment claim.

As in so many other areas of the employment relationship, common sense comes in very handy. If a company has a clear written policy, ensures that all employees know about it, conducts tests according to the policy and insists on the testing lab furnishing the appropriate documentation, it will be in a favorable position in any unemployment claim or lawsuit arising from the test.

A. Sample Drug-Free Workplace Policy – Drug/Alcohol Testing

It is the goal of XYZ Corporation, Inc. (XYZ) to provide a safe and drug-free work environment for our employees and our clients (customers, patients, etc.). With this goal in mind and because of the serious safety and performance consequences of drug abuse in the workplace, we are establishing the following policy for current and future employees of XYZ. XYZ explicitly prohibits:

1. The use, possession, solicitation for, or sale of narcotics or other illegal drugs, alcohol, or prescription medication without a prescription on company or customer premises or while performing an assignment.
2. Being impaired or under the influence of legal or illegal drugs or alcohol away from XYZ or customer premises, if such impairment or influence adversely affects the employee's work performance, the safety of the employee or of others, or puts at risk XYZ's reputation.
3. Possession, use, solicitation for, or sale of legal or illegal drugs or alcohol away from XYZ or customer premises, if such activity or involvement adversely affects the employee's work performance, the safety of the employee or of others, or puts at risk XYZ's reputation.
4. The presence of any detectable amount of prohibited substances in the employee's system while at work, while on the premises of the company or its customers, or while on company business. "Prohibited substances" include illegal drugs, alcohol, or prescription drugs not taken in accordance with a prescription given to the employee.

XYZ will conduct drug testing under the following circumstances:

1. RANDOM TESTING: Employees may be selected at random for drug testing at any interval determined by XYZ.
2. FOR CAUSE TESTING: XYZ may ask an employee to submit to a drug test at any time it appears that the employee mat be under the influence of drugs or alcohol, including but not limited to the following circumstances: evidence of drugs or alcohol on or about the employee's person or in the employee's vicinity; unusual conduct on the employee's part that suggests impairment or influence of drugs or alcohol; negative performance patterns or excessive and unexplained absenteeism or tardiness.
3. POST ACCIDENT TESTING: Any employee involved in an on-the-job accident or injury under circumstances that suggest possible use of drugs or alcohol in the accident or injury event may be asked to submit to a drug and/or alcohol test. "Involved in an on-the-job accident or injury" means not only the individual who was injured, but also any employee who potentially contributed to the accident or injury in any way.

If an employee is tested for drugs or alcohol outside of the employment context and the results indicate a violation of this policy, the employee may be subject to appropriate disciplinary action, up to and including discharge from

employment with XYZ. In such a case, the employee will be given the opportunity to explain the circumstances prior to any final employment action becoming effective.

B. Sample Employee Acknowledgment, Consent and Release Concerning Drug/Alcohol Testing Policy

I _____ acknowledge that I have received a copy of XYZ Corporation's (XYZ's) Drug Testing Policy (policy), that I have read and understand the policy, and that by signing this acknowledgment, I agree to adhere to the policy as a condition of my employment and/or continuing employment with XYZ. I also acknowledge that I am an at-will employee and that my employment may be terminated at any time for good cause, bad cause or no cause. I further acknowledge that my failure to adhere to this policy may subject me to disciplinary action, up to and including immediate termination without advance warning.

I further acknowledge that I have reviewed the policy and have been given the opportunity to ask questions about the policy. I understand that my refusal to submit to a drug screen or a positive result on such a drug screen can lead to my immediate termination for work-related misconduct.

_____ _____

Employee Date

10. Workplace Violence/Weapons Policies

During the 1990's, violence became the leading cause of death in the workplace nationwide. Employers around the country have been sued by both employees and third parties who suffered violent acts in the workplace, with liability arising under various theories including negligent hiring, supervision and retention and workers' compensation. And, the tragic events of 9/11 introduced a horrific new kind of violence in the workplace.

Unfortunately, it is not humanly possible to stop 100% of all violent workplace behavior; however, employers should seriously consider adopting a zero tolerance policy towards the workplace violence that they can control. Any such policy should clearly state the employer's commitment to providing a safe, violence-free workplace where employees, customers, or anyone else on company property are all strictly prohibited form behaving in a threatening or violent manner. The policy should also include a statement that workplace violence will result in discipline, up to and including immediate termination.

This entire area became more complicated on January 1, 1996 when the Texas Legislature first authorized persons who successfully obtained a license to carry a concealed handgun. Nonetheless, even obtaining such a license does not give a Texan the absolute right to carry a handgun at all times, nor did the law change an employer's right to exclude certain individuals (including those carrying alcohol, drugs, or pornographic material) from their property. However, there is simply no single, one-size-fits-all answer as to whether an employer should ban concealed weapons and handguns on the job. This is an answer that each and every employer must reach for their individual company after careful reflection and consideration.

If an employer does allow its employees to carry weapons and handguns, that employer is opening itself up to all sorts of legal liability which didn't exist before carrying a concealed handgun was permissible (e.g., an employer could be held liable if one of their employees shoots and injures or kills someone within the scope and course of their job duties). On the other hand, the Texas Legislature has made a decision that it's a good idea for private citizens who qualify for a state-issued permit to be able to carry concealed handguns. It is always a good idea to be careful in restricting the legal, statutory rights of workers.

What Texas employers must do is balance the risks associated with one of their employees injuring or killing someone while doing their job against the risk of employment litigation. If an employer does decide to impose a no weapons policy, any such policy should clearly prohibit possessing, carrying, or using any weapon on the employer's premises, while performing duties for the employer off premises, or while participating in any employer-sponsored activity or event.

A. Sample Workplace Violence Policy

XYZ Corporation (XYZ) has a zero tolerance policy for violence in the workplace. "Workplace violence" is defined to include:

1. Physically aggressive, violent or threatening behavior, such as attempts to instill fear in others or intimidation;
2. Verbal or physical threats of any sort;
3. Any other conduct that suggests a tendency toward violent behavior. Such behavior includes, but is not limited to, excessive arguing, profanity, threats of sabotage of XYZ property, belligerent speech or a demonstrated pattern of insubordination and refusal to follow XYZ policies and procedures;
4. Causing physical damage to XYZ's facilities or defacing company property; or
5. With the exception of XYZ security personnel, carrying firearms or weapons of any type or kind onto XYZ premises, in XYZ parking lots, or while conducting XYZ business.

If any XYZ employee becomes aware of or observes any of the above-referenced behavior or actions by a co-worker, consultant, customer, third party vendor, visitor, or any other party, he or she should notify his/her supervisor, any member of management, and/or the human resources department immediately. Employees should notify the human resources department if they are aware of any restraining orders that are in effect, or of the existence of any other non-work-related situation with the potential to erupt into workplace violence.

All reports of violence in the XYZ workplace will be taken seriously and will be investigated thoroughly and promptly. To the extent possible, XYZ will keep the identity of the reporting employee confidential. However, under certain circumstances, XYZ may need to disclose the reporting employee's identity (for example, to protect that individual's safety). XYZ will not tolerate retaliation in any form against an employee who makes a report of workplace violence.

If, after a thorough investigation, XYZ determines that workplace violence has occurred, appropriate corrective action will be taken, and discipline will be imposed on the offending employee(s). The level of appropriate discipline will depend on the facts in each case, and may include oral or written warnings, reassignment of responsibilities, probation, suspension, or termination. If a non-employee is responsible for the violent activities, XYZ will take corrective action to ensure that such behavior is not repeated.

B. Sample Concealed Weapons Policy

XYZ Corporation does not allow any job applicant, employee, contractor, subcontractor, vendor, agent or representative to possess, use, conceal, carry or maintain a concealed weapon or handgun on XYZ's premises. Such premises include any portion of the building in which XYZ is housed, any private or public driveway, parking lot, sidewalk, street, parking garage or any other parking area used in connection with XYZ's business, and any vehicle used, owned or leased by XYZ. XYZ also prohibits the carrying of a weapon or concealed handgun on your person or property while you are rendering any services or attending any event or function relating to your employment with XYZ or conducting any business on the company's behalf. This prohibition includes carrying or maintaining a concealed weapon or handgun in any vehicle used in connection with your employment or brought onto XYZ's premises.

If XYZ has a reasonable suspicion at any time that a concealed handgun or weapon has been maintained, carried or stored in violation of this policy, XYZ reserves the right to conduct a reasonable search of the person, work area, personal items or any vehicle in the possession or subject to the control of such person to investigate whether or not a prohibited weapon is present. Any employee who witnesses the concealment or possession of a weapon or who witnesses a physical or verbal assault involving another person should report it to their supervisor or the human resources department immediately. Violating this policy or refusing to consent to a reasonable search conducted pursuant to his policy may lead to discipline up to and including termination. Compliance with this policy is also a term and condition of continued employment with XYZ.

_____ _____

Employee Signature Date

Because this policy involves the potential for searching employee property and the need for employees to consent to such searches, it is wise to have every employee sign a consent form. (Also see topic #11 of this paper, "Searches at Work" for further details).

C. Sample Acknowledgment, Consent and Release Form for XYZ Corporation's No Weapons Policy

I acknowledge that I have received, read and understand a copy of XYZ's No Weapons Policy (the policy). By signing this acknowledgment, I agree to adhere to the terms of the policy as a condition of my employment with XYZ. I also acknowledge that my employment is at will, meaning that it is of indefinite duration and may be terminated at any time, with or without advance notice, for good cause, bad cause or no cause at all. I further acknowledge that if I fail to adhere to this policy, I may be subject to disciplinary action up to and including immediate termination without prior warning.

In connection with the enforcement of XYZ's No Weapons Policy, I give my consent to XYZ conducting reasonable searches for weapons prohibited by this policy, including, but not limited to: searches of my person; any locker, desk or storage area provided for me to use by XYZ; any personal belongings in my possession while on XYZ premises or while conducting business on behalf of XYZ, regardless of whether I am on XYZ's premises, including, but not limited to, purses, handbags, briefcases and/or back packs; and/or any vehicle I have possession of while on XYZ's premises, including but not limited to, any vehicle I own or use and/or any vehicle owned, leased or financed by XYZ or used by XYZ to transport its goods or products.

I understand that all lockers, storage areas, desks and vehicles owned, financed or leased by XYZ or used by XYZ to transport its products and goods are subject to being searches at any time without my permission. I also acknowledge that I am prohibited from locking or otherwise securing any such locker, storage area, desk or vehicle with any lock or locking device that is not supplied by XYZ.

I hereby release and hold harmless XYZ, its affiliates or subsidiaries from any and all liability, including liability for negligence, associated with any searches undertaken pursuant to this policy and/or with the enforcement of this policy.

_____ _____

Employee Signature Date

11. Searches at Work

While making searches for unauthorized weapons were discussed above, other problems potentially requiring a workplace search include cash and inventory shortages, disappearing company or employee property, and contraband items such as drugs, alcohol and knives. This is not an easy area for employers, who have to worry about the legality of searches, the usefulness of such measures, and their impact on employee morale. A company should not rush to start searching its workers; there are a number of legal issues to consider first.

Public sector, governmental employers have to worry about state and federal constitutional prohibitions against "unreasonable searches and seizures." Private sector employers face a variety of potential causes of action such as invasion of privacy, defamation, and intentional infliction of emotional distress. Even if a lawsuit brought under one of these theories is unsuccessful, the "winning" employer may still have spent huge amounts of time and money defending the suit.

It is a common sense precaution for employers to watch out for avoidable troubles such as actions that would entitle an employee to raise claims of assault or battery, false imprisonment and intentional infliction of emotional distress. For that reason, it is extremely unwise to physically force an employee to submit to a search or to hold the employee until the police can be consulted. An employee should never be touched without their consent. By the same token, no one should call the employee who is to be searched defamatory names such as "thief", "drug addict" or worse.

Employers should draft a simple policy informing employees that the company reserves the right to conduct searches to monitor compliance with rules concerning security of company and individual property and other personal items. It should

reassure employees that in requesting a search, the employer is not accusing anyone of theft or some other crime. As noted above, an employer should never force an employee to submit to a search. However, the employer may make submission to reasonable searches a condition of continued employment. The policy should make clear that refusal, after fair warning, to submit to a search or test can lead to immediate discharge. Some employers specify that such refusal will be considered a voluntary quit, initiated by the employee. Various administrative agencies and courts have analyzed these situations both as a firing for misconduct and as a voluntary quit initiated by the employee. Any such policy should be given in writing to and acknowledged by all employees.

For new hires, employers have the right to make signing such a form a condition of employment. While the search policy should be contained within the company's handbook, it is best to have an additional separate form consenting specifically to that condition of employment. Finally, when a search is conducted, it should be done in a manner protecting the employee's privacy and with as much consideration as possible given to the employee's personal feelings.

K-Mart Corp. v. Trotti, 677 SW 2d 632 (Tex. App. – Houston (1st Dist) 1984, writ refused, n.r.e.), is a landmark case in this area. Ms. Trotti sued her employer after her locker was searched. She had used her own lock on the locker, and the employer never required her to provide them with the combination. The court ruled that Ms. Trotti had a reasonable expectation of privacy which the employer had violated, and that $100,000 in punitive damages was not excessive under these circumstances. Many observers believe that the employer could have won the case had it had a clearly written policy informing its employees that their lockers were subject to search at any time and that if private locks were used, a key or the combination had to be provided to the supervisor.

If an employer winds up with an unemployment claim arising from a situation involving a search, it should be prepared to submit a copy of its policy on searches, a copy of the claimant's acknowledgment of the policy, copies of any warnings given, and firsthand testimony from any eyewitnesses to the final specific incident leading to the discharge. The employer should also be prepared to address any questions regarding why the search was requested, the reasonableness of the search, and whether the policy was applied consistently.

A. Sample Acknowledgment, Consent and Release Form Regarding Reasonable Workplace Searches

I acknowledge that I have received, read and understand XYZ Corporation's (XYZ's) policy regarding reasonable workplace searches (the policy). By signing this acknowledgment, I agree to adhere to the terms of the policy as a condition of my employment with XYZ. I also acknowledge that my employment is at will, meaning that it is of indefinite duration and may be terminated at any time, with or without advance notice, for good cause, bad cause or no cause at all. I further acknowledge that if I fail to adhere to this policy, I may be subject to disciplinary action up to and including immediate termination without prior warning.

I understand that the purpose of this policy is to allow XYZ Corporation (XYZ) to monitor compliance with reasonable work and safety rules and that all employees are subject to the policy. If a search is requested, it is not an accusation of theft or other wrongdoing; it is merely part of a company investigation.

I understand that a search may include the employees, their work areas, lockers, vehicles if driven or parked on company premises or used on company business, and any other personal items brought onto XYZ's premises. All of the aforementioned areas are subject to search at any time. If XYZ allows employees to have lockers or other storage areas, XYZ will either furnish the lock and keep a copy of the key or combination, or allow the employee to furnish a personal lock; however, in that event, the employee must provide XYZ with a copy of the key or combination.

I understand that refusal to submit to a search may lead to immediate termination. I hereby release and hold harmless XYZ, its affiliates or subsidiaries from any and all liability, including liability for negligence, associated with any search undertaken pursuant to this policy and/or with the enforcement of this policy.

_____ _____

Employee Signature Date

If an employer incorporates these points into any search policy it may develop and conducts searches in a careful and considerate manner, such a policy would put the company in a good position to defend itself against any claims of unreasonable searches, invasion of privacy, or infliction of emotional distress. It is also a very good idea for employers to consult an attorney engaged in the private practice of labor law for assistance in drafting and implementing such a policy.

12. The "Technology Policies" – E-mail, the Internet, Voice Mail, Telephone and Computer Network Systems Use Policies

Voice mail, e-mail, and the Internet have all become invaluable tools in many workplaces; it's almost impossible to remember how offices operated before their widespread introduction. Given the explosion of electronic communication in the workplace, a policy addressing these tools is critical to limit potential employer legal liability. There are still a limited number of reported court cases that provide clear guidance regarding the balance between an employer's legitimate business interests in these types of employee communications and their employees' expectation of privacy. Such cases will undoubtedly be decided in greater numbers in the not too distant future; meanwhile, employers should create company policies that are clear, straightforward and well publicized to reduce or eliminate any employee's expectation of privacy when using this employer-provided equipment.

An Internet, e-mail or voice mail invasion of privacy claim could be brought on the common law theory of intrusion on seclusion. An employee/plaintiff's success in such a lawsuit would depend on whether the employee had a reasonable expectation of privacy. Such expectations are usually created - or taken away - by an employer, in writing, within the employee's workplace environment (see topics 10 and 11 above regarding weapons and workplace searches in general).

To minimize an employee's chances of successfully asserting an invasion of privacy claim, an employer should adopt express, clear policies informing employees that they do not have a personal privacy right in any matters received by, created in, sent over or stored in your system. The policy should inform all employees that the information on company-provided computers and e-mail is to be used for business purposes only, that computer data and e-mail is the company's property, and that you may be monitoring such communications for business purposes.

This policy should be communicated to your employees not only through the policy handbook, but also in e-mail, voice mail and Internet instructional guides and on-screen notices. Employees should also be required to acknowledge your policy of telephone, electronic and computer network access. As in any other area, developing, communicating and enforcing a consistent policy should become a priority. Without a policy, an employer may have a very hard time disciplining employees who misuse company equipment. Employers may wish to expressly prohibit inappropriate conduct such as sending pornographic materials, racist or sexist jokes or running the Super Bowl pool over your system.

Accessing employee voice mail can be analogized to telephone monitoring cases. It has long been established that employers may not listen to their employees personal phone calls any longer than absolutely necessary to decide if a conversation is personal in nature. Likewise, the safest advice for accessing messages left on an employee's voice mail system is to fast forward any voice mail messages that are of a personal nature.

A. Sample Internet and Computer Usage Policy (*see the sample policy on pages 296 - 298 of this book*)

B. Sample Internet and Computer Usage Policy Acknowledgment Form

I acknowledge that all electronic communications systems and all information received from, transmitted by or stored in these systems are and will remain XYZ's property. I also acknowledge that these systems are to be used only for job-related purposes, not for personal purposes. I have no personal privacy right or any expectation of privacy in connection with my use of this equipment or with the receipt, transmission or storage of information in XYZ's equipment.

I agree not to access a file, use a code or retrieve any stored communication unless I am authorized to do so. Further, I agree to disclose messages or information from electronic communications systems only to authorized individuals. I acknowledge and consent to XYZ's monitoring my use of this equipment at its discretion, at any time. XYZ's monitoring may include printing out and reading all electronic mail leaving, entering or stored in these systems. I further agree to abide by XYZ's policy prohibiting the use of the Internet and electronic communication systems to transmit offensive, lewd, racist or sexist material. I have been clearly informed that violation of this policy can lead to disciplinary action up to and

including immediate termination.

_____ _____
Employee Signature Date

13. No-Fault Leave of Absence Policy

One of the most frequently asked questions we receive in the employer commissioner's office relates to extended (and sometimes, seemingly endless) absences. There is some good news here: the Supreme Court of Texas has expressly approved neutral and consistently enforced leave of absence policies. What this means is that you can develop a straightforward, clear policy which states that ALL employees who remain absent from the workplace for a specified period of time (i.e., six months) will no longer have a job with the company. This can be an invaluable policy in defending yourself against a workers' comp retaliation claim if an extended absence is the result of an on-the-job injury.

The courts have been very clear that such an absence control policy must be consistently applied, gender-neutral and uniformly enforced; in other words, this policy must be applied across the board, to everybody, every time, regardless of race, sex, national origin, reason for the absence, etc. To do otherwise is to invite being sued for discrimination or retaliation.

In a very helpful case for Texas employers, the Supreme Court of Texas upheld summary judgment against an employee who was terminated under a well-known company policy calling for the firing of any worker who was absent from work for three consecutive days without notice or permission. (*Texas Division-Trainter, Inc. v. Carozza*, 876 SW 2d 312 (Tex. 1994). Other common leave of absence policies provide that workers who fail to return to work after some longer period of time are subject to termination. In many cases, such a policy has provided Texas employers some protection against a claim of workers' compensation retaliation.

The most important exception to this rule is that the policy must not discriminate on its face against workers who miss work due to a workers' comp injury. For example, an employer may not have a policy calling for the firing of only those workers who are absent due to workers' compensation-related injuries. In order to be valid and useful toyou,THEPOLICYMUSTBEAPPLIEDACROSSTHEBOARDTOALLEMPLOYEESREGARDLESSOFTHEREASONFOR THEIR LEAVE OF ABSENCE. If you are unwilling or unable to be consistent, don't adopt such a policy.

Another caveat applies if you are covered by the federal Family and Medical leave Act (FMLA). Employers with 50 more employees stationed within 75 miles of each other are subject to the FMLA. If an employee is on FMLA leave, such absences may not be counted against the worker for disciplinary reasons under any absence control policy. Doing otherwise may violate the anti-retaliation provisions of the FMLA.

(*Editor's note: Be sure to also take into account the guidelines from the EEOC to the effect that under the Americans with Disabilities Act, an employer must consider the issue of whether an extension of a medical leave of absence would be a reasonable accommodation for an employee with a disability.*)

A. Sample No-Fault Leave of Absence Policy

Any employee of XYZ Corporation (XYZ) who is absent from the workplace for six consecutive months will be terminated. No leave of absence may exceed six calendar months for any reason. The six month period does not include approved leave taken under the Family and Medical Leave Act (FMLA). This policy applies to all XYZ employees, regardless of the reason(s) for their absence from work. If an XYZ employee remains on leave of absence in excess of six months, they will be terminated, regardless of the reason for their absence.

Decisions regarding XYZ employees who are covered by the Americans with Disabilities Act (the ADA) and require as a reasonable accommodation a leave of longer than six consecutive months will be made based on medical documentation provided by the employee's healthcare provider; such decisions will be made on a case by case basis. Before returning to work after a medical leave of absence, all XYZ employees must provide written certification from their physician that they have been medically released to return to work.

14. Benefits

Employee discounts, paid holidays and vacations, group insurance and other employee benefits are common to many businesses. While no law in Texas requires employers to provide any benefits, most employers do so to attract and retain quality employees.

Because the benefits offered by employers vary greatly from company to company, employers should make their employees aware of all benefits offered. This information should be in the policy handbook provided to all employees. Additionally, the handbook should cover the company's compensation policy, including pay for working on holidays (if any is offered in addition to that required by law), overtime pay and paid vacation and sick leave (if any). Clearly point out who is eligible for what and how paid leave is earned.

Also specifically point out what happens to accrued but unused leave when an employee quits or is fired. Failing to have a written policy on compensation for unused sick and vacation time can cause serious problems for employers. In many cases, without something in writing, practice can become policy, whether that was the employer's intention or not. Keep in mind, however, that any promises made in writing must be kept.

The company's health/dental insurance coverage, workers' compensation coverage (if any), profit sharing plan, pension fund, stock options, and credit union participation, where applicable, should be clearly identified and explained. It can be helpful to use examples in the explanation, making sure to state that they are examples only and not binding representations of the company.

A. Benefits Checklist

- List all benefits the company offers. Include the policy (if any) on health/dental insurance, workers' compensation, profit sharing, pension funds, stock options and credit union participation, if applicable;
- There is no federal or Texas state law defining what constitutes part-time or full-time employment. Employers should provide the company's definition of "part-time" and "full-time" employment and explain the differences in benefits for the various types of workers;
- There is no federal or state law requiring a Texas employer to give breaks, lunch hours, paid vacation or paid sick leave; all of these are creations of an employer's policy. Explain how sick leave and vacation time is actually earned (i.e., is the time earned on a monthly basis, by pay period, or after a certain period of service with the company, such as one year);
- Explain how sick leave is accrued, describe the company's policy for carrying over sick leave and whether employees will be paid for unused sick leave upon separation from the company. Define the company's policy regarding when proof of illness will be required;
- State which employees are entitled to vacation (i.e., full-time vs. temporary or part-time employees). Explain when vacation is accrued, how it may be used and whether it can be carried over to the next year;
- Explain if there is a distinction between those employees who voluntary separate from the company and those who are fired. State the company policy for payment of accrued but unused vacation in the event of layoffs or other work separations;
- If business needs dictate that working overtime will be required from time to time, point out that doing so is a condition of employment with the company. Clearly state that the company complies with all provisions of the Fair Labor Standards Act, and that hourly, non-exempt employees will be paid time and one half their regular hourly rate of pay if they work more than 40 hours in a seven-day workweek. If an employee works overtime without proper authorization from a supervisor or manager, the employer has no choice under both federal and state law but to pay the employee for that work. However, make it clear that working unauthorized overtime is a disciplinary matter: the first time it occurs, the employee will be given a written job in jeopardy warning; if it happens again, termination will result.

As stated above, no law in Texas requires employers to provide paid vacation or sick leave. (The only employers that are required to provide up to 12 weeks of unpaid, job-protected leave under the federal Family and Medical Leave Act are those with 50 or more employees stationed within 75 miles of each other.) However, if such leave is promised in a written policy or agreement, the leave is an enforceable part of the wage agreement under the Texas Payday Law and will be enforced accordingly.

Similarly, there is no law requiring employers to pay employees for unused vacation, but on occasion, Texas courts have made such awards. The company policy will govern whether or not the employee is entitled to receive this pay. Therefore, it is imperative that the employee handbook states the company's policy regarding unused vacation and sick leave. If the policy is silent, employers run the risk of having to pay for unused leave. An example of a policy that clearly state's a company's position would be:

B. Sample Accrued Leave Upon Separation Policy

Generally, XYZ does not pay accrued (type of) leave to employees who are separated from employment. Any unused paid (type of) leave is forfeited upon an employee's work separation. However, unused (type of) leave may be paid out under the following circumstances:

- If an employee is involuntarily separated from employment with XYZ for economic reasons as part of a company reorganization or a reduction in the workforce, the employee will receive the full balance of accrued, but unused (type of) leave.
- If an employee retires from employment pursuant to XYZ's retirement policy, the employee will receive the full balance of accrued, but unused (type of) leave.
- If an employee voluntarily resigns from employment giving at least two weeks' advance written notice, the employee will receive the full balance of accrued, but unused (type of) leave.
- If an employee voluntarily resigns from employment with less than two weeks' notice, but with at least one week's advance written notice, the employee will receive 50% of the balance of accrued, but unused (type of) leave.
- Any payment made under this provision will be subject to set-offs and deductions for any amounts due or owing pursuant to legal requirements and to the wage deduction authorization agreement signed by the employee.

15. Deductions from Pay

The two main laws limiting deductions from an employee's pay are the federal Fair Labor Standards Act and the Texas Payday Law. A careful employer will watch for situations in which an employee's pay may be reduced for one reason or another and consider whether the deduction potentially involves a reduction below minimum wage and/or must be authorized in writing by the employee before the deduction is made. While some types of deductions are fairly predictable and straightforward, many other kinds of deductions are extremely complex and restricted. Before going ahead with a policy regarding wage deductions, it may be advisable to have the policy and procedures reviewed by an employment law attorney who is familiar with both federal and Texas wage and hour laws.

It is best to have all employees sign a wage deduction authorization agreement listing the various types of deductions from pay that might be made and the amounts (as specifically as possible) that would be deducted if those situations were to arise. In addition to the wage deduction authorization agreement, certain deductions should be individually and specifically authorized in writing to give the employer the greatest amount of protection in case a wage claim is filed. Those would include any type of loan or wage advance; before the money changes hands, the employer should have the employee sign a detailed receipt and repayment agreement specifying what the installment payments will be and what happens to a balance remaining when an employee leaves the company. Similarly, before an expensive piece of equipment is checked out to an employee, the employee should sign a form acknowledging receipt, promising return of the item in good condition, and specifically authorizing a deduction from pay in a specific dollar amount in case of damage or non-return of the item.

A. Sample Wage Deduction Authorization Agreement (*see the sample agreement on pages 319 - 320 of this book*)

16. House Rules Checklist

Every business should have basic rules of decorum to ensure mutual respect and professional courtesy among its employees. These codes of conduct should be briefly covered in the handbook. List the house rules clearly in the company policy and state the consequences or disciplinary action which will result from breaking those rules. Also specify that house rules apply to all employees. Topics most frequently included in this area are:

- Company expense accounts;
- Customer relations;
- Employee behavior when representing the company "off site."
- Office hours;
- Parking;
- Professional courtesy and consideration;
- Reimbursement for expenses;
- Safety rules;
- Seniority;
- Smoking policy (subject to local ordinance);
- Soliciting other workers for the sale of goods or services unrelated to the company;
- Suggestions;
- Transfers;
- Travel;
- Use of company credit cards; and
- Weather emergencies.

A Final Word of Caution…….

When drafted carefully and enforced fairly and consistently, employee policy handbooks can be an invaluable tool for employers. However, when the handbook is not prepared cautiously, it can be a sword instead of a shield. Pitfalls to avoid include:

- Failing to put company policy and practices in writing;
- Using unclear and ambiguous language in a stated policy or procedure;
- Making suggestions or express statements of guaranteed, permanent, lifetime employment in the policy;
- Enforcing company policies inconsistently;
- Failing to follow established procedures;
- Failing to give every employee a copy of the company handbook;
- Failing to obtain written acknowledgment of receipt of the handbook from all employees;
- Failing to advise all employees of any revisions, modifications, deletions or additions;
- Failing to obtain written acknowledgment from all employees that such revisions have been received.

Keep in mind that these sample forms, disclaimers and policies are nothing more than guidelines; there is no such thing as a "one size fits all policy" that meets all or even the majority of Texas employers' needs. All policies, procedures and disclaimers should be drafted by counsel to ensure that all legal requirements are met and to reduce the possibility of arbitration or litigation.

Renee M. Miller, Attorney at Law

Workers' Compensation Return to Work Programs

Workers' Compensation

Controlling the Cost of Job-Related Injury

Workers' Compensation Insurance

- Pays reasonable medical treatment
- Weekly Income benefits
- Death and Burial-beneficiary benefits
- Lifetime benefits
- No fault - no blame
- No lawsuits
- Carrier pays & manages

Certified Self-Insured

- Certified by Division of WC
- Large employer
- Assumes financial responsibility
- Subject to all WC laws and requirements
- Claims administered by TPA

Alternative coverage

- Not a substitute for WC
- Accident and Health policies
- Employee indemnity agreements
- Disability Policies
- Not subject to WC laws & protections

These options don't

- Protect employer from being sued
- Pay common law defenses
- Not likely to cover pain & suffering
  - No punitive damages
  - No legal costs

Requirements for Non-covered Employers

- Five or more employees
- File annually with DWC
- Report injury / death
- Post notice of non-coverage
- Forms DWC005 & DWC007
- www.tdi.texas.gov/forms

Workers' Compensation Return to Work Programs

Workers' Comp Premium

- Payroll
- Industry type
- Past experience (number of claims & costs)

Higher Costs = Higher Premium
Lower costs = Lower premiums

The longer your injured employee is away from work, the higher your costs, and the worse it is for your employee.

Goal is to

Return injured workers back to regular lifestyle as soon as medically possible following a job-related illness or injury.

Eliminate lost time

Your trained experienced employee continues to do work that contributes to the success of your business while they recover.

RTW benefits employers:

- Keep your trained workforce
- Avoid/minimize absences
- Pay wages for actual work
- Maintain quality and production
- Reduce WC and business costs
- Employees heal better - faster

When your employee is away from work, they…….

- Lose job-related benefits
- Lose job skills
- Lose connection with employer
- Out of condition
- Poor mental and physical condition
- Could lose job
- Financial hardship
- Develop complications that delay recovery

Employer's contribution to unnecessary lost time and higher costs

- 100% well
- Too busy
- Insurance carrier's job
- No "light duty" – no opportunities
- Poor communication
- Work environment

Workers' Compensation Return to Work Programs

A shared responsibility

Getting injured employees back to work is a shared responsibility!

Employer's responsibility:

- Reporting - prompt and right
- Take initiative - monitor claims
- Communicate - doctor, adjuster, employees
- Attend hearings
- Policies - procedures - consistency
- Education and accountability
- Provide work opportunities

Your insurance carrier's role

- RTW Coordination Services
- Review for Case Management
- Treatment and Lost Time Guidelines
- Safety and Prevention Services
- Education
- Communication

Doctors & RTW?

- Treat condition
- Identify limitations and duration
- Communicate (DWC073)
- Doctors often lack confidence that restrictions will be followed by employer.
- They need information about injured employee's work requirements.

Work Assignments

- Medically appropriate
- Productive
- Temporary & transitional
- Permanent changes
- FMLA and ADA

Real Work –

NOT "LIGHT DUTY"

Tasks – Functions – Duties

Job Task Analysis
Make "Return to Work" - Work!

Workers' Compensation Return to Work Programs

Where to Look

- Employee's regular job
- Trade jobs & cross-train
- Fill in for absences
- Ask employees and injured employee
- Share work
- Different way of doing things

The part-time work advantage

- $400.00 Employee's Average Weekly Wage
- $400 x 70% = 280.00 Weekly Benefit
- Employee returns to work 4 hrs
- Earns $200 Working for employer
- $200 x 70% = $140 New Weekly Benefit

- Injured employee receives more
  - $200 wages earned + $140 TIBS
  - $340 instead of $280
- Employer pays less
- Employer benefits from 4 hours of work
- Lower cost = lower premium

Fewer consequences for employee

DWC Resources

- Education & Consultations
- Safety & loss control services
- OSHCON
- Publications / DVD library
- DARS & TWC Referrals
- Small employer RTW incentive program

Remember:

The longer your employee
is away from work,
the more it costs you,
and
the worse it is for the injured employee.

Your $$ - Your Employees

Pat Crawford
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TDI Consumer Help Line
1-800-252-3439
www.tdi.texas.gov

Hiring & Employing Legally in the 21st Century

Texas Conference for Employers

2020 Do's & Don'ts of Interviewing and Hiring

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ATTORNEYS AT LAW

HIRING GOALS

- Hiring Legally (besides the obvious)
- Hiring Competence
- Hiring Good Judgment
- Not Hiring a Dangerous Person
- Hiring a Good Fit

ANGRY JURORS?

Bottom line EEO hiring law

- Applicants should not be judged on protected differences
- The recruiting and hiring process should not discourage or exclude protected applicants

"Protected Differences"

- Age
- Race
- Religion (dress codes)
- Ethnicity
- Disability
- Gender (caregiver / gender stereotypes)
- Genetic Information
- Protected Activities (retaliation)

CAN YOU REPHRASE THESE COMMON QUESTIONS?

- Do you have any health issues that would prevent you from performing this job?
- Have you ever been addicted to illegal drugs?
- What year were you born / graduated high school?
- Do you have child care arrangements?
- Are you a U.S. citizen?
- What church do you go to?
- Have family members who need special care?
- How did you lose your leg?

Hiring & Employing Legally in the 21st Century

Job Description is Exhibit 1

December 2013 *Henschel* case

Applicant: They didn't hire me – I think it is because of my age and irrelevant physical condition.
Company: No, we didn't hire him because he only had one leg and the truck that hauls the equipment to the site has a clutch.
Applicant: Well, their job descriptions describes equipment operator only, no hauling. Then they caught one sight of me and told me hauling was required!
Company: Actually, our job description is wrong. What we are telling you now, after we got sued, is actually the truth.

Hiring Competence

- Screen and Question Applications
- Check Background
- Ask Skill-Related Questions

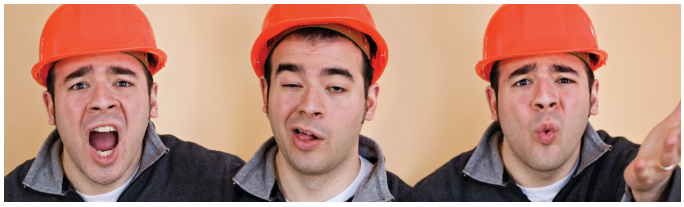
Ask Skill-Related Questions

- Walk me through a safety check of this truck.
- Tell me how you would handle this situation.
- What does the following term mean?
- Can you deliver product on weekends or nights?
- Read this instruction sheet and tell me what it requires you to do.

Job Description is Roadmap During Interviews

- All questions should relate to job description
- How would you do each function?
- What experience do you have with each function?
- What are some common problems that come up and how would you fix them?

Hire Good Judgment



Hiring & Employing Legally in the 21st Century

Tweet, Tweet, Tweet

Cisco just offered me a job!
Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.

Who is the hiring manager? I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the Web.

www.twitter.com

Oh, the things you can learn just through Googling or Facebook!

Only public pages - no "surreptitious friending"!!
Searcher should not be the decisionmaker.

Don't hire a dangerous person

- Safety history (check vehicle accidents / tickets, but not workers' comp history)
- Criminal history (don't exclude everyone - consider the seriousness of the crime, the time passed since it occurred, and its relevance to the job)

Pre-Employment Drug Testing

- Legal in Texas (public employers more limited)
- Announce in postings and ads
- Perform late in process
- Use certified lab

HIRING A GOOD FIT

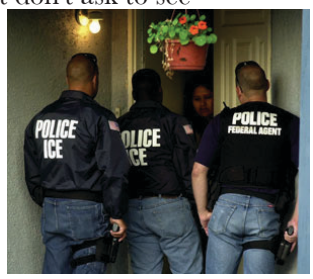
(Greetings from Austin!)

Interview Red Flags

- Not courteous to your office staff
- Late for interview
- Inappropriate dress/hygiene
- Reveals confidential information about former employer
- Criticizes former employer
- Angry about prior employment
- Knows little about you

I-9s

- Must use newest form for new hires
- Must be filled out correctly – ICE assesses separate penalty for each form
- Post hire – within first 3 days of employment
- Ok to ask prior to hire if they will be able to show proof of legal work status, but don't ask to see documents



Thank you and good luck!

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Texas and Federal Wage and Hour Laws

Texas and Federal Wage and Hour Laws

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Commissioner Representing Employers
Texas Workforce Commission
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Book: www.twc.state.tx.us/news/efte/tocmain2.html
Web app: texasworkforce.org/tbcapp
(800) 832-9394; (512) 463-2967

What Wage and Hour Laws Do And Do Not Do

The FLSA covers::
- minimum wage ($7.25/hour)
- overtime (time and a half)
- child labor
- equal pay

What Wage and Hour Laws Do And Do Not Do

The Texas Payday Law covers:
- timely payment of wages in full at least twice each month for non-exempt employees
- enforcement of the wage agreement
- final pay
- wage deductions
- wage claims

What Wage and Hour Laws Do And Do Not Do

Neither law requires:
- breaks
- premium pay
- shift differentials
- raises
- vacation or sick leave*
- holiday pay*
- severance pay*
- pension benefits
- expense reimbursements**

* unless such benefits are promised in a written policy or agreement
** unless business expenses take an employee below minimum wage

Minimum Wage – Allowable Deductions

- payroll taxes and other legally-required deductions
- court-ordered garnishments (child support)
- meals, lodging, and other facilities
- voluntary wage assignments, loans, and advances
- vacation pay advances
- uniforms and uniform cleaning costs *
- tip credits
- union dues
- cash losses due to misappropriation *
- Keep the Texas Payday Law in mind!

Hours of Work

- Includes all time during which the employee is at the disposal of the employer, i.e., "suffered or permitted to work"
- Waiting or on-call time
- Breaks
- Sleeping time
- Preparatory and concluding activities
- Time spent in meetings and training programs
- Travel time
- Time worked does not include paid leave
- Hours worked and the FMLA – goes by FLSA rules

Texas and Federal Wage and Hour Laws

Voluntary or Unauthorized Overtime

- If overtime is worked, employer must pay for it
- Whether it was authorized or wanted is irrelevant
- Employer may handle unauthorized overtime as a disciplinary matter
- Employees may not voluntarily give up the right to overtime pay – agreements to the contrary are void
- No working "off the clock" allowed

Calculating Overtime Pay

- Hourly: time and a half over 40 hours
- Salary: salary ÷ number of hours the salary is intended to compensate = regular rate
  - Regular hours < 40: add regular rate for each hour up to 40, then pay time and a half for hours over 40
  - Regular hours = 40: time and a half
  - Regular hours > 40: pay hours from 40 up to regular schedule at half-time, then time and a half past that
  - Irregular hours: regular rate = salary ÷ total hours, then pay half-time for all hours over 40
- Other pay methods: regular rate = total pay ÷ total hours; add half the regular rate for each overtime hour

Exempt White-Collar Employees

- Executive, administrative, professional, outside sales representative, computer professional
- Both salary and duties tests must be satisfied
- Minimum salary - $684/week, up to 10% of which can consist of commissions and non-discretionary bonuses
- Duties test - focus is on "primary duty" of exempt work - exempt employees customarily and regularly perform an exempt-level duty as their primary duty
- Discretion and independent judgment as to the details of the work

Easiest Ways to Tell If An Employee is Exempt

- They're your boss
- They sign your paychecks
- They design workplace policies
- They decide rates of pay
- They decide on promotions
- They're the ones the subordinate employees criticize behind their backs
- They do the work only a licensed professional can do

Exempt Salaried Employees

- their hours do not matter as much as the results they achieve - the company is buying results, not specific amounts of time
- no way to tell how long specific projects or tasks will last
- discretion and independent judgment are major criteria
- other employees look to exempt employees for leadership
- their decisions affect other employees' jobs and the company as a whole

Salary Basis Test

- True salary of at least $684/week (including commissions and non-discretionary bonuses up to 10% of the salary amount)
- No partial-day deductions
- Partial-week deductions only if specifically allowed (absences due to personal business, medical reasons, unpaid suspensions)
- Special exception for FMLA
- Special rules apply for governmental employers
- Extra pay for extra work is OK, on any basis

Texas and Federal Wage and Hour Laws

Executive Exemption

- Primary duty is management of the enterprise or a recognized department or division
- Customarily and regularly supervises two or more employees
- Authority to hire and fire, or else has substantial power to recommend such actions
- Examples: president, CEO, department head, COO, CFO, general manager

Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of employer or employer's customers
- Exercises discretion and independent judgment as to matters of significance
- Not "line employees"
- Examples: department head, personnel director, CFO, VP for Administration, marketing manager, database administration

Professional Exemption

- Primary duty is work requiring advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction
- At least a four-year college degree in employee's field of work
- Not skilled trades, but rather established professions, generally involving state licensure or certification
- Examples: physician, attorney, teacher, engineer, architect, CPA, scientist, pharmacist, registered nurse

Creative Professionals

- Primary duty is work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Does not include work that primarily depends upon intelligence, diligence, and accuracy, or that can be done with general manual ability or training
- Examples: musician, novelist, playwright, actor, painter, photographer, cartoonist, editorial writer, investigative journalist

Outside Salespeople

- Customarily and regularly engaged in the primary duty of making sales outside of the employer's principal place of business
- Paid by commission – no salary or minimum wage necessary
- OT exemption as well

Computer Professional Exemption

- Top computer programmers, systems analysts, or network administrators
- Webmasters arguably included as well, depending upon scope of job
- Straight-time hourly pay of at least $27.63 per hour, or salary of at least $684/week

Texas and Federal Wage and Hour Laws

Coverage of the Texas Payday Law

- all private employees in Texas
- all private employers in Texas
- governmental employers and employees are not covered
- independent contractors and volunteers are not covered

Purposes of the Texas Payday Law

- Enforces the wage agreement in effect when the work was performed
- Prohibits illegal wage deductions – only legal if:
  - ordered by a court
  - required or specifically authorized by a law
  - made for a lawful purpose and authorized in writing by the employee
- Requires timely payment of wages due, at least twice/month for non-exempt employees and once/month for exempt employees
- Provides a deadline for final pay
- Provides a claim and appeal process for wage claims

Deductions Under The Texas Payday Law

- deductions do not have to be authorized in writing by the employee if they are ordered by a court (child support), or else are required or specifically authorized by law (payroll taxes, etc.)
- deductions made for any other reason must be authorized in writing by the employee
- have all employees sign wage deduction authorization forms listing all reasons you are likely to ever need to deduct pay (a sample form is on pages 319 - 320 of the book)

Pay Agreements

- verbal or written - enforceable either way
- any pay method is allowed
- the more complicated the arrangement is, the more important it is to put it in writing
- methods and rates of pay may be changed, but never in such a way that a retroactive pay cut results
- pay whatever the agreement promises

Methods of Pay

- hand-delivery to employee at work
- hand-delivery at other place agreed to by employee
- registered mail, to arrive no later than payday
- delivery to another person designated by the employee in writing by a method similar to first three methods
- any reasonable method agreed to by employee in writing
- direct deposit if employee has bank account

Direct Deposit

- Permitted under both FLSA and TPL
- Must be voluntary on employee's part, according to DOL (minimum wage issue)
- EEOC issues as well (minimum wage and disparate impact)
- Texas law doesn't cover issue of forcing employee to have a bank account - FDIC prohibits employers from requiring employees to have a specific bank
- 60 days' advance written notice to employees
- Payment by debit card needs 60 days' advance written notice, employee's consent re the card issuer, and written notice of opt-out procedures and alternative payment methods

Texas and Federal Wage and Hour Laws

Texas Payday Law – Miscellaneous Rules

- wage payments in kind must be authorized in writing by the employee (meals, lodging, and other facilities - keep exact records as required by DOL regulation 531.27!)
- fringe benefits are payable only if promised in a written policy or agreement - payable as promised - if policy is silent, benefit is not enforceable under the Payday Law

Paying on Time

- No specific penalty for paying late, but upon a second payday law violation, TWC may impose a penalty for a "bad faith" failure to pay properly
- Employer cannot hold paycheck pending return of items or repayment of loans
- Employer cannot hold paycheck pending submission of timesheets, unless there is no way to calculate pay otherwise
- Excessive late payments may lead to bonding requirement

Final Pay

- Must include all components of final pay
- Layoff or discharge: within six calendar days of discharge
- Voluntary quit: by next regularly-scheduled payday
- Exception: commissions, bonuses, and fringe benefit payments covered by written contract, policy, or agreement – simply follow the agreement and the timeline in it
- Nature of work separation is determined by TWC's rules on unemployment claims

Property Return Security Deposit

- Method for encouraging return of property
- Small deduction each pay period for PRSD
- 100% return to employee upon work separation if everything is returned in decent shape; offset against PRSD for replacement cost if some items are not returned
- TPL compliance: written authorization for deduction; written policy; the two can be combined into one form for ease of use
- Sample form is in the book (pages 306 - 307)

Minimum Wage for Final Pay Period

- Not particularly recommended, but if it cannot be avoided, there are two ways to do this legally
  - as part of a written wage agreement (more difficult and risky) - see page 148 in the book
  - in conjunction with a "resignation notice security deposit" agreement (easier to enforce)
- Doing it any other way makes it look like a retroactive pay cut, which violates the law
- Do not condition the lower wage on something that is beyond the employee's power to control

Thanks for your attendance!

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twc.texas.gov

Texas Guidebook for Employers book:
twc.texas.gov/news/efte/tocmain2.html
Web app: twc.texas.gov/tbcapp

1-512-463-2826 or
1-800-832-9394

Notes

Notes

TEXAS WORKFORCE SOLUTIONS

TEXAS WORKFORCE COMMISSION

TWC-10 (0120)