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The I-9 Story: What Every Employer Should Know About Employment Eligibility Verification

Wal-Mart Stores, Inc., the nation's largest private sector employer and the world's largest retailer, was recently stung by allegations that it was aware that some of its contract cleaning services used workers who were in the United States illegally. In response, management vowed to review the status of all of its 1.1 million U.S. workers and fire any who aren't legally authorized to work here. If a company with such national prominence can find itself in this dilemma, it's easy to understand why one of the most frequent calls we receive on the Employer Commissioner's hotline involves concern about complying with federal immigration laws. This is a very good opportunity to review some of the main elements of the federal employment eligibility verification requirements.

The Basics

The Immigration Reform and Control Act requires all U.S. employers to verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986. Employers are required to complete Employment Eligibility verification forms (Form I-9) for all employees, including U.S. citizens.

Every U.S. employer must have a Form I-9 in its files for each new employee, *unless*:

- the employee was hired before November 7, 1986, and has been continuously employed by the same employer since that time;
- the employee provides domestic services in a private household on a sporadic, irregular or intermittent basis;
- services are provided by an independent contractor (i.e., they are not employees, but rather, self employed, independent business entities in a position to make a profit or loss based upon how they manage their own independent enterprise, free from direction or control by the recipient of their services; the service recipient is concerned with results and outcomes, not daily management.)

Don't waste time getting I-9 information on all job applicants – this information is only required for employees who are actually hired. However, remember that the law requires employers to verify the I-9 information by the end of the third day of a worker's employment. Condition your job applicants to be ready to produce their documentation promptly should they be hired.

Employers are not required to keep copies of the documents a new hire presents for the I-9 form; however, keeping copies will help a company show that it tried, in good faith, to verify the identity and work authorization of their employees. I-9 records must be kept for three years after the date of hire, or for one year after the employee leaves, whichever is later. Many employment attorneys recommend that their employer clients keep this and all other employment records for seven years after an employee leaves in order to exhaust all statutes of limitations for various employment-related causes of action.

Current Version of Form I-9

The current versions of the Form I-9 and the U.S. Citizenship and Immigration Services (the agency formerly known as the Immigration and Naturalization Service) "Handbook for Employers" are dated 11/21/91. Both documents are undergoing revision to reflect changes in U.S. immigration

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law since they were issued, but no publication date has been established. The Form I-9 and most other INS forms are published in English only.

What Do We Do With I-9 Forms Once They're Completed?

Unlike tax forms, for example, I-9 forms are not filed with the federal government. The requirement is for employers to maintain I-9 records in its own files for three years after the date an employee is hired or for one year after the date the former employee's employment is terminated, whichever is later. This means that Form I-9 needs to be retained for all current employees, as well as terminated employees whose records remain within the retention period.

Form I-9 records may be stored at any location as long as they can be retrieved and provided for official inspection within three days. U.S. Immigration law neither requires nor prohibits storing a private employer's I-9 records in employee personnel files.

Discrimination Prohibited

The law protects certain individuals from unfair immigration-related employment practices by a U.S. employer, including being refused employment based on a future expiration date of a current employment authorization document. The federal entity charged with oversight of the laws protecting against unfair immigration-related employment practices is the Office of Special Counsel for Unfair Employment-Related Discrimination Practices, which is part of the Civil Division of the U.S. Department of Justice.

What is an Employee's Responsibility Regarding Form I-9?

A new employee must complete Section 1 of Form I-9 no later than close of business on their first day of work. The employee's signature holds them responsible for the accuracy of the information provided. The employer is responsible for ensuring that the employee completes Section 1 in full. No documentation from the employee is required to substantiate Section 1 information provided by the employee.

What is an Employer's Responsibility Regarding Form I-9?

The employer is responsible for ensuring completion of the entire form. No later than close of business on the employee's third day of employment, the employer must complete section 2 of the Form I-9. The employer must review documentation presented by the employee and record document information on the form. Proper documentation establishes both that the employee is authorized to work in the U.S. and that the employee who presents the employment authorization document is the person to whom it was issued.

The employer should supply the employee with the official list of acceptable documents for establishing identity and work eligibility; this list is contained on the I-9 form itself. The employer may accept any List A document, establishing both identity and work eligibility, or a combination of a List B d document (establishing identity) and a List C document (establishing work eligibility) that the employee chooses from the list to present.

List A – Documents That Establish Both Identity and Employment Eligibility:

- United States Passport (unexpired or expired)
- Unexpired foreign passport which: (a) contains an unexpired stamp which reads "Processed for I-551, Temporary Evidence of Lawful Admission for permanent residence. Valid until _____"Employment authorized;" or (b) has attached to it a Form I-94 bearing the same name as the passport and containing an employment authorization stamp so 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 FormI-94.
- Alien Registration Receipt Card (INS Form I-551) provided that it contains a photograph of the bearer
- Unexpired Temporary Resident Card (INS Form I-688)

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- Unexpired Employment Authorization Card (INS Form I-688A)
- Unexpired Employment Authorization Document issued by the INS which contains a photograph (INS Form I-688B)

List B – Documents that Establish Identity:

For individuals 18 years of age or older:

- 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, sex, height, eye color and address
- 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, sex, height, eye color and address (including U.S. Citizen ID Card, INS Form I-197) and ID Card for use of Resident Citizen in the U.S. (INS Form I-179)
- School identification card with a photograph
- Voter's registration card
- United States military card or draft record
- Military dependent's identification card
- United States Coast Guard Merchant Mariner Card
- Native American tribal document
- Driver's license issued by a Canadian government authority.

For individuals under the age of 18 who are unable to present one of the documents listed above:

- School record or report card
- Clinic, doctor or hospital record
- Day care or nursery school record

List C – Documents That Establish Employment Eligibility:

- U.S. Social Security Number Card other than one which has printed on its face "NOT VALID FOR EMPLOYMENT." (This must be a card issued by the Social Security Administration; a facsimile such as a metal or plastic reproduction is not an acceptable document)
- Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
- Original or certified copy of a birth certificate issued by a state, country, municipal authority or outlying possession of the United States bearing an official seal
- Native American tribal document
- U.S. Citizen ID Card (INS Form I-197)
- ID Card for Use of Resident Citizen in the U.S. (INS Form I-179)
- Unexpired employment authorization document issued by the INS).

The employer should examine the document(s) carefully and accept them if they reasonably appear to be genuine and to relate to the employee who presents them. Requesting more or different documentation than the minimum necessary to meet this requirement may constitute an unfair immigration-related employment practice. If the documentation presented by an employee does not reasonably appear to be genuine or relate to the individual who presents them, employers must refuse acceptance and ask for other documentation from the list of acceptable documents that meets the requirements. An employer should not continue to employ an individual who cannot present documentation that meets the requirements.

What About the Genuineness of Documents?

Fortunately, employers are not required to be document experts. In reviewing the authenticity of the documents presented by employees, employers are held to a standard of "reasonableness." Since no employer that is not participating in one of the federal government's employment verification pilots has access to receive confirmation of information contained in a document presented by an individual to demonstrate employment eligibility, an employer may sometimes accept a document that is not in fact genuine – or is genuine but does not belong to the person who presented it. In that case, an employer will not be held responsible if the document reasonably appeared to be genuine or to relate to the person presenting it. An employer who receives a document that appears not to be genuine may request assistance from the nearest Immigration field office or contact the Office of Business Liaison.

Discovering False Documentation

False documentation includes documents that are counterfeit or those that belong to someone other than the individual who presented them. Occasionally, an employee who initially presented false documentation to gain employment later obtains proper work authorization and presents documentation of this work authorization. In such a case, U.S. immigration law does not require the employer to terminate the employee's services. However, an employer's internal company policies regarding providing false information to the employer may apply. The employer should correct the relevant information on the Form I-9.

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Photocopies of Documents

There are two separate and unrelated photocopy issues in the employment eligibility verification process. The first one is whether an employer may accept photocopies of identity or employment eligibility documents to fulfill I-9 requirements. The answer: only original documents (not necessarily the first document of its kind ever issued to the employee, but an actual document issued by the appropriate authority) are satisfactory, with the single exception of a certified photocopy of a birth certificate. The second issue is whether the employer may or must attach photocopies of documents submitted to satisfy I-9 requirements to the employee's Form I-9. The answer: this is permissible, but not required. If an employer undertakes this practice, it must be consistently applied to every employee, without regard to citizenship or national origin.

"Green Cards"

The terms Resident Alien Card, Permanent Resident Card, Alien Registration Receipt Card, and Form I-551 all refer to documents issued to an alien who has been granted permanent residence in the U.S. Once granted, this status is permanent. However, the document that an alien carries as proof of this status may expire.

Starting with the "pink" version of the Resident Alien Card (the "white" version does not bear an expiration date), and including the new technology Permanent Resident Cards, these documents are valid for either two years (conditional residents) or 10 years (permanent residents). When these cards expire, the alien cardholders must obtain new cards. An expired card cannot be used to satisfy Form I-9 requirements for new employment. Expiration dates do not affect current employment, since employers are neither required nor permitted to re-verify the employment authorization of aliens who have presented one of these cards to satisfy I-9 requirements (this is true for both conditional residents as well as permanent residents). Even if unexpired, "green cards" must appear genuine and establish the identity of the cardholder.

Social Security Card Issues

The Social Security Administration (SSA) currently issues SSA numbers and cards to aliens only if they can present documentation to show that they are currently authorized to work in the U.S. Aliens such as lawful permanent residents, refugees, and asylees are issued unrestricted SSA cards that are undistinguishable from those issued to U.S. citizens.

There are various types of notes found on restricted SSA and other cards:

- SSA "Valid only with INS (or Department of Human Services) Authorization" card – issued to aliens who present proof of temporary work authorization; these cards do not satisfy the Form I-9 requirements.
- SSA "Not Valid for Employment" card – issued to aliens who have a valid non-work reason for needing a social security number (e.g. federal benefits, state public assistance benefits), but are not authorized to work in the U.S.
- Internal Revenue Service (IRS) Individual Taxpayer identification Numbers (ITNs) – issued to aliens for tax compliance purposes (e.g. reporting unearned income such as savings account interest, investment income, royalties, scholarships, etc.). An individual Taxpayer Identification Number card is not employment eligibility verification.
- Aliens who satisfy I-9 requirements have been known to present a restricted SSA card for payroll administration purposes (consistent with advice from SSA and the IRS) In cases such as this, the employer needs to encourage the individual to report the change in status to the SSA immediately.

Retention of I-9 Forms

All of an employer's current employees must have Forms I-9 on file. A retention date can only be determined at the time an employee is terminated. The forms should be retained until either: 1. three years beyond the date of hire; or 2. one year beyond the date of termination, whichever is later in time.

Official Inspection of I-9 Records

Upon request, all I-9 forms subject to the retention requirement must be made available in their original form or on microfilm or microfiche to an authorized official of the U.S. Citizenship and Immigration Services (part of the U.S. Department of Homeland Security), the Department of Labor, and/or the Justice Department's Office of Special Counsel for Unfair Immigration-Related Employment Practices. The official will give an employer at least three days advance notice before the inspection takes place. Original documents (as opposed to photocopies) may be requested.

Form I-9 Requirements for New Owners of Existing Businesses

If a new business owner is a successor in interest (having acquired an existing business), the new employer may keep

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the acquired employer's I-9 records rather than complete new Forms I-9 on workers who were also employees of the acquired employer. However, since the new employer would be responsible for any errors, omissions or deficiencies in the acquired records, it may choose to protect itself by having a new Form I-9 completed for each acquired employee and attached to that employee's original I-9 form.

What About Remote Hires?

It is not unusual for a U.S. employer to hire a new employee who doesn't physically come to the employer's offices to complete paperwork. In such cases, employers may designate agents to carry out their I-9 responsibilities. Agents may include notaries public, accountants, attorneys, human resources personnel, supervisors, managers, foremen, etc. An employer should choose an agent cautiously, since it will be held responsible for that agent's actions. Employers should not carry out I-9 completions by faxing documents to a new employee or through identifying numbers appearing on acceptable documents. Remember: an employer must review original documents. Likewise, I-9 forms should not be mailed to a new employee to complete Section 2 by themselves.

Service Providers

Some business entities contract with professional employer organizations (PEO's) to handle the human resources and benefits aspects of the business. This may include completion and retention of I-9 forms. Where the business entity and the PEO are "co-employers," only one I-9 form needs to be completed between the co-employers for each employee who was simultaneously hired by the co-employers. A business entity and PEO will be deemed to be "co-employers" if, among other things, an employer/employee relationship is said to exist between the business entity and PEO on the one hand, and the individual on the other, even though the employee is only performing one set of services for both co-employers.

However, since both entities are employing the individual, both entities remain equally responsible for meeting the I-9 requirements, and are equally liable for any failures to do so. And, the employer is fully responsible for errors, omissions, and deficiencies in the PEO's processing of the I-9 forms.

For More Information

If you have questions or need additional information about the form I-9, you may call the United States Bureau of Citizenship and Immigration Services at 1-800-375-5283, or visit their website at www.uscis.gov/graphics/lawsregs/handbook/hand_emp.pdf to obtain the "Handbook for Employers." To obtain copies of the I-9 form itself, visit www.uscis.gov/graphics/formsfee/forms/files/I-9.pdf.

From the Dais – Fall/Winter 2004

Dear Texas Employers,

Although economic conditions continue to challenge every aspect of doing business, including the cost of unemployment insurance taxes, we are beginning to see signs of improvement on the horizon. At the Texas Workforce Commission (TWC), we have taken several steps that will minimize increases in the overall unemployment tax bill that Texas employers pay and avoid the large fluctuations in tax assessments that we have seen in prior economic downturns.

First, we have changed the method of financing the gap between tax payments and benefits paid to unemployed workers. Thanks to the leadership of Governor Rick Perry and the 78th session of the Texas Legislature, the TWC has been authorized to find alternative methods of financing shortfalls in the Unemployment Insurance Compensation Trust Fund.

Until now, the only option was to borrow from the federal government at a rate that currently exceeds that available on the open market. In September 2003, bonds were sold through the Texas Public Finance Authority to allow us to repay what we had already borrowed before interest was levied, thereby saving $17 million in interest payments. This action also brought the Trust Fund up to mandated levels before October 1, thereby eliminating the deficit tax for 2004.

Second, by borrowing this money over a five-year time period, Texas employers will save $300 million compared to the cost of federal borrowing.

Finally, although Texas employers will see an obligation assessment added to their unemployment tax bills to begin repayment of the bonds, by spreading this over five years at a significantly lower interest rate, we are keeping $1 billion circulating in the Texas economy, just when we need it most.

From the Dais cont.

The components of your 2004 tax rate are:

1. **The obligation assessment** – to collect the amount needed to repay the bond obligation due next year. It is experience-rated, based on your 2003 tax rate.
2. **The general tax** – based on claims against your account. If TWC has paid benefits to former employees who were laid off or separated through no fault of their own in the past three years, you will pay the general tax.
3. **The replenishment tax** – charged to all employers to cover unemployment claims not charged to a specific employer. This tax tends to rise following economic downturns when claims increase and businesses close.

New Program Integrity Unit Created

Based upon feedback from Texas employers and with the persistent encouragement of my office, the agency is developing a new strategy to detect fraud of all kinds in the programs it administers. TWC is realigning resources and sharpening its focus on this challenge, but we will need the increased support of not only Texas employers to help us find wrongdoers, but also Texas prosecutors to prosecute individuals who engage in illegal activities.

How Big is the Fraud Problem?

According to audit results recently released by the federal Department of Labor, nationally, the Unemployment Insurance (UI) system erroneously pays billions of dollars to claimants who do not qualify for various reasons. In 2002, these overpayments amounted to $3.7 billion, or nine percent of the total $41 billion paid to claimants nationwide. Even more troubling, Texas was one of three states identified as having the highest benefit overpayment rates (Louisiana and Virginia were the other two). While not all overpayments are the result of fraud, it's obvious that we must do better.

The Department of Labor reports that the failure of claimants to report wages while they are still receiving unemployment insurance benefits accounts for 27% of all overpayments – more than any other single cause. For the past several years, TWC has intensified its efforts to deter fraud and obtain restitution by encouraging county prosecutors to pursue unemployment insurance fraud cases, either as misdemeanors or felonies. Texas prosecutors have done a great job with the relatively few cases the agency has referred in the past, but we need both your help and their help to become even more assertive in the future.

New Work Search Requirements Established

The unemployment insurance system is a compact between employers and workers. Employers provide partial, temporary income replacement to workers who have been separated from work through no fault of their own. In return, the workers pledge to actively seek suitable work and accept it when offered. Failing to make contact with potential employers in any week may result in loss of unemployment benefits.

As part of the agency's increased efforts to ensure the integrity of the unemployment compensation system, new work search requirements were recently established. Claimants must now make at least three weekly work search contacts to demonstrate that they are actively seeking work. The Commission also determined that it was appropriate to allow local workforce boards to require more than three contacts per week, depending on local labor market conditions. Local workforce boards have been given the flexibility to change the minimum required number of weekly work search contacts under certain circumstances and review the assigned number of contacts at least annually based on changes in their local economies.

Not only will TWC require more unemployment claimants to turn in their work search logs for review, the agency will soon begin making over 1,000 phone calls each week to employers around the state to verify that the workers actually made the work search contacts that they have claimed.

I apologize in advance for any inconvenience this may cause, but I ask that you assist us whenever possible. By working together, we can ensure that only those workers who are actively searching for work collect benefits, thereby keeping all employers' tax rates as low as possible.

The Texas Workforce Commission is dedicated to finding ways to lower the financial impact of rising unemployment on the employers of this state. We work closely with local workforce development boards across Texas to fill job openings with qualified workers, and we fund training to upgrade the skills of workers to better match area employers' needs. We also work closely with economic development organizations to support existing Texas companies and bring new business to the state.

As always, it is a privilege to represent you here at the agency.

Sincerely,

Ron Lehman
Commissioner Representing Employers

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Texas Unemployment Rate Declines in September as Employers Add New Jobs

Texas employers added 12,600 non-agricultural jobs between August and September 2003, while the unemployment rate dropped by one-tenth of a percentage point to 6.5%. Total non-agricultural employment in Texas increased for the second consecutive month, with increases seen in several major industries. While California, Michigan, New Jersey, New York and Pennsylvania lost more than 300,000 jobs in 2003, Texas has seen modest, but encouraging, job growth. Construction, trade, transportation, utilities and government experienced the largest employment gains, while manufacturing employment fell over the month. The annual growth rate for nonagricultural employment rose to 0.5%, its highest level since August 2001.

Economists predict that 2004 should be the best year for the Texas economy since 2000. Underlying the expected economic improvements are gradual increases in consumer and business confidence, a weakened U.S. dollar to spur Texas exports, and the stimulative nature of the nation's fiscal and monetary policy. These improvements should gradually translate into more jobs for the approximately 10,895,600 individuals in the Texas civilian labor force.

Nationally, the unemployment rate fell to 6% in October as U.S. companies added 126,000 new jobs, significantly more than the 50,000 new jobs that Department of Labor economists had predicted. And, while it was initially reported that 57,000 new jobs were added in September 2003, that number has since been revised upward to 125,000.

Third Quarter National Economic Growth Posts Strongest Gains in Nearly 20 Years

The U.S. economy grew by 8.2% during the third quarter of 2003 – the fastest pace since 1984. Gross domestic product (GDP), the broadest measure of economic activity, grew by only 3.3% in the second quarter according to the U.S. Department of Commerce. On average, economists expected GDP growth of 6% according to Briefing.com. According to Lehman Brothers economist, Drew Matus, "This is obviously an extraordinarily strong report, led by the consumer, but also with good signs about the state of the business sector and business confidence." Consumer spending led the spurt of GDP growth, with a 6.6% jump in spending, the fastest pace since the third quarter of 1997. Consumer spending grew by 3.8% during the second quarter of 2003. Lower rates of income tax withholding and child tax credit checks helped fuel the third quarter spending surge.

While few expect economic growth numbers to continue at this pace every quarter, most economists are hopeful that continued strong demand will lead to sustained job growth. In a recent nationwide survey by Manpower, Inc., nearly 25% of all employers that responded indicated that they planned to hire additional employees during the fourth quarter of 2003. Insurance, real estate and finance are the primary industries anticipating hiring more employees. However, the job outlook among manufacturers is predicted to remain unchanged.

Health Care Premiums Rise Dramatically

Rising health care costs are a perennial concern to both employers and their employees. According to a new study released by the Kaiser Family Foundation and the Health Research and Educational Trust, employees who are enrolled in employer-sponsored health plans are paying almost 50% more in out-of-pocket expenses for benefits than they did just three years ago. Drew Altman, president of the Kaiser Family Foundation, states that out-of-pocket expenses for deductibles, co-payments and premiums climbed to $2,790 in 2003 for the average employee carrying family coverage, up from $1,890 in 2000. Double-digit hikes in health care premiums during the last several years have forced many employers to shift more of the cost to their workers. Nearly two-thirds of the employers surveyed indicated that they increased employee contributions in 2003, and almost 80% plan to do so in 2004.

Update on Proposed Federal Wage and Hour Exemptions

Since the U.S. Senate recently passed an amendment preventing the federal Department of Labor (the DOL) from finalizing its proposed revisions to the "white collar" overtime regulations under the Fair Labor Standards Act (FLSA), the future of the revisions remains in limbo. The proposed federal regs were intended to clarify and update the existing regulations, which were last revised in 1954. (See "Texas Business Today," Summer 2003).

Business groups vowed to continue the battle to preserve the proposed overtime regulations in the House-Senate Conference Bill (which reconciles the differences between Senate and House bills). In August, the U.S. House rejected

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a similar amendment, voting 213-210 to preserve the overtime regulations. And, President George W. Bush has threatened to veto the Appropriations Bill for fiscal year 2004 for the Departments of Health and Human Services, Education and Labor if the amendment to kill the DOL's proposed overtime regulations is attached.

Under the amendment passed by the Senate, the DOL would be prohibited from spending any funds to finish the FLSA Part 541 rulemaking process, which began in April 2003 when the changes to the law's overtime exemptions for salaried executive, professional, administrative, outside sales and computer employees were first published for public comment in the Federal Register. By the time the comment period closed in June, more than 80,000 comments had been received. Stay tuned for further details.

Will You Be Leaving Tax Dollars on the Table in 2004?

The Texas Comptroller's Office recently released a list of 219 counties where businesses may apply for hundreds of millions of dollars in state franchise tax credits. The tax credits are available for research conducted, jobs created, investments made, day care spending, and cash donated to before- and after-school programs. Taxpayers saved a combined total of $43.9 million on their 2001 and 2002 franchise tax reports. However, credits earned but not used totaled $371.1 million.

More information about the credits and eligibility requirements is available online at www.window.state.tx.us/specialrip/sb441_03/franchise03.pdf or by contacting the Comptroller's Franchise Tax Division at 1-800-252-1381.

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Why Test for Drugs in the Workplace?

The federal Department of Labor estimates that the annual cost to American employers of on-the-job substance abuse is one hundred billion dollars ($100,000,000,000). This figure includes lost productivity, theft, accidents, and additional health-care costs. Studies reported by the Institute for a Drug-Free Workplace show:

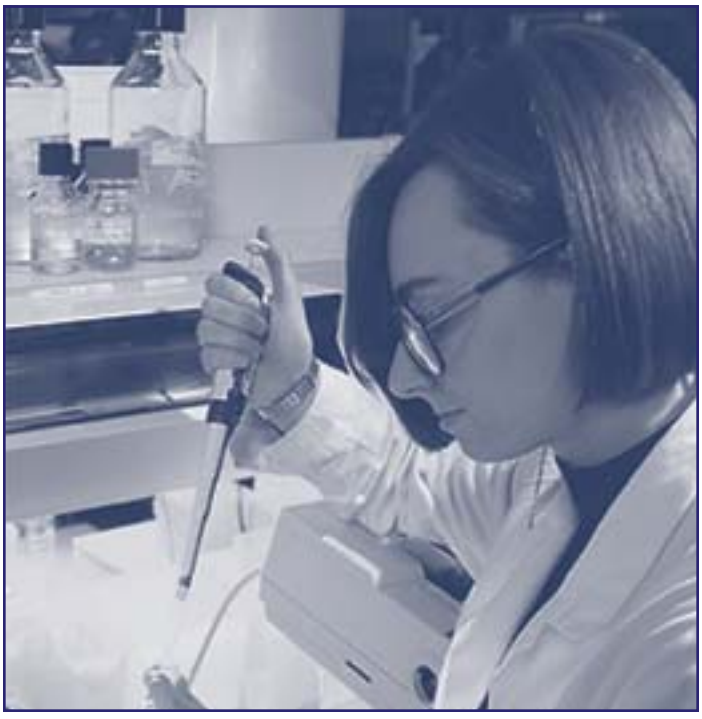
Of all workplace drug users who test positive, 52 percent are daily users;

Employees who test positive for drugs were 60 percent more likely to be responsible for plant accidents, use a third more sick leave, and have many more unexcused absences;

One national automobile manufacturer reports that drug-using employees averaged 40 days of sick leave each year, compared with 4.5 days for non-users;

The state of Wisconsin estimates that expenses and losses related to substance abuse average 25 percent of the salary for each worker affected.

Drug and alcohol abuse is a bottom-line issue for employers, and no workplace is immune to the problem. Employers have a vested interest in eliminating the problem. Recognizing the importance of protecting their bottom lines against drug and alcohol abuse, employers have begun implementing drug-and-alcohol-free workplace programs.



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If you fire an employee who tests positive for drugs or alcohol, chances are good that they will file a claim for unemployment benefits after the termination. An employer must be prepared to present their case to the Texas Workforce Commission in a way that will demonstrate that the individual was fired for work-related misconduct in order to prevail on the claim.

Winning Your TWC Appeal Case: Evidence

Winning an unemployment case depends largely on presenting evidence to overcome a claimant's sworn denial of wrongdoing. When it comes to the subject of drug testing, the employer must be prepared to present evidence to overcome a claimant's sworn denial of drug use. Also, employers need to be prepared for a range of tactics that workers often employ to evade drug testing or cast doubt on the drug test results.

In 1997, the Commissioners adopted an unemployment case as a precedent to provide guidance on the subject of the type of evidence that will overcome a claimant's sworn denial of drug use. The digest of that case follows:

> Appeal No. 97-003744-10-040997. 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 sufficient to overcome a claimant's sworn denial of drug use.

An Acknowledged Policy

You must be prepared for a worker who files an unemployment claim after being fired for failing a drug test to tell TWC:

> *"I didn't know that the employer had a policy to prohibit drug use or testing positive. Nobody told me about it."*

The best policy is one that is in writing and is individually signed by the claimant. Verbal policies are often not sufficient to satisfy this element of the required evidence. Additionally, a list of signatures indicating attendance at a meeting that included a discussion of drug testing and the consequences of testing positive is extremely weak evidence and will almost certainly not satisfy this element. Play it safe: have each worker sign a copy of the policy, and keep those signed copies secure. If the policy is updated at any time, each worker must individually sign the new policy in its entirety. This is one area where it's just too risky for an employer to attempt to streamline the process with anything less than individually signed copies of the entire policy in its most recent, up-to-date version.

Consent

This element should be easy, but it often causes difficulty for employers. You must be prepared for the former worker to testify:

> *"I knew about the policy, but I never consented to be tested."*

When it comes to consent, too much is always better than not enough. First, your written policy should include a written consent statement. In addition, most formal collection procedures involve a separate consent form to be signed immediately before the sample is collected. Any employee who refuses to consent to testing at the time the sample is collected should be shown a copy of the employee's signed consent contained in the policy document. The employee should be reminded of the consequences under the policy for refusing to cooperate with the drug testing procedure.

For many employers, the consequence in this instance is immediate discharge. However, you should not simply move to the step of discharge if a worker refuses to consent to testing after being selected to produce a sample. To obtain the evidence you need later, you should first have two members of management present and question the worker: "Why are you refusing to give your signed consent before producing your sample?" It is not likely that the worker will have a legitimate response to your question, but you must always ask to be sure. Keep in mind that the TWC will ask the worker why the worker refused to consent to testing to allow the worker an opportunity to explain the refusal.

Chain of Custody

Again, the first step is to anticipate the testimony that can be presented by the former employee:

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"I'm sure that some sample tested positive, but it wasn't my sample. The samples must have been switched by the lab. They handle thousands of those things, so it's pretty easy to get them mixed up. My cousin used to work at one of those places,and he said they switched samples all the time."

Modern drug testing procedures often involve the collection of a sample at a location that is remote from the testing laboratory. Currently, there are approximately only 50 laboratories in the United States certified by the U.S. Department of Health and Human Services to meet the standards set by mandatory guidelines for federal workplace drug testing programs. This certification is the most widely accepted standard for drug-testing laboratories, and it satisfies current TWC requirements. Although private employers are not required to use certified laboratories for non-regulated drug testing, many do because of the higher standards.

Given the remote nature of the collection facility with respect to the testing laboratory, there is always the risk that the individual's sample will be switched with the sample of another individual at one or more stages during the handling of the sample. Therefore, stringent procedures have been adopted to maintain the chain of custody of samples to minimize this risk. For example, it is common for the individual to be required to sign a certification when producing the sample attesting to the fact that the sample is the individual's and that it was sealed in the individual's presence with a tamper-evident seal.

Employing a certified laboratory will provide the highest possible protection that the chain of custody will be maintained. However, you must present all of the documentation to prove the chain of custody. The paper forms used in drug testing, especially involving certified laboratories, are complex. An example of the federal drug testing custody and control form can be viewed at http://workplace.samhsa.gov/ResourceCenter/r376.pdf. Merely failing to present all of the documentation in connection with the chain of custody can mean the difference between winning and losing an expensive unemployment claim.

Gas Chromatography/Mass Spectrometry Confirmation Testing

Currently, gas chromatography/mass spectrometry testing is considered by the scientific community to represent the state of the art in urinalysis drug tests. As it is often referred to, "GC/MS" testing is not subject to false positive errors that plagued early testing methods. Each substance or metabolite subject to testing has a unique "mass spectrum" used to identify the presence of prohibited substances in the system of the tested individual. Nevertheless, folklore based on old testing methods remains. Previous test methods were subject to false positives. For example, it is widely known that the commonly used non-prescription painkiller ibuprofen could result in a false positive result for one prohibited substance under previous test methods, and drug users are well aware of these flaws. Although GC/MS tests are not subject to these types of errors, individuals who test positive still claim that ibuprofen caused their positive test.

You must present a written test report from the laboratory showing the positive result and indication that confirmatory GC/MS testing was used. Often this is nothing more than a brief notation on the test report in the form of "CONFIRMED BY GC/MS," but this is sufficient. All the sworn testimony in the world on GC/MS testing without a written report will never be enough to win your case. Be sure to select a laboratory that can show you a sample of their report to know that it includes the certification you need to prove that a GC/MS confirmation test was performed.

GC/MS testing is not free from outcomes known as "true" positives, some of which can actually be reported as a negative test result. For example, drug testing routinely detects delta-9-tetrahydrocannabinol-9-carboxylic acid, otherwise referred to as delta-9-THC or simply THC, the psychoactive substance in marijuana. The prescription drug *Marinol* (dronabinol), approved by the US Food and Drug Administration, contains synthetic delta-9-THC. *Marinol* is prescribed to chemotherapy patients as an anti-emitive. An individual consuming *Marinol* under a legitimate prescription and who undergoes GC/MS drug testing will test "presumptively" positive for THC.

The presumptive positive result is then reported to the Medical Review Officer, otherwise referred to as the MRO. The MRO is a licensed physician. In the past, individuals subject to drug testing would be required to disclose any of their prescription medications at the time the sample was produced, but this procedure is no longer followed. Presumably, disclosing certain prescriptions was considered the equivalent of disclosing confidential medical information. Today, the MRO speaks to the tested individual, typically by telephone, to allow the individual an opportunity to explain and document the presumptive positive result. Continuing the *Marinol* example, an individual who provided satisfactory documentation to the MRO to prove that the positive test for delta-9-THC was the result of a legitimate prescription would not have the test result reported as positive. An individual who has delta-9-THC in the individual's system as the result

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of consuming a legitimate prescription medication is not considered to have tested positive for drugs.

Please keep in mind that this example is merely hypothetical, used only to illustrate some current procedures and terminology (false positives, true positives, and Medical Review Officer) associated with GC/MS testing. Individuals who have been prescribed *Marinol* are typically extremely ill and very unlikely to be working. (For more information on *Marinol*, see http://www.marinol.com/.)

Nevertheless, you must be prepared for a claimant to testify for the first time at an unemployment hearing that some legitimate prescription medication caused the positive result. The MRO procedure, if followed properly, should eliminate this risk, but you must be prepared to have the MRO testify and provide a report to respond this type of testimony. For more information on the subject of MRO's, please consult the American Society of Addiction Medicine (http://www.asam.org/), the American College of Occupational and Environmental Medicine (http://www.acoem.org/), and the American Association of Medical Review Officers (http://www.aamro.com/).

Positive Test Result Above a Stated Threshold

This portion may seem a bit scientific, but not every individual with a prohibited substance in their system will test positive, based on the testing threshold involved. Drug tests detect prohibited substances and metabolites (see note below). The testing thresholds involved in drug testing are levels of concentration below which the test will be shown as negative. The unit of measurement for the test thresholds is nanograms per milliliter, represented by ng/ml. A nanogram is one billionth of a gram. A milliliter is one thousandth of a liter.

The test report that you obtain from the laboratory and submit as evidence to TWC must show:

- The test threshold for the substance that was detected on the positive test
- The specific substance that was detected
- The test threshold for the specific substance above which the individual's sample tested positive

Note on "metabolites": A metabolite is merely the substance that appears in the human body after the ingestion of a prohibited substance. For example, ingested cocaine is metabolized, resulting in a substance named benzoylecgonine appearing in the human body. If an individual ingests cocaine and alcohol simultaneously, the resulting metabolite that will appear in the human body is a substance named cocaethylene. There is no known substance other than cocaine that will result in the metabolite benzoylecgonine, and there is no known substance other than simultaneous ingestion of cocaine and alcohol that will result in the metabolite cocaethylene.

Some Common Pitfalls

One common problem in drug testing is the employee who claims to be unable to produce the required urine sample after being selected for testing (formally referred to as "shy bladder"). Although the individual may be required at that point to consume water or other fluids to induce urination, some individuals "hold out" until late in the evening, forcing the employer to decide between giving up or staying up later still. One possible solution to this problem is to notify individuals selected for testing upon their arrival at work in the morning and transport them immediately to the sample collection facility without allowing them access to a restroom. If you will employ this procedure, notify your employees in advance. An employee will be hard-pressed to spend an entire work shift or longer consuming fluids without urinating to produce a sample.

Another potential problem is the worker who claims not to be in possession of at least one form of picture identification and a collection facility that will not collect a sample without proper identification of the individual. The solution is to adopt a policy that requires employees to carry legitimate picture identification at all times during working hours. Employees who do not hold a driver's license may obtain a Texas Identification Card from the Texas Department of Public Safety. Be sure that any policy you adopt includes a consequence (discipline, suspension, immediate discharge) for a violation of the policy.

There are many other ploys that employees use to evade drug testing. Work with your laboratory or other service provider to educate yourself about the most common tactics and adopt policies and procedures to minimize your risks.

Conclusion

Drug abuse in the American workplace is a serious and very expensive problem. Workplace drug testing can be an effective way to battle this situation. Before discharging a worker for refusing to be tested or testing positive, be sure that you know how to present the evidence you will need to win the unemployment claim the worker may file.

Jonathan Babiak
Attorney at Law

Give 'Em a Break, A Tax Break: How to Give Your Employees a Raise *and* Cut Your Taxes without Hurting Your Bottom Line

More money for employees and lower payroll and unemployment taxes at little or no cost; sounds too good to be true, doesn't it? Well, the reality is that Texas employers and their workers miss out on millions of dollars in federal tax breaks every year. Now's the time to make sure you and your workforce are getting the most out of federal tax law. April 15 is coming quickly, so be sure that your employees receive a tax refund that will make them thank you for your interest in and dedication to their financial well being. Best of all, some tax incentives actually *reduce* your payroll and unemployment taxes.

Let's highlight two of the tax breaks available for workers: pre-tax payroll deduction accounts for dependent care expenses and the Earned Income Tax Credit. The more your employees use these tax incentives, the more money they take home. Helping your workers access tax breaks is a great way to put money in their pockets at little or no cost to your business. If your workers know that you are looking out for their best interests and helping them access the federal tax breaks to which they are entitled by law, you are building workforce loyalty and productivity. Imagine the gratitude your workers will feel when their income tax refund check arrives, significantly larger thanks to your efforts.

How much will my business save in taxes if I start a pre-tax payroll deduction program for my employees?

When an employee who makes less than $87,000 a year sets aside $5,000 in a Dependent Care pre-tax payroll deduction account, the employer saves **$383** ($5,000 x 7.65%) in payroll taxes per employee per year. There's an additional savings in unemployment taxes; that's a **big** tax savings.

Pre-Tax Dependent Care Accounts

Childcare and care for seniors are expensive for working families in Texas. Many Texas employers report absenteeism, turnover, and other losses of work place efficiency because of the high cost of these basic and necessary support services. Childcare is already a huge financial burden on workers and with the baby boom aging, more and more workers will add senior care to their list of financial responsibilities. Reducing the cost of and easing access to child and elder care allows workers to purchase the care they need and builds the productivity businesses need to be successful and boost profitability. On-site dependent care and other support services can be expensive to start and maintain even with available state franchise tax credits designed to support their creation.[1] However, Texas employers can easily help families pay for the escalating price of dependent care without incurring significant cost.

Federal tax law allows workers to shelter up to $5000 of the money they spend on dependent care expenses from federal income taxes. By helping your workers access this tax break, you are providing them with significant tax relief. Let's imagine a typical worker, a single mother earning $20,000 per year and paying for childcare for two children. Her annual childcare bill totals $5000. Using a pre-tax dependent care account, $5000 of her income is not taxed by the federal government. This mother would save $935 in federal taxes by setting aside $5,000 in a pre-tax dependent care account.

In addition to the gains in employee loyalty and productivity associated with federal tax breaks, there's also good news for your bottom line. Let's face it; times are tough for many Texas employers. Pre-tax dependent care accounts provide tax relief to employers, as well as their employees. Employ-

[1] To learn more about franchise tax credits available to employers who provide child care or after school care for their employees, visit the Texas Workforce Commission's web site at http://www.window.state.tx.us/taxinfo/taxpubs/tx96_687.html#childcare.

Give 'Em a Break, A Tax Break: ... cont.

ers don't pay payroll taxes or unemployment taxes on employee wages paid into a pre-tax dependent care account. When an employee who makes less than $87,000 a year sets aside $5,000 in a Dependent Care pre-tax payroll deduction account, the employer saves $383 ($5,000 x 7.65%) in payroll taxes per employee. There's an additional savings in unemployment taxes.

Where can I get more information and free bilingual promotional materials about the Earned Income Tax Credit?

Log on to http://www.cbpp.org/eic2003/ for fliers, posters, and everything you need to help your workers access the Earned Income Tax Credit.

So, now that you've learned about all the advantages of dependent care pre-tax accounts, you are probably wondering how to offer them to your employees. Talk to your human resources professional or a benefits provider. Many employers already offer their employees a similar benefit for un-reimbursed medical expenses, sometimes referred to as Section 125 accounts. Tax-free reimbursements for dependent care expenses could be added to the menu of options available to employees. The accounts can be established at little or no cost to employers, depending on your current benefits plan. Even if there is a modest charge for the services, compare it to the savings in payroll and unemployment taxes when your employees begin to shelter their earnings from federal taxes.

Earned Income Tax Credit: Who Doesn't Want up to $4,204?

Federal law provides significant tax relief to low-income *working* Americans. Working families can receive a maximum of $4,204 from the 2003 Earned Income Tax Credit if they have two or more children and a maximum of $2,547 if they have one child. The Earned Income Tax Credit not only puts money in the pockets of working Texans, but also brings federal dollars that would otherwise be lost home to Texas communities where they belong. Simply completing the federal income tax return accesses the Earned Income Tax Credit for eligible workers. Many Texans are under the mistaken impression that they don't need to fill out a federal income tax return if their earnings are low. Be sure that your employees know that the Earned Income Tax Credit may put thousands of dollars into their family's budget and your community's retailers.

To find out how to get FREE tax preparation help for your workers, call 2-1-1, if it's available in your community, or your local United Way. For contact information, visit www.give2uway.org. You can also call the IRS at 1-800-829-1040 for more information.

Most workers don't have an accountant or tax preparation specialist prepare their taxes. As a result, they miss out on thousands of dollars in tax breaks and incentives. Employers can make sure that their employees know about the Earned Income Tax Credit and how to get it. This is a simple and easy way to put money in your employees' pockets. You might consider bringing tax preparation volunteers to your business during the workday, at lunchtime, during shift changes, or after work to help your employees fill out their taxes. There are also sites staffed by volunteers in your community to help workers prepare their taxes. Contact your local United Way or Texas Workforce Center for details. At the very least, be sure to remind your workers that they might be eligible for the Earned Income Tax Credit and to be certain to always fill out federal income tax forms by April 15 each year.

Let's look at how much a single mom with two children earning $20,000 per year could save if she took full advantage of existing federal tax breaks.

A single mother with two children who earns $20,000 in 2003 and decided to set aside $5,000 in a dependent care pre-tax account would get $3,937 from the EITC and would receive a total of $935 in federal tax savings on her dependent care expenses.

The IRS has regional service centers that help promote the Earned Income Tax Credit. Call the IRS toll free at 1-800-829-1040 for more information. The Texas Comptroller also has an EITC information line at 1-800-277-8383.

United Ways of Texas is the state association of local United Ways. United Way is committed to partnering with the Texas Workforce Commission, Texas employers, and their workers to make Texas a great place to live and do business.

Karen Johnson, President/CEO
Jason Sabo, Public Policy Director
United Ways of Texas

Workforce Roundup – Fall/Winter 2004

West Central Texas Workforce Development Board Recognizes Outstanding Employers

One of the goals of the West Central Texas Workforce Development Board is to build partnerships with regional businesses and to recognize the contributions of business and industry in addressing workforce needs. To that end, this Workforce Board recently hosted a Salute to the American Workforce Celebration in Abilene. Regional legislators and TWC Commissioner Representing Employers Ron Lehman presented awards to businesses in the region for their outstanding service to the workforce and their communities.

Businesses that were recognized were: the City of Eastland; Heritage Manor, Gorman; Jonell, Inc., Breckenridge; Lawrence Bros. IGA, Winters, Patterson-UTI Energy, Inc., Snyder, Rentech Boiler Services, Abilene, Schuman Equipment, Tye, and Stephens Memorial Hospital, Breckenridge.

The West Central Texas Workforce Development Board is one of 28 local boards around the state charged with oversight and policy-making responsibility for workforce and training programs in a 19-county region. The Workforce Center is contracted by the Workforce Board to provide services to businesses and to jobseekers in the region including job listings, training assistance, facility usage for interviewing and training, and information and referral. According to Mary Ross, Executive Director of the Workforce Board, "There are many outstanding businesses in our region who have utilized our services, and we wish to express our appreciation for their role in building a strong labor force for West Central Texas."

To locate your local workforce development board, visit the Texas Workforce Commission's website at www.texasworkforce.org, and click on the "Boards and Network Partners" icon.

What's In Store for 2004

A rapidly changing labor market combined with revolutionary new technology and business thinking generate both uncertainty and opportunity. From the Research Center at Workforce Management, read about expectations for the coming year by visiting www.workforce.com. Registration is required to visit this free workforce research center.

Southwest Economy

In its newest "Regional Update," the Federal Reserve Bank of Dallas examines recent developments in the regional economy. To access this information, visit www.dallasfed.org/research/swe/2003/swe0306d.html.

Employer Use of the Publicly Funded Workforce Development System: Perceptions of What's Working and What's Not

A summary of a recent Workforce Innovation Networks "Jobs for the Future" paper, including recommendations for improvement of the public system based on employer input, primarily from small and medium-sized employers of lower-skilled workers. For direct access, visit www.jff.org/jff/kc/library/0218. Registration is required.

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

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Unemployment Insurance Hearing Process, Workers' Compensation, the Texas Payday Law, Hiring, Firing, Sexual Harassment and Policy Handbooks. To keep costs down, lunch will be on your own. The registration fee is $75.00 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend.

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

- **Dallas - February 6, 2004**
- **Arlington - March 12, 2004**
- **Galveston - April 2, 2004**
- **Houston - May 21, 2004**

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